LESSONS FROM THE POST-*JONES* PERSISTENCE OF IMPRISONED PEOPLE'S LABOR ORGANIZING

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ABSTRACT

People in prison have been critical laborers throughout the history of the United States yet suffer extremely poor working conditions. The Jones v. North Carolina Prisoners' Labor Union, Inc. *Supreme Court decision in 1977 dealt a firm blow to incarcerated workers' labor organizing by holding that these workers do not have a First Amendment right to join a labor union. However, the standard account of* Jones *overstates its impact. Imprisoned people have continued to organize around working conditions, particularly in the 2016 and 2018 nationwide prison strikes. This Article highlights the persistence of post-*Jones *labor and political organizing by people in prison and considers how this history informs potential reforms supporting incarcerated workers' organizing.*

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I. INTRODUCTION: THE HIGH IMPORTANCE AND HARSH CONDITIONS OF IMPRISONED PEOPLE'S LABOR

People in prison are key laborers in the United States. They fight our wildfires[1] and clean up our oil spills.[2] A notable example of the importance of prison labor is its impact at the start of the Covid-19 pandemic. While many people were staying at home, prison workers were making protective equipment, as well as essential products like toilet paper.[3] In New York state, Governor Andrew Cuomo promised "100,000 gallons of sanitizer daily to be distributed to government agencies and schools" made by Corcraft, a company within the state's Department of Corrections and Community Supervision.[4] Prison labor is also conducted by a large number of people. In a 2022 report, the ACLU found that the U.S. incarcerated "more than 1.2 million people in state and federal prisons, and two out of three of these incarcerated people are also workers."[5] Throughout fiscal year 2020, Federal Prison Industries, Inc., also known as UNICOR, alone employed 16,478 inmate workers and had net sales of $363,224.[6]

Despite the significance of incarcerated workers' labor, their working conditions, as well as their living conditions more generally, are abysmal. In 2017, the average *highest possible* rate for imprisoned people's wages across the state and federal systems was $0.63 for non-industry jobs and $1.41 for jobs in correctional industries.[7] This is legal because courts have generally held that incarcerated workers are not covered by the Fair Labor Standards Act (FLSA), with limited exceptions,[8] even though these workers are not textually excluded like tipped workers, domestic workers, and agricultural workers.[9] Issues stemming from these low wages are often exacerbated by people in prison being charged for costs related

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[1] Amika Mota, *I Saved Lives as an Incarcerated Firefighter. To California, I was just Cheap Labor*, THE GUARDIAN (Sept. 1, 2020), https://www.theguardian.com/us-news/2020/sep/01/california-incarcerated-firefighters-prison [https://perma.cc/7FQ6-PHC7].

[2] Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, THE NATION (July 21, 2010), https://www.thenation.com/article/archive/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/ [https://perma.cc/MNE9-L2FY].

[3] Lauren-Brooke Eisen, *Covid-19 Highlights the Need for Prison Reform*, BRENNAN CENTER (Apr. 17, 2020), https://www.brennancenter.org/our-work/analysis-opinion/covid-19-highlights-need-prison-labor-reform [https://perma.cc/K2LB-RYZH].

[4] Rachel Ellis, *Prison Labor in a Pandemic*, 19 CONTEXTS, 90-91 (2020).

[5] *Captive Labor: Exploitation of Incarcerated Workers*, ACLU (June 15, 2022), https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers [https://perma.cc/V388-D5VF].

[6] FEDERAL PRISON INDUSTRIES, INC., FISCAL YEAR 2020 ANNUAL MANAGEMENT REPORT (November 13, 2020).

[7] Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/YM85-VAK9].

[8] *See* Harker v. State Use. Indus., 990 F.2d 131, 135-36 (4th Cir. 1993) (noting that some courts had found incarcerated workers to be covered by the FLSA under the "economic reality test," but those cases involved extraordinary circumstances such as the promotion of unfair competition).

[9] *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act: Hearing Before the H. Education and Labor Committee, S. Comm. on Workforce Protections*, 117th Cong. (2021) (statement of Rebecca Dixon, NELP Executive Director).

to their incarceration upon release.[10] Additionally, imprisoned people are also excluded from the protections of the Occupational Safety and Health Administration (OSHA).[11] During Covid-19, while incarcerated workers were making essential products, they were reporting significantly higher infection rates than the national rate, and higher death rates as well.[12]

The poor working and living conditions imprisoned individuals face partially stem from the connection between prison labor and racism in the criminal legal system. This can be seen in the language and history of the Thirteenth Amendment, which makes illegal slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted."[13] Following the passage of the Thirteenth Amendment, states used this loophole to continue the use of racialized forced labor.[14] States passed discriminatory laws "to arrest and imprison large numbers of Black people" then exposed these workers to the horrible conditions endemic to the convict leasing system.[15] Racial disparities persist today in our system of mass incarceration. In 2018, 2.27% of Black men were incarcerated in prisons, whereas .39% of white men were.[16] One field attorney for the National Labor Relations Board has argued that these disparities in incarceration rates, alongside the poor working conditions for prison workers, make prison labor a lawful form of race discrimination.[17] After the murder of George Floyd in 2020, there were calls to reform prison labor, acknowledging poor working conditions in prisons as a racial justice issue.[18]

The standard legal account of why these poor labor conditions have persisted is that the Supreme Court decimated imprisoned people's labor organizing

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[10] Chandra Bozelko & Ryan Lo, *You've Served Your Time. Now Here's Your Bill*, HUFFPOST (Sept. 16, 2018), https://www.huffpost.com/entry/opinion-prison-strike-labor-criminal-justice_n_5b9bf1a1e4b013b0977a7d74 [https://perma.cc/X6U8-7ZH5].

[11] Eisen, *supra* note 3.

[12] *Covid-19's Impact on People in Prison*, EQUAL JUSTICE INITIATIVE (Apr. 16, 2021), https://eji.org/news/covid-19s-impact-on-people-in-prison/ [https://perma.cc/F5QR-MLRQ].

[13] U.S. CONST. amend. XIII; Several states recently had ballot measures to change prison slavery provisions in their constitutions. *See, e.g.*, Brice Covert, *How Imprisoned People Forced to Pick Cotton Got 'Prison Slavery' Bans on the Ballot*, THE APPEAL (Nov. 7, 2022), https://theappeal.org/2022-election-prison-slavery/ [https://perma.cc/SK6W-ZVRE].

[14] *Prison Labor and the Thirteenth Amendment*, EQUAL JUSTICE INITIATIVE (Feb. 1, 2016), https://eji.org/news/history-racial-injustice-prison-labor/ [https://perma.cc/G3V3-UPNG]. Recently, some states have removed similar slavery loopholes in their own constitutions, departing from prior practices of forced labor. Kiara Alfonseca, *Slavery, Involuntary Servitude Are on the Ballot in These States*, ABC NEWS (Oct. 29, 2024), https://abcnews.go.com/Politics/slavery-involuntary-servitude-ballot-states/story?id=115270058 [https://perma.cc/UB3E-4JWW].

[15] *Id.*

[16] Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POLICY INITIATIVE (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities/#slideshows/slideshow4/1 [https://perma.cc/QA8E-9SDJ].

[17] Katherine E. Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 681 (2018).

[18] Adam Eichen & Evelyn Li, *It's Not Just Police Brutality. George Floyd's Death Also Must Prompt Prison Reform*, USA TODAY (June 17, 2020), https://www.usatoday.com/story/opinion/2020/06/16/why-george-floyds-death-must-prompt-reform-americas-prisons-column/3190158001/ [https://perma.cc/92Q2-SEUW].

through the 1977 decision *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[19] which held that these workers do not have a First Amendment right to join a labor union. This Article argues that the standard account is inaccurate because incarcerated individuals have continued to organize outside of formal labor unions. The Article then discusses potential reforms to support future incarcerated worker organizing that are informed by lessons from organizing that has occurred since *Jones*.

Following this introductory Part I, Part II provides a history of incarcerated workers' organizing through *Jones*, a description of the *Jones* holding, and an overview of the literature on *Jones*. Part III discusses the history of imprisoned people's organizing from *Jones* onward and offers takeaways from this history about the effect of *Jones* and current issues facing organizers in prisons. Part IV recasts *Jones* based on recent organizing by imprisoned people, arguing that the case was less impactful than the literature states. Specifically, *Jones* only limited formal unionization and collective bargaining rights, but labor and political organizing has continued. Part IV also provides implications of this cabining of *Jones* on reforms in support of incarcerated workers' labor organizing.

II. THE STANDARD LEGAL ACCOUNT OF IMPRISONED PEOPLE'S ORGANIZING

A. A Brief History of Prison Labor through the Jones *Decision*

Even before the drastic increase in the use of prison labor following the Civil War, people in prisons organized against their poor living and labor conditions.[20] One example of this is the "Blue Monday" work stoppages at Philadelphia's Walnut Street Prison at the turn of the 19th century.[21] The expansion of the prison labor system after 1865, which was assisted by southern whites' criminalization of Black people in an effort to uphold white supremacy, involved incredibly harsh conditions for inmate workers.[22] Often states would lease convicted individuals to private parties, including railroad companies, mining companies, and plantation owners.[23] Imprisoned people in the North were also forced into the growing prison labor industry.[24] Poor conditions led to large inmate labor strikes throughout the country and "more than a dozen major riots and full-blown insurrections" at prisons from 1879 to 1892.[25] These strikes were suppressed by prison authorities, often through violent force, but had some success in gaining public and political support for prison

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[19] 433 U.S. 119, 125 (1977).
[20] *Striking the Right Balance: Toward A Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1493-94 (2019).
[21] *Id.*
[22] Heather Ann Thompson, *Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, LABOR: STUD. IN WORKING-CLASS HIST. OF THE AM., Fall 2011, at 15, 16-17.
[23] Jonathon Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 GEO. IMM. L.J. 573, 576 (2020).
[24] *Striking the Right Balance*, *supra* note 20, at 1495-96.
[25] *Id.* at 1495-96.

reform.[26] Concerns from the disproportionately white "free world" working class and their unions over wage competition also led to federal regulation of prison labor, including the Hawes-Cooper Act of 1929, the Walsh-Healey Act of 1936, the Ashurst-Sumners Act of 1940, and the creation of the government corporation Federal Prison Industries.[27] These efforts were effective in shielding "free world" workers from competition, but inmate labor and organizing still continued.[28]

