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Incarcerated Workers Will Be Heard: Protecting the Right to Unionize Prisoners Through Dignity

Samuel Richter*

ABSTRACT

This Comment posits that incarcerated workers possess an inherent right to unionize pursuant to human dignity. Centering dignity in this discussion highlights the ways in which prisoners’ unions secure the economic and political conditions needed to express their autonomy and foster rehabilitation. By reviewing the historical successes and missteps of the incarcerated workers’ labor movement in the United States, this Comment demonstrates that an appreciation for dignity is crucial to prevent factional violence between incarcerated people on the one hand and the over-professionalization of prisoner organization on the other. Recognizing that unionization is a matter of dignity, not free speech or existing labor law statutes, also provides a more cohesive legal framework for extending the right to unionize to incarcerated workers. The right to dignity structures foundational constitutional principles and appeals to the benefits unionization offers to both incarcerated and nonincarcerated workers. In this way, the right to dignity provides a workable legal structure for understanding incarcerated workers’ right to unionize.

Keywords: prison labor, unions, dignity, collective bargaining, mass incarceration, Jones v. North Carolina Prisoners’ Labor Union, Inc.

In this Comment, I argue incarcerated workers’ right to unionize is necessary to protect their dignity. All workers intrinsically possess the right to unionize, and incarcerated workers should be no exception. Two-thirds of prisoners in the United States work while they are incarcerated.1 Of these incarcerated workers, a great majority provide general maintenance and upkeep for the facilities where they are imprisoned.2 Despite

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1 JENNIFER TURNER, MARIANA O. ROSENBLAT, NINO GURULI, CLAUDIA FLORES, SOPHIE DESCH, KATYA EL TAYEB, LEENA ELSADEK, ERIC SINGERMAN, JOSEPH NUNN, MONICA WEISMAN, GENEVIEVE AULD, AARON TUCEK, NICO THOMPSON-LLERAS, JOHNNY WALKER, & JENNIFER TURNER, UNIV. OF CHI. L. SCH., GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 5 (2022) [hereinafter CAPTIVE LABOR], https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1003&context=ghrc [https://perma.cc/DL8Q-7LGL].

2 Id. at 8–10 (finding more than 80% perform maintenance work for the prisons where they are incarcerated, 6.5% perform work for state prison industries (state-owned corporations that produce goods and services for
incarcerated labor being so widespread, federal labor laws generally exclude incarcerated workers from their coverage. This means incarcerated workers do not possess the statutory right to strike or organize a union, at least not under applicable labor laws. This lack of statutory protection leaves incarcerated workers vulnerable to exploitation and dangerous working conditions.

Incarcerated workers regularly experience degrading and dangerous work conditions. One incarcerated worker in Michigan contracted hepatitis C when he was forced to wade through excrement without protective gear to repair a damaged sewer line. In return, incarcerated workers earn on average $0.13 to $0.52 per hour for non-industrial jobs, while incarcerated workers working for industrial jobs earn an average of $0.30 to $1.30 per hour. Incarcerated workers urgently require the right to unionize to protect themselves from these exploitative and dehumanizing terms and conditions of employment. Furthermore, incarcerated workers’ unions rehabilitate prisoners by securing better living conditions through collective bargaining, meaningful work, civic engagement, and pro-social identity.

Prior efforts to unionize incarcerated workers relied on appeals to First Amendment protections or existing labor law. Such activist and legal frameworks failed to secure the right to unionize for incarcerated workers because they often misinterpreted the purpose of unionization or ignored prisoners’ own demands. The constitutional right to dignity, protected by the Fifth, Eighth, and Fourteenth Amendments, offers a different framework for conceptualizing prisoners’ labor rights. The right to dignity protects individual autonomy and identity from government intrusion while guarding against the dehumanizing conditions that characterize life and labor in prison. Unions secure dignity.

The first part of this Comment describes why unions remain important institutions for securing dignity for their members. The second and third parts review historical prison unionizing efforts and legal scholarship respectively to show that past efforts failed when they abandoned dignity in favor of existing prejudices or sterile appeals to the First Amendment and existing labor law. The fourth part proposes the right to dignity as an alternative legal framework for recognizing incarcerated workers’ inherent right to unionize. I conclude with a consideration of the practical limitations of securing dignity through a rights-based legal movement.

I. Unions Are Important Institutions Because They Secure Dignity.

Unions are collective worker organizations that advocate on behalf of their own interests regarding wages, hours, and other terms and conditions of their employment. Though unions structure their organizations in different ways, they almost always operate democratically: individual members pay dues to their union, and in exchange the members can attend union meetings, propose contract language, elect the union’s stewards and

other state agencies), 8% perform public works assignments, 2.2% perform agricultural work, and less than one percent work for private industries through the Prison Industry Enhancement Certification Program (PIECP)).

3 Id. at 12.
4 Id. at 61.
5 Id. at 58.
officers, and vote on contract ratification or other collective actions. Unionization occurs when individuals in a workplace join together (often through an election) as a collective to demand recognition from their employers. Unionization’s collectivist disruption of free-market economics remains rather incompatible with American culture’s emphasis on individualistic laissez faire capitalism.

Applying such collectivism to the prison context would be especially radical in this country, where our criminal punishment system uniquely degrades its offenders compared to other developed countries. Even so, incarcerated workers require this radical solution to secure procedural and substantive protections against the abuses they suffer. Unions secure dignity for incarcerated workers in four main ways: (A) they promote workplace safety and economic freedom through collective bargaining, (B) they create meaningful work, (C) they involve their members in democratic processes, and (D) they foster reintegrative and collective identities. I explain each of these in subparts below.


The primary reason that workers join unions is to secure better terms and conditions of employment for themselves through collective bargaining. Unionized workers possess higher wages, safer working conditions, and better health and retirement benefits compared to nonunion workers. Unions can protect incarcerated workers from their dangerous and degrading work conditions. Sixty-four percent of incarcerated or formerly incarcerated workers reported feeling concerned about their safety. One reported instance included an electronics recycling scheme by the Federal Prison Industries, Inc. (UNICOR) program, the federal government-