After World War II there was a decade-long wave of work stoppages and protests in prisons.[29] These actions, which involved hundreds of imprisoned people across many states, were mainly in response to poor working environments and conditions.[30] The protests followed a dramatic increase in the racial disparities of prison populations in Northern states mostly as a result of the Great Migration.[31] Although largely unsuccessful in sparking change, this wave inspired another series of large strikes in the 1960s and 1970s, which included significant efforts for union recognition.[32] Gains by these strikes included pay raises and the creation of inmate-run grievance committees, as well as one instance of remarkable inmate self-governance at Walpole prison.[33] Furthermore, by 1973, there were unions of imprisoned people "across the country, including Delaware, Maine, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Pennsylvania, Washington, D.C., and Wisconsin" primarily managed by Black individuals who linked their struggles for labor and racial justice.[34] However, the National Prisoners' Reform Association, which successfully petitioned the Massachusetts State Labor Relations Commission, was the only union to receive recognition as a bargaining unit.[35]

Imprisoned people's strike and unionization efforts faced several blows in the 1970s. First, there was significant suppression by prison officials, which often included isolating prison activists, and even transferring them to high-security facilities.[36] There was also a lack of public support, which worsened with high-profile violent events such as the 1971 Attica riot.[37] In the legal realm, prison officials were successful in hampering incarcerated individuals' efforts to gain formal union recognition through the 1977 case *Jones v. North Carolina Prisoners' Labor Union, Inc.*, which held that imprisoned people do not have a First

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[26] *Id*.
[27] Thompson, *supra* note 22, at 17-20.
[28] *Id.*
[29] *Striking the Right Balance*, *supra* note 20, at 1497.
[30] Christie Thompson, *Do Prison Strikes Work*, THE MARSHALL PROJECT (September 21, 2016), https://www.themarshallproject.org/2016/09/21/do-prison-strikes-work [https://perma.cc/H5LG-C9SA].
[31] Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Reimagining Prison Web Report*, ch. 2, *American History, Race, and Prison*, VERA. INST. OF JUST. (2018), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison [https://perma.cc/YC42-ANWB].
[32] Thompson, *supra* note 30.
[33] *Striking the Right Balance*, *supra* note 20, at 1499; Thompson, *supra* note 22, at 24.
[34] Thompson, *supra* note 22, at 24.
[35] Keith Armstrong, *"You May Be Down and Out, But You Ain't Beaten": Collective Bargaining for Incarcerated Workers*, 110 J. CRIM. L. & CRIMINOLOGY 593, 619 (2020); Thompson, *supra* note 22, at 24.
[36] Thompson, *supra* note 22, at 29.
[37] *Striking the Right Balance*, *supra* note 20, at 1499.

Amendment right to join a labor union. The rationale behind *Jones* also made it highly unlikely that the Supreme Court would recognize a First Amendment right to strike for incarcerated people.[38]

B. The Jones *Case: Background and Court Decision*

The Supreme Court issued the *Jones v. North Carolina Prisoners' Labor Union, Inc.* decision during the significant wave of strikes and labor union organizing by people in prisons in the 1970s. This labor organizing was in stark contrast to the contemporaneous decline of the U.S. private sector labor movement. Union membership in the United States peaked in the 1940s and 1950s and has mainly been in a prolonged period of decline since then.[39] However, it is notable that during the 1960s and 1970s private sector unionization efforts continued despite significant obstacles placed by employers, [40] and public sector unions grew rapidly.[41] Organizing in both the private and public sectors during this period was particularly galvanized by women and people of color.[42] Therefore, imprisoned people's labor organizing can be seen as one part of a larger wave of demands by people of color for better labor conditions during the 1960s and 1970s.

Imprisoned people's organizing in the 1970s had strong ties to the Civil Rights and Black Power movements. Black Panther Party leaders who were incarcerated continued to use their organizing skills on the inside to inculcate greater political awareness amongst other incarcerated individuals.[43] In California especially, incarcerated Black Panther Party members helped organize prison strikes and write demands. California was also where the first incarcerated worker union was formed, which inspired similar actions by incarcerated individuals in many other states, including North Carolina.[44]

Activism by people in prison during this era was met with substantial backlash from prison officials who desired to maintain extreme control.[45] Officials tried banning various methods of communication both among incarcerated individuals and between them and those outside the prison, and they isolated activist leaders.[46] Of particular importance to prison officials was preventing imprisoned

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[38] *Id*. at 1507-08; Jones, 433 U.S. at 125 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)) ("A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system").

[39] Lawrence Mishel & Jessica Schieder, *As Union Membership Has Fallen, the Top 10 Percent Have Been Getting a Larger Share of Income*, ECON. POL'Y INST. (May 24, 2016), https://www.epi.org/publication/as-union-membership-has-fallen-the-top-10-percent-have-been-getting-a-larger-share-of-income/ [https://perma.cc/V7U7-SLH4].

[40] LANE WINDHAM, KNOCKING ON LABOR'S DOOR: UNION ORGANIZING IN THE 1970'S AND THE ROOTS OF A NEW ECONOMIC DIVIDE, 28-56 (2017).

[41] Joseph A. McCartin, *"A Wagner Act for Public Employees": Labor's Deferred Dream and the Rise of Conservatism, 1970-1976*, 95 J. OF AM. HIST. 123, 123 (2008).

[42] Windham, *supra* note 40, at 31, 70.

[43] Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOWARD L.J. 221, 252 (2016).

[44] *Id*. at 253-54.

[45] Thompson, *supra* note 22, at 30.

[46] *Id*.

people's right to unionize, given that this right could significantly upend their current exploitative system of prisoner labor.[47]

540 incarcerated individuals at the North Carolina Central Prison created the North Carolina Prisoners' Labor Union (NCPLU) in 1973.[48] The union was incorporated the following year[49] and was intended to advocate for changes such as ameliorated working conditions and inmate grievance processes.[50] At first there was not significant backlash to union membership by prison officials. However, as the union grew, eventually including around 2000 members in 40 prisons,[51] officials acted.[52] They banned union meetings, solicitation, and bulk mailing.[53] Shortly prior to the implementation of these policies, the union sued for violations of the First and Fourteenth Amendment,[54] requesting declaratory and injunctive relief under 42 U.S.C. § 1983.[55] The Fourteenth Amendment argument was based on the differential treatment the union received as compared to other groups of imprisoned people.[56]

The district court, made up of three judges, ruled for the NCPLU, granting them injunctive relief.[57] The NCPLU did not request approval from the court to function as a formal labor union, but rather as a peaceful advocacy organization,[58] and the Department of Correction was already allowing incarcerated individuals to join, just not solicit, meet, or send bulk mailings.[59] Thus, the court's decision was on a narrow issue—the extent to which a carceral institution can ban solicitation and communication of an inmate organization if it allows membership to the organization.[60] The court held that solicitation among incarcerated individuals must be allowed and that the union must have the same ability to meet and send bulk mail as other inmate organizations.[61] In rationalizing this holding, the court noted that it is illogical to allow membership in but not solicitation of membership in an organization, and found that "[t]here is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions. Nor is there any evidence…that the inmates intend to operate it to hamper and interfere with the proper interests of government."[62]

Yet, the district court took great pains to clarify the limitations of imprisoned people's rights, stating that if incarcerated individuals' organizing disrupts the

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[47] *Id*.
[48] *Id*. at 24.
[49] Armstrong, *supra* note 43, at 248.
[50] Armstrong, *supra* note 35, at 605.
[51] Demetria D. Frank, *Prisoner-to-Public Communication*, 84 BROOK. L. REV. 115, 146 (2018).
[52] William B. Griffin, *Jones v. North Carolina Prisoners' Labor Union, Inc.: The "Hands-off Doctrine" Revisited*, 14 WAKE FOREST L. REV. 647, 647-48 (1978).
[53] *Id*.
[54] Armstrong, *supra* note 35, at 605.
[55] Griffin, *supra* note 52, at 648.
[56] *Id*.
[57] *Striking the Right Balance*, *supra* note 20, at 1506.
[58] North Carolina Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 940 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977).
[59] *Id.* at 941-42.
[60] *Id*. at 943-44.
[61] *Id*. at 944-45
[62] *Id*. at 943-44.

prison operations, the prison officials are "fully empowered to not only stop further solicitation of membership but to put down the Union and its adherents to whatever extent may be necessary to restore and protect security and order."[63] Going even further, the court clarified the following:

> 1. Whatever right of association, if any, prisoners derive from the first amendment, they have no right to form or belong to a labor union for the purpose of taking concerted action to force their demands upon prison administrators.
> 2. With or without the utilization of a union, inmates may not lawfully band together to resist prison discipline.
> 3. Prison administrators may lawfully refuse to negotiate requests or demands from any group of prison inmates whether or not organized as a union or association of prisoners.
> 4. Prison administrators may refuse to contract with any group or union of inmates; moreover, any such contract is void under the law of North Carolina and of no effect whatsoever.
> 5. Whatever the rights of prisoners to associate together may be, there is no right to assemble in such numbers, at such times, and at such places within the walls as they please. Even in free society, reasonable restrictions of time, place and manner are upheld against first amendment attack. Regulations designed to guard against excessive congregation of numbers of prisoners and to prevent the possibility of mass action and flash riot are prima facie valid and within the sound discretion of prison administrators.[64]

[Internal citations redacted]

However, this portion of the district court opinion could be characterized as dicta since the issues addressed were not squarely before the court.

The ruling of the district court was appealed and the case was taken up by the Supreme Court, which reversed the district court.[65] The Court's opinion, written by Justice Rehnquist, stressed that the district court gave insufficient deference to prison officials regarding the administration of their institution, which is complicated and beyond judicial expertise.[66] The Court deemed the ban on solicitation and meetings "rationally related to the reasonable. . . objectives of prison administration."[67] With respect to the Equal Protection arguments against prohibiting meetings and bulk mailing rights, the Court found that because the prison is not a public forum, there only needs to be a rational basis for distinctions between different inmate groups.[68] The Court said this rational basis was satisfied by the explanation that the other groups, such as Alcoholics Anonymous, are rehabilitative and work collaboratively with prison officials.[69]

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[63] *Id.* at 944-45.
[64] *Id.* at 945.
[65] Jones, 433 U.S. at 121.
[66] *Id*. at 125-26.
[67] *Id*. at 129 (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).
[68] *Id*. at 134.
[69] *Id*. at 134-36; *id.* at 134 n.10, 135 n.11.

Justice Burger authored a concurring opinion, stressing that the Court's holding does "not suggest that prison officials could not or should not permit such inmate organizations, but only that the Constitution does not require them to do so."[70] He also emphasized the local nature of this issue and the expertise of prison officials.[71] Justice Stevens concurred in part and dissented in part, writing that the Court's ruling should be read narrowly as allowing a ban only on solicitation, defined as "an invitation to collectively engage in a legitimately prohibited activity," and not as a general determination on the merits of unionization.[72] Thus, Justice Stevens would have struck down the prison regulation's banning of conduct that did not fit the Court's definition of solicitation.[73]

Justice Marshall's dissent, which Justice Brennan joined, began with an allusion to the racial justice and human rights issues at stake, writing "There was a time, not so very long ago, when prisoners were regarded as 'slave[s] of the State,' having 'not only forfeited [their] liberty, but all [their] personal rights…'"[74] Justice Marshall stated that courts have shifted away from this position, and laments the fact that the majority took "a giant step backwards."[75] Justice Marshall took issue with two parts of the Court's analysis: (1) the Court abandoned the prior analytical framework used to determine imprisoned people's First Amendment rights,[76] and (2) the Court ignored the incentives for a warden to unnecessarily curtail free speech.[77] Justice Marshall argued that once these errors are accounted for, it becomes clear that solicitation and bulk mailing must be allowed, given the lack of evidence of interruption of the prison's administration.[78] Marshall acknowledged that allowing meetings of the union is more complicated, but notes that there were witnesses that testified to unions playing a "constructive role"[79] in prisons, and ultimately states that where union meetings are not an "immediate and substantial threat to the security or rehabilitative functions of prisons," they are protected by the First and Fourteenth Amendments.[80] The dissent also warned that the reasoning of the majority could justify the stripping of *all* constitutional rights from imprisoned people so long as the prison administrators doing so are acting rationally.[81]

Justice Marshall, through his discussion of imprisoned people being viewed as "slaves of the State," indicated some awareness of the intersection of race and incarceration.[82] This understanding was notably absent from the majority opinion; however, the inaccurate idea that imprisoned people's unions had race-based instead of class-based goals for prison reform was implied during oral argument by Justice

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[70] *Id*. at 137 (Burger, C.J., concurring).
[71] *Id*. at 136-38 (Burger, C.J., concurring).
[72] *Id*. at 138-39 (Stevens, J., concurring in part and dissenting in part).
[73] *Id*.
[74] *Id*. at 139 (Marshall, J., dissenting) (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)).
[75] *Id*.
[76] *Id*. at 139-41.
[77] *Id*. at 141-43.
[78] *Id*. at 143-45.
[79] *Id*. at 145.
[80] *Id*. at 146.
[81] *Id*. at 147.
[82] *Id*. at 139 (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)).

Stewart, who joined in the majority opinion.[83] Justice Stewart asked if prisons could ban the Ku Klux Klan or Palestinian Liberation Organization chapters, and about the NCPLU's connections with a California incarcerated worker union.[84] This indicates concern about the NCPLU being a racial supremacy organization, although there was no evidence of this presented,[85] and about the organizing power of Black imprisoned people in particular.[86] However, the NCPLU, in its brief to the Court, "portrayed its leadership as 'multiracial,' noting the Board of Directors is composed of seven white persons, six Black persons, and one American Indian."[87]

Although *Jones* held there was no First Amendment right for incarcerated people to organize through unions, the decision gave prisons the option to allow the practice. Predictably, prisons declined to allow unionization and *Jones* "effectively resulted in the widespread elimination of incarcerated workers' unions."[88] Furthermore, while prison officials were advocating for restrictions on the rights of imprisoned people to organize in courts, conservatives were trying to undo the limitations on the use of prison labor that were placed in the 1920s and 1930s.[89] They were successful two years after *Jones* through the passage of the Justice System Improvement Act, which established the Prison Industry Enhancement Certification Program (PIECP) that allowed private entities to contract for prison labor.[90] This led to increased private access to prison labor during the nation's "second major incarceration boom — one as dependent upon criminalizing spaces of color as had been the original imprisonment explosion of the late nineteenth century."[91]

C. The Academic Reaction to Jones

Across the board, the literature describing *Jones* presents the ruling as the death knell of labor organizing by people in prison. This characterization has been both explicit, with authors somber about the negative impacts of the case,[92] and implicit, with authors focusing on the need to pursue a formal right to organize for imprisoned people through other legal avenues.[93] Scholarship continues to portray the legal right to unionize or strike as the remedy to poor working conditions for imprisoned people even while the proposed methods for obtaining such a right have changed. The focus on obtaining formal legal rights ignores the significant history of post-*Jones* organizing by incarcerated workers and its lessons for potential reforms to support future organizing.

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[83] Armstrong, *supra* note 43, at 254-257.
[84] *Id*. at 255-57.
[85] *Id*. at 254-257.
[86] *Id*.
[87] *Id*. at 254.
[88] Armstrong, *supra* note 35, at 606.
[89] Thompson, *supra* note 22, at 30-31.
[90] Shannon M. Sliva & Ceema Samimi, *Social Work and Prison Labor: A Restorative Model*, 63 SOCIAL WORK 153, 154-55 (2018).
[91] Thompson, *supra* note 22, at 30-31.
[92] *See, e.g.*, Sidney Zonn*, Inmate Unions: An Appraisal of Prisoner Rights and Labor Implications,* 32 U. MIAMI L. REV. 613 (1978).
[93] *See, e.g.*, Kara Goad, *Columbia University and Incarcerated Worker Labor Unions under the National Labor Relations Act,* 103 CORNELL L. REV. 177 (2017).

Legal scholarship in the 1970s prior to *Jones* was understandably focused on the potential constitutional right of people in prisons to form labor unions.[94] Following *Jones*, scholars stressed the negative impacts the Court's holding would have. One scholar lamented that the decision "makes evident that a highwater mark has been reached" for imprisoned people's rights.[95] Others stated that in *Jones*, the Court "critically disabled recent trends in prison reform" by increasing deference to prison administrators who "will not risk adopting reforms that could upset the order and regimen of the custodial institution"[96] and "halted the movement toward expanded recognition of prisoners' rights and returned to a 'hands-off' attitude, announcing a hesitancy to further invade an area traditionally regarded as state domain."[97] There was a shift away from scholarship asserting constitutionally protected rights for incarcerated workers in recognition of precedential obstacles. Even a scholar who recently focused on the potential for a First Amendment right to strike for incarcerated workers conceded that this would require "significant doctrinal change."[98]

Progressive scholars instead began advocating for recognition of incarcerated workers' unions under the National Labor Relations Act (NLRA),[99] which would extend to incarcerated individuals working in private industries and potentially those in the Prison Industry Enhancement (PIE) program.[100] This path shows some promise as federal courts have found that under the NLRA imprisoned people on work release could be in bargaining units with non-incarcerated employees.[101] Cases regarding the Fair Labor Standards Act (FLSA), which has a comparable definition of "employee" to that of the NLRA, have found the statute does not categorically exclude incarcerated workers.[102] Furthermore, the 2016 *Columbia University* decision by the National Labor Relations Board (NLRB) held that "as long as there is an employment relationship, the existence of some other relationship not covered by the Act does not prevent an individual from being protected as an employee."[103] However, even if the right for imprisoned people to organize is recognized by the NLRB, courts could ultimately undermine the impact of such a decision.[104] Similar arguments have been made for the recognition of

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[94] *See, e.g.*, Paul R. Comeau, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFF. L. REV. 963 (1972); Sarah M. Singleton, *Unionizing America's Prisons - Arbitration and State-Use*, 48 INDIANA L.J. 493 (1973).
[95] Zonn, *supra* note 92, at 634.
[96] Bradley B. Falkof, *Prisoner Representative Organizations, Prison Reform, and Jones v. North Carolina Prisoners' Labor Union: An Argument for Increased Court Intervention in Prison Administration*, 70 J. CRIM. L. & CRIMINOLOGY 42, 43 (1979).
[97] Christa Hoeher, *Constitutional Law—Freedom of Speech and Assembly—Prisoners' Rights—Jones v. North Carolina Prisoners' Labor Union, Inc.*, 24 N. Y. L. SCH. L. REV. 290, 301 (1978).
[98] *Striking the Right Balance*, *supra* note 20, at 1518.
[99] *See* Goad, *supra* note 93, at 179, 193-194; Armstrong, *supra* note 35, at 610-14; Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 875-81 (2008).
[100] Armstrong, *supra* note 35, at 611, 614.
[101] *See* Speedrack Prods. Grp., Ltd. v. NLRB, 114 F.3d 1276, 1278-82 (D.C. Cir. 1997); Rosslyn Concrete Constr. Co. v. NLRB., 713 F.2d 61, 63-64 (4th Cir. 1983); Goad, *supra* note 93, at 188.
[102] Armstrong, *supra* note 35, at 611-13.
[103] Goad, *supra* note 93, at 191 (citing NLRB Case No. 02-RC-143012 (August 23, 2016)).
[104] *Id.* at 200.

unions of imprisoned federal UNICOR workers by the Federal Labor Relations Authority (FLRA).[105]

The limited reach of a favorable NLRB or FLRA ruling given that "the vast majority of incarcerated workers… are held in state prisons and work directly for the prison or the state" then led to scholarship considering state-level recognition of imprisoned people's unions through state labor laws; there is a noticeable lack of scholarship regarding the potential right of imprisoned people to associate in unions based on state constitutions.[106] The obstacles of state labor law recognition are also significant, as many states have banned collective bargaining for all or most public employees and others have explicitly excluded imprisoned people from definitions of "public employee," leaving only thirty states where incarcerated individuals employed by the state might be able to successfully petition the state labor relations boards as of 2020.[107] Of these states, some still have restrictive definitions of "public employee" that could be hard to overcome.[108] If unionization by imprisoned people was successful on the state level, there could also be potential conflict given that public sector unions currently represent corrections officers.[109]

The formal recognition of imprisoned people's labor unions under labor laws proposed in recent scholarship would also result in the application of certain restrictions on organizing, including that unions would be limited by the scope of collective bargaining. For private employment, the NLRA defines the scope of bargaining, which is generally divided into mandatory, permissive, and illegal subjects.[110] These distinctions are significant; for example, neither an employer nor a union is allowed to "insist to impasse on a proposal concerning a permissive subject of bargaining."[111] A similar framework applies under the FLRA.[112] In the states and localities that allow collective bargaining by public employees, state or local laws govern the scope of bargaining and can be extremely limiting.[113] Although

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[105] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 956 (2019).

[106] Armstrong, *supra* note 35, at 596, 608 n. 92, 614-21.

[107] *Id.* at 616-617.

[108] *Id*. at 618.

[109] *Corrections*, AFSCME, https://www.afscme.org/about/jobs-we-do/corrections [https://perma.cc/YE3P-AHST]. A similar conflict could also arise if incarcerated federal workers receive recognition under the FLRA, given that federal government employee unions include corrections officers.

[110] *Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5))*, NATIONAL LABOR RELATIONS BOARD (last visited Apr. 10, 2025), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative [https://perma.cc/N6AH-SXET].

[111] *Id*; *Collective bargaining (Section 8(d) & 8(b)(3))*, NATIONAL LABOR RELATIONS BOARD (last visited Apr. 10, 2025), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/collective-bargaining-section-8d-8b3 [https://perma.cc/35QS-GXSN].

[112] UNITED STATES FEDERAL LABOR RELATIONS AUTHORITY, GUIDE TO NEGOTIABILITY UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (June 17, 2013).

[113] CLJE:Lab, *Building Worker Power in Cities & States: State Constitutions and Public Sector Collective Bargaining Rights*, CENTER FOR LABOR & A JUST ECONOMY (Sep. 1, 2024), https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states/state-constitutions-and-public-sector-collective-bargaining-rights/ [https://perma.cc/553G-68K8]; Shawn Johnson, *Wisconsin's Act 10 is Back in Court. Here's What to Know About the Controversial Law*, WIS. PUB.

there have been recent efforts to promote broader union demands that go beyond standard bargaining topics and benefit the wider community,[114] the legal restrictions still remain. Operating outside of formal collective bargaining allows imprisoned workers to simultaneously make demands on a variety of issues affecting their conditions of confinement rather than solely their working conditions.

Scholarly arguments paint *Jones* as the major impediment to imprisoned people's organizing for better working and living conditions. The scholarship has evolved from constitutional arguments for the right to unionize, to NLRB and FLRA recognition, to recognition under state labor laws, but there has remained a clear focus on formal legal recognition of imprisoned people's labor organizing. While these proposals would greatly increase imprisoned people's rights and protections, there are obstacles and limitations to formal unionization. The narrow focus on formal legal rights also discounts the post-*Jones* organizing of incarcerated workers and the instructiveness of this organizing on potential reforms.

III. POST-*JONES* LABOR ORGANIZING IN PRISONS

A. Labor Organizing in Prisons Following Jones

Despite the doom and gloom narrative of the scholarship around *Jones*, imprisoned people's labor organizing has persisted. In the 1990s, a strike by incarcerated individuals working for the Minnesota Department of Corrections' industrial division gained support by outside labor activists.[115] And there were continuing efforts by people in prisons in several states to create unions.[116] The Missouri Prison Labor Union was especially effective in its organizing; despite lacking formal bargaining powers, the union had 500 members by 2000.[117] A core demand by the members of the Missouri Prison Labor Union was to receive the federal minimum wage.[118]

There has also been a significant wave of strikes and organizing efforts by imprisoned people in the last few decades, and several of these initiatives have included work stoppages and demands relating to working conditions.[119] In 2010, thousands of people in Georgia state prisons joined a work strike spanning at least

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RADIO (Dec. 4, 2024), https://www.wpr.org/news/wisconsins-act-10-is-back-in-court-heres-what-to-know-about-the-controversial-law [https://perma.cc/9ZSQ-NGD6]; Stephenie Overman, *In Virginia, 'Patchwork' of Ordinances Makes Public-Sector Organizing a Maze*, VIRGINA MERCURY (Jan. 16, 2023), https://virginiamercury.com/2023/01/16/in-virginia-patchwork-of-ordinances-makes-public-sector-organizing-a-maze/ [https://perma.cc/M762-FHCF].

[114] Joseph A. McCartin, *Bargaining for the Common Good*, 63 DISSENT 128, 131-33 (2016); *Bargaining for the Common Good*, RUTGERS SCHOOL OF MANAGEMENT AND LABOR RELATIONS, https://smlr.rutgers.edu/faculty-research-engagement/center-innovation-worker-organization-ciwo/bargaining-common-good-0 [https://perma.cc/7GC9-X4NX].

[115] Thompson, *supra* note 22, at 40-41.

[116] *Id.* at 40.

[117] *Id*.

[118] *Id*.

[119] *Striking the Right Balance*, *supra* note 20, at 1500.

six prisons.[120] Participants would not leave their cells as part of the action.[121] Notably, the strike had participants across "racial and gang factions that do not often cooperate."[122] The incarcerated organizers received some assistance from a former Black Panther leader, Elaine Brown, in compiling a list of demands, including the core demand to receive pay for their work,[123] as they were receiving no payment for their labor.[124] Georgia prison officials responded by putting the prisons in indefinite lockdown.[125] The strike lasted six days until the strikers decided to sue for better conditions instead.[126] In another instance of activism, people in California prisons participated in hunger and labor strikes to challenge the use of indefinite solitary confinement in 2013.[127]

B. The 2016 Nationwide Prison Strike

In 2016, there was a nationwide prison strike, which was the largest collective action by incarcerated individuals in the U.S. up to that point.[128] The strike had its origins with imprisoned people in Alabama, and the Free Alabama Movement prison group.[129] In 2014, participants in the initial effort included incarcerated individuals from three prisons across the state, and they conducted a labor strike protesting poor conditions and mass incarceration.[130] The action grew to a national scale, with continued organizing from the Free Alabama Movement.[131]

The 2016 Prison Strike Call to Action was broadcast by the Free Alabama Movement, SupportPrisonerResistance.net, and the Incarcerated Workers Organizing Committee, which is a segment of the Industrial Workers of the World (IWW) led by people in prison. The message stressed that prison labor constituted slavery and noted the recent increase in collective actions by people in prison.[132] It described the intersectionality of the movement, "including immigrant detention centers, women's prisons and juvenile facilities,"[133] which was particularly relevant given that the number of women in state and federal prisons grew from 23,099 to

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[120] Thompson, *supra* note 30.
[121] Sarah Wheaton, Prisoners Strike in Georgia, N.Y. Times (Dec. 12, 2010), https://www.nytimes.com/2010/12/12/us/12prison.html?_r=0 [https://perma.cc/NU3D-HXE4].
[122] *Id.*
[123] *Id*.
[124] Thompson, *supra* note 30.
[125] Wheaton, *supra* note 121.
[126] Thompson, *supra* note 30.
[127] Raven Rakia, *Over 200 People Went On Hunger Strike After Months In Lockdown At California Prison*, THE APPEAL (Feb. 15, 2019), https://theappeal.org/corcoran-state-prison-california-hunger-strike-lockdown/ [https://perma.cc/5X47-EFGK].
[128] *Striking the Right Balance*, *supra* note 20, at 1500.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *2016 Prison Strike Call to Action*, INCARCERATED WORKERS ORGANIZING COMMITTEE (Jan. 11, 2017), https://incarceratedworkers.org/resources/2016-prison-strike-call-action [https://perma.cc/CE35-5T4Q].
[133] *Id*.

111,491 between 1985 and 2015.[134] The call to action also connected the prison strike to the fight against mass incarceration and criminalization, which it said the protests "surrounding the deaths of Mike Brown, Tamir Rice, Sandra Bland and so many others have drawn long overdue attention to."[135]

The 2016 nationwide prison strike began on September 9th, in recognition of the 45th anniversary of the Attica uprising, and included at least 24,000 people across 50 prisons and 12 states.[136] In addition to work stoppages, there were also hunger strikes, and efforts by people in prison to gain control over parts of the facilities.[137] The organizing was done through use of contraband cell phones as well as assistance from friends, family, and other organizers outside of prison.[138] There was not a centralized list of demands but better pay, living conditions, and programming were seen by many protestors as necessary reforms.[139] The media co-chair for the Incarcerated Workers Organizing Committee explained the difficulty of having one list of demands since the imprisoned participants were unable to all meet together, so "demands do vary from unit to unit and state to state."[140] Ongoing updates about the strike were difficult to obtain given the "information blackout… largely due to prison officials' ample discretion in the details they choose to disclose."[141] In fact, officials in several states refuted that work stoppages or strikes had occurred despite evidence to the contrary.[142]

Prison officials' reactions to the strike also varied by locale. At the Holman facility in Alabama, "nearly a dozen prison guards held a solidarity strike over safety conditions after a guard was fatally stabbed inside the overcrowded facility."[143] However, this solidarity was not the norm. A tactical team at Kinross Correctional Facility in Michigan "used guns, rifles, tear gas, and shields to subdue and handcuff around 150 inmates, leaving them in the rain for five to six hours"[144] and strike

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[134] *Incarcerated Women and Girls*, THE SENTENCING PROJECT (Nov. 24, 2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls/ [https://perma.cc/E6QQ-5G7W].

[135] *2016 Prison Strike Call to Action*, *supra* note 132.

[136] German Lopez, *We're in the Midst of the Biggest Prison Strike in US history*, VOX (Oct. 19, 2016), https://www.vox.com/identities/2016/10/19/13306178/prison-strike-protests-attica [https://perma.cc/L5RV-KZCF].

[137] *Id*.

[138] Beth Schwartzapfel, *A Primer on the Nationwide Prisoners Strike*, MARSHALL PROJECT (Sep. 27, 2016), https://www.themarshallproject.org/2016/09/27/a-primer-on-the-nationwide-prisoners-strike [https://perma.cc/A443-E8ZX].

[139] *Striking the Right Balance*, *supra* note 20, at 1500.

[140] Lopez, *supra* note 136.

[141] Alice Speri, *The Largest Prison Strike in U.S. History Enters its Second Week*, THE INTERCEPT (Sep. 16, 2016), https://theintercept.com/2016/09/16/the-largest-prison-strike-in-u-s-history-enters-its-second-week/ [https://perma.cc/344X-VVVQ].

[142] Schwartzapfel, *supra* note 138.

[143] Max Blau & Emanuella Grinberg, *Why US Inmates Launched a Nationwide Strike*, CNN, https://www.cnn.com/2016/10/30/us/us-prisoner-strike/index.html [https://perma.cc/YA54-8QSE] (Oct. 31, 2016).

[144] Lopez, *supra* note 136.

organizers from the facility were "transferred to other prisons in the state."[145] Other responses to organizing that activists faced included placement in solitary confinement, removal of their privileges such as visitation rights,[146] and violence against them by staff.[147]

No widespread reforms came from this strike, but it laid the groundwork for further nationwide collective actions by people in prison[148] and spread awareness of their living and working conditions through the significant media attention it attracted.[149] Furthermore, there were some more localized effects of the strike. For example, on October 6, 2016, the Department of Justice publicized that it would examine the conditions of Alabama's men's prisons.[150] The work stoppages also caused "sizable financial losses for public agencies and government corporations like the California Prison Industry Authority. According to the Solidarity Research Center, the California prison system lost as much as $636,068 in revenue for every day the strike lasted."[151]

C. The 2018 Nationwide Prison Strike

In 2018, there was another significant strike, beginning on August 21st and ending on September 9th, incorporating work stoppages, hunger strikes, and spending boycotts.[152] The start date of the strike was on the anniversary of the killing of Black Panther George Jackson during an escape attempt from San Quentin prison, and the end date again referenced the Attica riot.[153] The strike was a response to a deadly April riot at Lee Correctional Institution in South Carolina.[154] Like in 2016, organizing was done through contraband cell phones and organizers outside of

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[145] Kanyakrit Vongkiatkajorn, *Why Prisoners Across the Country Have Gone on Strike*, MOTHER JONES (Sep. 19, 2016), https://www.motherjones.com/politics/2016/09/prison-strike-inmate-labor-work/ [https://perma.cc/NC9S-6FGL].

[146] Nicky Woolf, *Inside America's Biggest Prison Strike: 'The 13th Amendment Didn't End Slavery.'*, THE GUARDIAN (Oct. 22, 2016), https://www.theguardian.com/us-news/2016/oct/22/inside-us-prison-strike-labor-protest [https://perma.cc/U866-CJLL].

[147] Janaé Bonsu, *A Strike Against the New Jim Crow*, 64 DISSENT 64, 64 (2017).

[148] *Striking the Right Balance*, *supra* note 20, at 1500-01.

[149] *See*, *e.g.*, Blau & Grinberg, *supra* note 143.

[150] Lopez, *supra* note 136.

[151] Bonsu, *supra* note 147, at 64.

[152] Jennie Neufeld, *A Mass Incarceration Expert Says the 2018 Prison Strike Could Be "One of the Largest the Country Has Ever Seen,"* VOX (Aug. 22, 2018), https://www.vox.com/2018/8/21/17721874/national-prison-strike-2018-13th-amendment-attica [https://perma.cc/WN2G-3ZVB].

[153] Amy Goodman, *Between Attica and Lee*, JACOBIN MAGAZINE (Aug. 23, 2018), https://jacobinmag.com/2018/08/prison-strike-lee-attica-george-jackson [https://perma.cc/2V67-CPUF].

[154] Merrit Kennedy, *Inmates Plan to Hold Weeks-Long Strike at Prisons Across U.S.*, NPR (Aug. 21, 2018), https://www.npr.org/2018/08/21/640493211/inmates-plan-to-hold-two-week-strike-at-prisons-across-u-s [https://perma.cc/7V28-48E9].

prison.[155] It was challenging to get information about the strike efforts in real time,[156] but there were thousands of participants in roughly fifteen states,[157] and the action was probably the largest prison work stoppage in U.S. history.[158] But again, certain department of corrections officials denied the participation of imprisoned people in their facilities notwithstanding reports at odds with their statements.[159]

This time the strike organizers, Jailhouse Lawyers Speak, crafted a list of 10 demands[160]:

> 1. Immediate improvements to the conditions of prisons and prison policies that recognize the humanity of imprisoned men and women.
> 2. An immediate end to prison slavery. All persons imprisoned in any place of detention under United States jurisdiction must be paid the prevailing wage in their state or territory for their labor.
> 3. The Prison Litigation Reform Act must be rescinded, allowing imprisoned humans a proper channel to address grievances and violations of their rights.
> 4. The Truth in Sentencing Act and the Sentencing Reform Act must be rescinded so that imprisoned humans have a possibility of rehabilitation and parole. No human shall be sentenced to Death by Incarceration or serve any sentence without the possibility of parole.
> 5. An immediate end to the racial overcharging, over-sentencing, and parole denials of Black and brown humans. Black humans shall no longer be denied parole because the victim of the crime was white, which is a particular problem in southern states.
> 6. An immediate end to racist gang enhancement laws targeting Black and brown humans.
> 7. No imprisoned human shall be denied access to rehabilitation programs at their place of detention because of their label as a violent offender.
> 8. State prisons must be funded specifically to offer more rehabilitation services.
> 9. Pell grants must be reinstated in all US states and territories.

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[155] Nicole Lewis, *What's Really Happening With the National Prison Strike?*, THE MARSHALL PROJECT (Aug. 24, 2018), https://www.themarshallproject.org/2018/08/24/what-s-really-happening-with-the-national-prison-strike [https://perma.cc/4NGG-DNTY].

[156] Cheryl Corley, *U.S. Inmates Plan Nationwide Prison Strike to Protest Labor Conditions*, NPR (Aug. 21, 2018), https://www.npr.org/2018/08/21/640630606/u-s-inmates-plan-nationwide-prison-strike-to-protest-labor-conditions [https://perma.cc/PCT4-ZQJL].

[157] *Striking the Right Balance*, *supra* note 20, at 1490.

[158] Bozelko & Lo, *supra* note 10.

[159] Ed Pilkington, *Major Prison Strike Spreads Across US and Canada as Inmates Refuse Food*, THE GUARDIAN (Aug. 23, 2018), https://www.theguardian.com/us-news/2018/aug/23/prison-strike-us-canada-forced-labor-protest-activism [https://perma.cc/EP6H-DMBN].

[160] *Prison Strike 2018*, INCARCERATED WORKERS ORGANIZING COMMITTEE, https://incarceratedworkers.org/campaigns/prison-strike-2018 [https://perma.cc/FY26-G3BU].

> 10. The voting rights of all confined citizens serving prison sentences, pretrial detainees, and so-called "ex-felons" must be counted. Representation is demanded. All voices count.

The importance to the strikers of the demands regarding prison labor was highlighted in reporting that stated "If there's one issue inmate protesters are united on, it's prison labor" [161] and "One of the most passionately held demands is an immediate end to imposed labor in return for paltry wages, a widespread practice in US prisons that the strike organisers [sic] call a modern form of slavery."[162] In addition to the ten central demands, certain local sets of incarcerated individuals, such as those in North Carolina, also released their own specific demands.[163]

Around 150 organizations endorsed the 2018 strike,[164] and their support highlights the intersectionality of the issue of prison reform. For example, HEARD, a "a cross-disability abolitionist organization,"[165] along with the Louisiana Registry of Interpreters for the Deaf and other organizations, issued a statement in solidarity with the strikers and "responding to decades of neglect of the needs of Deaf/Disabled imprisoned people."[166] Other supportive organizations included the ACLU,[167] The HEAL Food Alliance & Food Chain Workers Alliance,[168] Students for a National Health Program,[169] WhiteCoats4BlackLives,[170] local Democratic Socialists of

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[161] German Lopez, *America's Prisoners Are Going on Strike in At Least 17 states*, VOX (Aug. 22, 2018), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018 [https://perma.cc/JFP6-PQBF].

[162] Ed Pilkington, *US Inmates Stage Nationwide Prison Labor Strike Over 'Modern Slavery,'* THE GUARDIAN (Aug. 21, 2018) [https://perma.cc/ZCC4-MUK8].

[163] Pilkington, *supra* note 159. Canadian prisoners also released their own demands. Jordan House, *Why Canadian Prisoners Are Participating in the US Prison Strike*, JACOBIN (Aug. 5, 2018), https://www.jacobinmag.com/2018/09/canada-prison-strike-burnside-jail-incarceration [https://perma.cc/LYW4-N3MP].

[164] *Striking the Right Balance*, *supra* note 20, at 1491.

[165] HEARD, *About Page*, FACEBOOK, https://www.facebook.com/HEARDDC/ [https://perma.cc/4E96-CTNF].

[166] HEARD, *Community Statement on Louisiana Department of Corrections' Use of Hearing Imprisoned People as "Interpreters" for Deaf Imprisoned People*, FACEBOOK (Aug. 22, 2018), https://www.facebook.com/watch/?v=2183433805233938 [https://perma.cc/Z2BB-URPQ].

[167] *ACLU Statement on Nationwide Prison Strike*, ACLU (Aug. 21, 2018), https://www.aclu.org/press-releases/aclu-statement-nationwide-prison-strike [perma.cc/R4PK-AMSH].

[168] *Press Statement: The HEAL Food Alliance & Food Chain Workers Alliance Declare Solidarity with the 2018 Prison Strike*, HEAL FOOD ALLIANCE (Aug. 22, 2018), https://healfoodalliance.org/for-the-press/press-statement-2018-prison-strike-solidarity-statement/ [https://perma.cc/3CVV-JVVA].

[169] *Statement in Solidarity with the National Prison Strike*, STUDENTS FOR A NATIONAL HEALTH PROGRAM (Aug. 15, 2018), https://student.pnhp.org/action-alert-national-prison-strike/ [https://perma.cc/FZ33-CUKR].

[170] *WC4BL National Prison Strike Letter of Endorsement*, WHITE COATS FOR BLACK LIVES (Aug. 18, 2018), https://whitecoats4blacklives.org/2018/08/18/wc4bl-national-prison-strike-letter-of-endorsement/ [https://perma.cc/ATS6-E5ZQ].

America chapters,[171] and the Harvard Black Law Students Association.[172] Outside supporters assisted by boycotting businesses that use prison labor,[173] and hosting solidarity rallies.[174]

The 2018 prison strike activists dealt with harsh reprisals for their actions similar to those faced by 2016 strikers.[175] For some individuals, the consequences were long-lasting.[176] A spokesperson for the Incarcerated Workers Organizing Committee stated that "The retaliation and repression was instantaneous and constant. Leaders were picked off, one by one, and thrown into solitary in anticipation of the strike that was coming."[177] Prison officials also used transfers to try to stop strike organizers, which left some activists further from family on the outside.[178] One organizer in a South Carolina prison that was under lockdown during the strike said that "They have suspended all recreation so that we are in our cells literally 24/7… They turn back our mail, threaten anyone found to be associated with the strike with solitary, and they've painted windows in our cells black so we have no idea whether it's night or day."[179]

Amani Sawari, Jailhouse Lawyers Speak spokesperson and Right 2 Vote national coordinator, has argued that the 2018 strike succeeded in several ways. First, Sawari notes that the worldwide solidarity among incarcerated people, and changes in public opinion about prison conditions were wins in and of themselves.[180] Second, the 10th demand about imprisoned people having the right to vote became its own movement, and gained significant political attention.[181] There were also local successes, like a decrease in prison phone rates in states including Texas and Michigan.[182] Other supporters have stated that the 2018 action importantly provided

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[171] Lewis, *supra* note 155; *see, e.g.*, *Why and How Socialists Should Support the 2018 National Prison Strike*, SACRAMENTO DSA (Aug. 15, 2018), https://www.sacdsa.org/blog/2018/08/15/socialist_support_2018_national_prison_strike/ [https://perma.cc/MT36-SJHA].

[172] *Harvard Black Law Student's Association Statement on the 2018 National Prison Strike*, HARVARD BLACK LAW STUDENTS ASSOCIATION (Sept. 26, 2018), https://orgs.law.harvard.edu/blsa/2018/09/26/hblsa-prison-strike-statement/ [https://perma.cc/HJA8-9FE2].

[173] Goodman, *supra* note 153.

[174] Dalvin Brown, *'You can't just treat people like animals': U.S. prison strike prompts solidarity rallies***,** USA TODAY (Aug. 22, 2018), https://www.usatoday.com/story/news/2018/08/22/prison-strike-sparks-nationwide-protests/1065723002/ [https://perma.cc/J68M-YML5].

[175] Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, THE GUARDIAN (Aug. 31, 2018), https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation [https://perma.cc/RJ8X-2VAR].

[176] *2018 Prison Strike Solidarity Letters*, INCARCERATED WORKERS ORGANIZING COMMITTEE, https://incarceratedworkers.org/prison-strike-letters [https://perma.cc/TF6U-JFBB].

[177] Lartey, *supra* note 175.

[178] *Id*.

[179] Ed Pilkington, *US Inmates Mark End of Prison Strike with Push to Regain Voting Rights*, THE GUARDIAN (Sep. 9, 2018), https://www.theguardian.com/us-news/2018/sep/09/us-prison-strike-latest-demands-voting-rights [https://perma.cc/ACC4-C2QS].

[180] Adam H. Johnson, *The Appeal Podcast: What's Changed Since The 2018 Prison Strike?*, THE APPEAL (Jun. 13, 2019), https://theappeal.org/the-appeal-podcast-whats-changed-since-the-2018-prison-strike/ [https://perma.cc/92X6-SLPZ].

[181] *Id*.

[182] *Id*.

hope for change.[183] One research study, pulling from interviews conducted with outside organizers, documented that "Participants observed the Strike's impact in two key areas: (1) the relative mainstreaming of abolitionist discourse and (2) the popularization of imprisoned people's rights demands in U.S. politics."[184]

D. Labor Organizing in Prisons Since the 2018 Strike

One recent successful work strike, slow-down, and lay-in by people in prison took place in December 2018 at Rush City Prison in Minnesota.[185] These workers were mostly employed packaging balloons and license plates.[186] They were protesting a delay in delivery of goods from the commissary, but also had felt "exploited by high canteen prices that outstrip their $2-a-day wage, and…complained of guard abuse and overcrowding that leads to violence."[187] Prison officials, including the warden, met with several of the activists and discussed their concerns.[188] Ultimately, the commissary delays were addressed, "but answers to other concerns remain[ed] more elusive."[189]

There was also a substantial level of imprisoned people's organizing during the COVID-19 pandemic as well, with "over 119 documented instances of incarcerated protests and strikes during the first ninety days of the pandemic."[190] Imprisoned people from 39 different states took action, mainly inside immigration prisons.[191] In Massachusetts during March of 2020, Bristol County House of Correction immigration detainees went on a labor strike in order to protest unsafe conditions leading to concerns about virus spread.[192] This greatly impacted the operation of the facility given that detainees complete laundry, cleaning, and food service.[193] In early April, women in Irwin County Detention Center in Georgia decided to go on work and hunger strike to protest a lack of Covid-19 protections,

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[183] Mitch Smith, *Prison Strike Organizers Aim to Improve Conditions and Pay*, N.Y. TIMES (Aug. 26, 2018), https://www.nytimes.com/2018/08/26/us/national-prison-strike-2018.html [https://perma.cc/2E6U-4XB2].
[184] Taylor Fox, *Freedom, Caged: A Foucauldian Inquiry into the National Prison Strike,* at 33, 55 (May 1, 2020).
[185] 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/CU44-W7BE].
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *Id*.
[190] M. Eve Hanan, *Incarcerated Activism during COVID-19*, 18 OHIO ST. J. CRIM. L. 475, 478 (2021).
[191] *Prisoners Have Led 100+ Strikes over Dangerous Conditions During Pandemic*, DEMOCRACY NOW! (Nov. 16, 2020), https://www.democracynow.org/2020/11/16/headlines/prisoners_have_led_100_strikes_over_dangerous_conditions_during_pandemic [https://perma.cc/FJM7-LPHF].
[192] Shannon Dooling, *ICE Detainees In Bristol County Go On Work Strike Over Conditions Amid Coronavirus Fears*, WBUR, https://www.wbur.org/news/2020/03/31/ice-detainees-in-bristol-county-go-on-work-strike-protesting-conditions-amid-coronavirus-outbreak [https://perma.cc/3U4L-4VMX] (Mar. 31, 2020).
[193] *Id*.

and successfully sought the participation of male detainees as well.[194] Also in April, there were transfers of individuals from the Carl Robinson Correctional Institution in Connecticut after they indicated they would organize hunger and labor strikes in response to restrictions that were put in place due to Covid.[195] In the "Key Recommendations" of an ACLU report on immigration detention during the pandemic, the authors implored the Department of Homeland Security to "Provide public reporting on suicide attempts, hunger strikes, work stoppages, use of solitary confinement, use of force, and other significant events at detention centers."[196]

One recent example of a sustained incarcerated worker strike began in Alabama prisons in September 2022.[197] The strikers' demands mainly focused on sentencing policy reforms and better oversight of Alabama's criminal legal system, but the strike was "predicated on the premise that ADOC depends on prison labor to function."[198] One incarcerated activist said that "The courts are shut down to us. The parole board is shut down to us. So, our only option is understanding that this is their language: money."[199]

*E. Takeaways from Post-*Jones *Labor Organizing in Prisons*

There are several important takeaways from the history of imprisoned people's labor organizing following the *Jones* case. The first is that people in prisons have continued to organize work stoppages. In fact, the nationwide prison strikes in 2016 and 2018 both set records for the largest collective actions by people in prisons in U.S. history.[200] Therefore, it is clear that *Jones* was not the end of the incarcerated workers' labor movement.

Second, the organizing post-*Jones* has not involved the creation of formal unions or the use of collective bargaining, but rather the use of labor strikes to advocate for specific demands.[201] In many cases, labor strikes have also been accompanied by hunger strikes.[202] It is also notable that imprisoned people's demands during these strikes are not solely focused on working conditions, although labor concerns are often central, but also relate to broader conditions of confinement and even the system of mass incarceration more generally.[203]

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[194] Seth Freed Wessler, *Fear, Illness and Death in ICE Detention: How a Protest Grew on the Inside*, N.Y. TIMES (Jun. 7, 2021), https://www.nytimes.com/2020/06/04/magazine/covid-ice.html [https://perma.cc/9XUZ-E4YV].
[195] *More Than 100 Inmates in Conn. Transferred After Coronavirus Unrest*, NBC CT (Apr. 5, 2020), https://www.nbcconnecticut.com/news/coronavirus/more-than-100-inmates-in-conn-transferred-after-coronavirus-unrest/2250561/ [https://perma.cc/2TPX-3JHQ].
[196] *The Survivors: Stories of People Released from ICE Detention During the COVID-19 Pandemic*, ACLU (2021), at 8.
[197] Sam McCann, *What You Need to Know About the Alabama Prison Strike,* VERA (Oct. 27, 2022), https://www.vera.org/news/what-you-need-to-know-about-the-alabama-prison-strike [https://perma.cc/CN3F-DXT5].
[198] *Id*.
[199] *Id*.
[200] *Striking the Right Balance*, *supra* note 20, at 1500; Bozelko & Lo, *supra* note 10.
[201] *See*, *e.g.*, *Prison Strike 2018*, *supra* note 160.
[202] *See*, *e.g.*, Lopez, *supra* note 136.
[203] *See*, *e.g.*, *Prison Strike 2018*, *supra* note 160.

Third, post-*Jones* organizing, and particularly the 2016 and 2018 prison strikes, depended largely on communication among imprisoned people using contraband phones and the assistance of organizers outside of prison.[204] These methods of communication have been effective in working around prison officials' ability to prevent unsanctioned meetings of imprisoned people.[205]

Fourth, there have been successes from these strikes, including increased public awareness of prison conditions and shifts in public perception of prison reform.[206] There have also been local changes following strikes such as improved commissary delivery speeds[207] and decreases in phone rates.[208] These wins demonstrate that even when people in prisons do not have the formal right to unionize or strike, their collective action can still be successful in creating meaningful change.

Lastly, this history makes clear that punishment of activists in prison for organizing is pervasive throughout the country. Retaliation comes in the form of sending individuals to solitary confinement, revoking privileges that they have, and even violence.[209] Prison officials also have transferred activists to other prisons.[210] The constant use of these tactics by prison officials hinders the effectiveness of imprisoned people's activism.

IV. RETHINKING *JONES* AND THE FUTURE OF IMPRISONED PEOPLE'S LABOR ORGANIZING

A. Cabining Jones

As discussed in Part II, there are obstacles and limitations to a formal legal right for imprisoned people to unionize or strike. And the post-*Jones* history detailed in Part III demonstrates that such measures are not required for successful organizing by people in prison. Therefore, the impact of *Jones* should be reconsidered and reforms outside of the establishment of formal legal rights merit further investigation and consideration.

Since the scholarship paints an overly pessimistic view of *Jones*' impact, it is necessary to first clarify what *Jones* does and does not say. *Jones* did shut down the movement in the 1970s for an affirmative right for people in prison to unionize.[211] However, as Justice Burger emphasizes in his concurrence, the opinion does not prevent prison officials' recognition of a union or allowance of union activity, it just states that there is no right to do so given by the Constitution.[212] The

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[204] Schwartzapfel, *supra* note 138; Lewis, *supra* note 155.
[205] *Id.*
[206] Johnson, *supra* note 180.
[207] Rakia, *supra* note 185.
[208] Johnson, *supra* note 180.
[209] Bonsu, *supra* note 147, at 64; *see generally* Savannah Kumar, *Compelling Labor and Chilling Dissent: Creative Resistance to Coercive Uses of Solitary Confinement in Prisons and Immigration Detention Centers*, 36 HARV. B.L. LAW J. 93 (2020).
[210] Vongkiatkajorn, *supra* note 145.
[211] Jones, 433 U.S. at 121.
[212] *Id*. at 137 (Burger, C.J., concurring).

Jones opinion did have negative impacts on jurisprudence regarding general First Amendment rights in prison, increasing deference to prison officials' determinations, and leading courts to allow the prohibition of any "any non-sanctioned group activity, including nonviolent activity, because of the potential of a threat to the order or security of the facility."[213] This paper's efforts to cabin *Jones* are not to say that the case did not detrimentally impact the incarcerated workers' labor rights movement, but rather to show that it was not enough to prevent subsequent widespread labor organizing by people in prison in the U.S., as seen most dramatically in the 2016 and 2018 strikes.

Thus, while *Jones* shut the door on a First Amendment right of incarcerated workers to join unions, organizing has still continued in the absence of formal legal rights. As described in Benjamin Sachs' *The Unbundled Union*, there are both political and collective bargaining functions of a traditional labor union.[214] Although this latter function has not occurred in prisons since *Jones* due to prison officials' refusal, incarcerated people's political organizing is clearly still occurring, particularly around issues of sentencing and other prison reforms.[215] People in prisons also have continued to communicate amongst each other, often aided by technology, about common concerns and plans to collectively act to force prison officials to address issues. The use of the strike is another example of continued union activity.

Scholars need to cabin *Jones* in light of the organizing that is continuing inside prisons. *Jones* resulted in the end of formal unionization but should not be read too broadly. A reconceptualization of *Jones* is not only inherently valuable for painting a more accurate historical picture, but also allows advocates and scholars to better understand how organizing by people in prison can be supported through reforms in furtherance of activity *Jones* has not stopped. Post-*Jones* organizing by incarcerated workers makes clear that (1) a formal union is not necessary for effective labor activism and (2) prison officials' ubiquitous retaliation against incarcerated activists has hampered their success.

B. National Level Reforms Supporting Imprisoned People's Labor Organizing

After studying post-*Jones* labor organizing by people in prison, and using this history to cabin *Jones*, it is possible to consider reforms to support this organizing that are outside of a formal rights framework and have previously been neglected. As discussed, punishment, including violence, solitary confinement, and transfers, based on imprisoned people's activism was a major issue during the 2016 and 2018 strikes.[216] Therefore, limiting the available punishments that corrections officers can use to retaliate against incarcerated organizers would be impactful. Similarly, improvements in oversight of prison officials and their use of repressive

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[213] Armstrong, *supra* note 43, at 257.
[214] Benjamin I. Sachs, *The Unbundled Union*, 123 YALE L.J. 148, 195 (2013).
[215] *Prison Strike 2018*, *supra* note 160.
[216] Bonsu, *supra* note 147, at 64; Vongkiatkajorn, *supra* note 145.

punishment tactics would support organizing by incarcerated people. There are opportunities to make these changes on the national, state, and local levels.

On the national level, the Supreme Court could expand the types of punishments that are unconstitutional under the Eighth Amendment. By limiting the extent to which guards can punish incarcerated individuals generally, this would also limit punishment's impact on incarcerated organizers. However, this type of Eighth Amendment jurisprudential change is unlikely given the current conservative composition of the Court. Furthermore, after *Pearson v. Callahan*,[217] stagnation of Eighth Amendment jurisprudence has become a real concern. This is because *Pearson* changed the implementation of the qualified immunity inquiry when there is an allegation of a state officer violating constitutional rights.[218] In particular, *Pearson* altered the precedent of *Saucier v. Katz*,[219] which laid out a two-step inquiry: (1) was a constitutional right violated and (2) if so, was the constitutional right clearly established at the time.[220] *Pearson* allows courts to use their discretion to skip over the first question entirely, thus allowing judges to evade setting Eighth Amendment precedent.[221] And as it currently stands, the Eighth Amendment is not very protective, as shown in the oft-cited case *Whitley v. Albers*:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[222]

This excerpt is particularly relevant, given that prison officials claim that activism by incarcerated individuals is a safety risk.[223]

Another potential avenue to limit guards' abilities to retaliate against incarcerated organizers is to repeal or amend the Prison Litigation Reform Act (PLRA) which limited federal courts' oversight of prisons. The PLRA made it more challenging for incarcerated individuals to bring civil rights suits, through the establishment of administrative exhaustion and physical injury requirements, and made it more challenging for incarcerated individuals to win these suits.[224] The Act also reduced financial incentives for attorneys to take on incarcerated people's civil rights cases.[225] Therefore, the rate of these civil rights suits dropped dramatically

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[217] 555 U.S. 223 (2009).
[218] *Id.*
[219] 533 U.S. 194 (2001).
[220] *Id*.
[221] *Id.*
[222] Whitley v. Albers, 475 U.S. 312, 320-321 (1986).
[223] Jones, 433 U.S. at 127-28.
[224] Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 years of evidence for repealing the Prison Litigation Reform Act*, PRISON POLICY INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/6TDS-VZU5].
[225] *Id*.

after the PLRA was enacted.[226] Due to the negative impacts of the PLRA, there have been calls to repeal the law, or certain portions of it.[227] Additional arguments in support of repealing the PLRA include that it would help curb violence from prison guards, which is commonplace,[228] and that federal courts have an important role in holding carceral institutions accountable.[229] One proposal for limiting the PLRA was The Justice for Juveniles Act, a bill that would have made some of the PLRA requirements inapplicable to incarcerated individuals under twenty-two years old.[230] However even if the PLRA was repealed or amended, and the procedure for litigation by people in prison was improved, the lack of protections provided by the substantive law would continue to pose a challenge.

Also at the national level, there are several potential reforms that would apply specifically to federal prisons. First, changes could be made by the Federal Bureau of Prisons, an agency within the Department of Justice that is responsible for issuing the written rules comprising the Inmate Discipline Program that applies to people in federal prisons. Notably, "Encouraging others to refuse to work, or to participate in a work stoppage" falls within high severity level prohibited acts, which is only below greatest severity level prohibited acts.[231] Disciplinary segregation is one of the potential punishments for acts of this severity.[232] Possession of a portable telephone, which is a common item in federal prisons, often used for non-criminal entertainment or communication purposes,[233] is in the greatest severity level.[234] Presumably the executive could pressure agency officials to alter the discipline program and decrease the severity of the categorization of these acts, thus limiting the possible punishments available.

A more general policy change which would benefit incarcerated organizers, and the incarcerated community as a whole, is the banning of solitary confinement in federal prisons. In June 2021, the Federal Anti-Solitary Taskforce, of which the ACLU is a member, released a report entitled "A Blueprint for Ending Solitary

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[226] *Id*.

[227] For example, the American Bar Association advocated for the reduction of requirements for plaintiffs to bring suits under the act. *No Equal Justice: The Prison Litigation Reform Act in the United States* 160, HUMAN RIGHTS WATCH (June 16, 2009). A commission of experts assembled by The Vera Institute of Justice made similar recommendations. *Id*.

[228] Annie Gersh, *Locked Up Litigation: The Case for Repealing the Prison Litigation Reform Act*, BROWN POLITICAL REVIEW (May 28, 2018), https://brownpoliticalreview.org/2018/05/locked-litigation-case-repealing-prison-litigation-reform-act [https://perma.cc/DNP9-BLZC].

[229] Easha Anand, Emily Clark & Daniel Greenfield*, How The Prison Litigation Reform Act Has Failed For 25 Years*, THE APPEAL (Apr. 26, 2021), https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years [https://perma.cc/4G5L-JDB4].

[230] Justice for Juveniles Act, H.R. 961, 117th Cong. (2021); Justice for Juveniles Act, H.R. 5047, 118th Cong. (2023).

[231] U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, INMATE DISCIPLINE PROGRAM (July 8, 2011).

[232] *Id*.

[233] Kim Severson & Robbie Brown, *Outlawed, Cellphones Are Thriving in Prisons*, N.Y. TIMES (Jan. 2, 2011), https://www.nytimes.com/2011/01/03/us/03prisoners.html [https://perma.cc/MC5S-LBHH].

[234] INMATE DISCIPLINE PROGRAM, *supra* note 231. It is also a felony to possess a phone in federal prison. Severson & Brown, *supra* note 233.

Confinement by the Federal Government."[235] The report noted that "President Joe Biden and Vice President Kamala Harris both committed to ending the practice of solitary confinement in the 2020 campaigns and policy platforms."[236]

Increased oversight of federal prisons could also help reduce unjust punishment of incarcerated activists. The House and Senate Judiciary Committees have an important role in overseeing the Federal Bureau of Prisons. They can hold hearings and ask prison officials questions regarding prison administration.[237] Additionally, in 2024, President Biden signed a law establishing independent oversight over the Federal Bureau of Prisons.[238] Expanding and empowering these oversight mechanisms could help prevent or respond to unjust retaliatory actions against incarcerated activists.

Realistically, however, the current political atmosphere makes it unlikely that any of these national-level reforms will occur in the near future.[239]

C. State and Local Level Reforms Supporting Imprisoned People's Labor Organizing

State and local level reforms can also impact the ability of imprisoned people to organize even in the absence of formally recognized legal rights.

Lower federal courts can themselves make decisions regarding the applicability of the Eighth Amendment. These decisions, while impacting a smaller area, still are significant constitutional interpretations. In fact, an empirical study after *Pearson* showed that "While circuit courts have generally begun avoiding constitutional determinations as expected, district courts have not done so," and have continued generating constitutional precedent.[240]

Changes in discipline rules, and specifically policies regarding work stoppages and contraband phones could also be made at the state level. For example, in North Carolina to "Participate in a riot, insurrection, work stoppage or group demonstration, or incite/encourage others to riot, participate in an insurrection, work stoppage or other group demonstration" or to "Possess or use in any manner any

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[235] *A Blueprint for Ending Solitary Confinement by the Federal Government*, ACLU & THE FEDERAL ANTI-SOLITARY TASKFORCE (June 2021), https://www.aclu.org/report/blueprint-ending-solitary-confinement-federal-government [https://perma.cc/FDH5-YQAS].

[236] *Id*.

[237] Walter Pavlo, *Bureau of Prisons Director Testifies at House Judiciary Committee*, FORBES (July 24, 2024), https://www.forbes.com/sites/walterpavlo/2024/07/24/bureau-of-prisons-director-testifies-at-house-judiciary-committee/ [https://perma.cc/DN8Z-UPAC]; *Director Testifies Before Senate Judiciary Committee*, FED. BUREAU OF PRISONS (last updated Feb. 28, 2024), https://www.bop.gov/news/20240228-director-testifies-before-senate-subcommittee.jsp [https://perma.cc/C362-LZ8N].

[238] Michael R. Sisak & Michael Balsamo, *Biden Signs Bill Strengthening Oversight of Crisis-Plagued US Bureau of Prisons After AP Reporting*, AP (July 25, 2024), https://apnews.com/article/federal-prisons-congress-oversight-abuse-transparency-biden-397d95d00d507a95c58dc0f78ada0407 [https://perma.cc/G8TW-QGR5].

[239] For example, Attorney General Pam Bondi issued numerous tough-on-crime policies immediately upon assuming her role. *Trump's First 100 Days: Friend or Foe to Criminal Justice Reform?,* VERA (May 13, 2025), https://www.vera.org/trumps-first-100-days-friend-or-foe-to-criminal-justice-reform [https://perma.cc/A737-T596].

[240] Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 468 (2011).

type of unauthorized recording or image taking device or any type of unauthorized communication device whether audio, video, or any device that has direct outside communication capability" are Class A Disciplinary Offenses, with authorized punishment of 30 days in disciplinary segregation.[241] Similar to at the federal level, state agencies that determine, and have the ability to change, prison discipline, are mainly led by executive appointees.[242]

Banning solitary confinement at the state or local levels could also be helpful, and there have been recent efforts to do so, particularly given isolation's detrimental effects on mental health.[243] One example of this is the HALT Solitary Act which was signed into law in New York on April 1, 2021, and went into effect in 2022.[244] Although this victory is most significant for the health and humanization of the incarcerated, it could also have secondary benefits to the ability of imprisoned people to collectively organize given the use of solitary against incarcerated activists.[245]

States could also make changes in their inspection and management of prisons. Incidents of state prison guards' abuse of imprisoned people have sparked media attention and calls for independent oversight.[246] Several states already have independent bodies in charge of overseeing the state's prisons.[247] These offices can have the power to "enter and inspect prisons without notice, conduct confidential interviews with incarcerated people and prison staff, recommend improvements and monitor their implementation, access data and records, and even help resolve complaints from families and prisoners."[248] The ABA has released guidance on effective accountability and oversight of prisons, which includes the use of

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[241] *Inmate Discipline*, NORTH CAROLINA DEP'T OF PUBLIC SAFETY (2017), https://www.dac.nc.gov/document/inmate-discipline-listing-current-offenses-punishments-and-administrative-fees [https://perma.cc/CGR5-6LCA].

[242] *See, e.g.*, *Department of Public Safety*, NORTH CAROLINA DEP'T OF PUBLIC SAFETY, https://www.nc.gov/agency/public-safety-department [https://perma.cc/6TUN-8TSE].

[243] *About*, NEW YORK CAMPAIGN FOR ALTERNATIVES TO ISOLATED Confinement, http://nycaic.org/statement-of-principles/ [https://perma.cc/S4BH-C53Q].

[244] Chelsea Siegal, *Governor Cuomo signs the HALT Solitary Confinement Act into law***,** ABC 10 (Apr. 1, 2021), https://www.news10.com/news/ny-capitol-news/governor-cuomo-signs-the-halt-solitary-confinement-act-into-law/ [https://perma.cc/JKH4-NTWS]; Corey James, *How Solitary Confinement Has Changed in New York Prisons*, SPECTRUM NEWS 1 (Mar. 3, 2025), https://spectrumlocalnews.com/nys/central-ny/news/2025/03/03/halt-solitary-confinement-act [https://perma.cc/D865-6W2U].

[245] Kumar, *supra* note 209, at 105-06.

[246] Brian Mann, *Reports of Prison Guard Brutality In New York Draw A Harsh Spotlight*, NPR (Oct. 20, 2016), https://www.npr.org/2016/10/20/498688702/reports-of-prison-guard-brutality-in-new-york-draw-a-harsh-spotlight [https://perma.cc/T5MY-WPU4].

[247] Kevin Ring, Congress should support independent oversight of federal prisons, THE HILL (Sep. 14, 2020), https://thehill.com/opinion/criminal-justice/515854-congress-should-support-independent-oversight-of-federal-prisons [https://perma.cc/2M4W-59CG]; Michele Deitch, *But Who Oversees the Overseers? The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207 (2020).

[248] Ring, *supra* note 247.

independent governmental regulatory bodies, independent investigations into prison conditions and abuse of incarcerated individuals, and more.[249]

The focus of this Article has primarily been imprisoned people's labor organizing for better working conditions. However, as the history of collective actions by people in prison demonstrates, incarcerated individuals have used work stoppages to also advocate for changes to their general conditions of confinement, and the criminal legal system in general. This is exemplified in the list of ten demands from the 2018 strike organizers.[250] Therefore, promoting labor organizing by people in prison expands these activists' capacity to not only reduce the inequities and exploitation that exist within the current system of prison labor, but also other aspects of the prison system.

V. CONCLUSION

The labor of incarcerated workers has been critical to the United States economy and its management of crises.[251] Yet these workers are some of the most marginalized, lacking federal minimum wage and OSHA protections.[252] And they continue to be disproportionately Black and Latinx people[253] and people with disabilities.[254] People in prison have a long history of responding to their harsh working and prison conditions through organizing.[255] In the 1960s and 1970s, a large movement began for the formation of incarcerated workers' labor unions, but it faced significant backlash from prison officials who desired ultimate control over these facilities.[256] This tension culminated in the Supreme Court ruling in *Jones*, which stated that there was no constitutional right for prisoners to join a labor union.

The narrative of the scholarship surrounding *Jones* is that the decision crushed the ability of incarcerated workers to organize. In reality, incarcerated activists have continued to frequently use strikes as a tactic to push their concerns post-*Jones*. National prisoners' strikes in both 2016 and 2018 involved actions by tens of thousands of incarcerated individuals and included demands regarding working conditions. By examining this collective action, it is clear that *Jones*' impact has been overstated and catastrophized. Correcting this inaccurate account

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[249] *Treatment of Prisoners*, AMERICAN BAR ASS'N 347-48 (3d. ed. 2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/treatment_of_prisoners.pdf.

[250] *Prison Strike 2018*, *supra* note 160.

[251] Mota, *supra* note 1; Eisen, *supra* note 3.

[252] *See* Harker v. State Use. Indus., 990 F.2d 131, 133-36 (4th Cir. 1993); Eisen, *supra* note 3.

[253] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/6R6P-MNAL]; *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/NUN3-K4ZG]; *Inmate Ethnicity*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/2P3W-EZR2].

[254] Elliot Oberholtzer, *Police, Courts, Jails, and Prisons All Fail Disabled People*, PRISON POLICY INITIATIVE (Aug. 23, 2017), https://www.prisonpolicy.org/blog/2017/08/23/disability/ [https://perma.cc/5MMQ-ZHWK].

[255] Thompson, *supra* note 22, at 21-25.

[256] *Id.* at 21-25, 30.

of *Jones* can help activists determine what reforms beyond the establishment of formal labor rights are still available to expand the ability of people in prison to organize around working conditions. Specifically, placing limits on the ability of guards to punish incarcerated people and increasing oversight and accountability mechanisms for guards' actions can help support the activism of incarcerated people. Banning solitary confinement in federal prisons and increasing oversight of these facilities are two such reforms that have gained significant support and political traction. On the state level, banning solitary confinement and the establishment of independent oversight bodies with the capability of investigating are also relatively popular policies, with several states having already passed or implemented them. Additional journalism and research regarding the successful organizing tactics of incarcerated workers is necessary to provide further insights into what reforms can best support these organizers.

People in prison are important advocates for prison reform, including changes to working conditions. In the words of incarcerated activist Phillip Vance Smith II, "I don't know of anybody else who would be more qualified to address [issues impacting people in prison] because we're here every day. We see the problem."[257] Imprisoned individuals are able to directly attest to the impacts of their small or even non-existent wages, their lack of workplace safety protections, and other labor concerns. Enhancing their ability to organize and self-advocate will help reduce the exploitation of their labor, ensure just compensation and protections, and address larger issues within the U.S. criminal legal system.

[257] Elizabeth Simpson, *Emancipate NC Interviews Phillip Vance Smith, II*, YOUTUBE, at 15:22-15:32 (Aug. 31, 2021), https://www.youtube.com/watch?v=z3-29WSKVzk [https://perma.cc/9KVD-HW45].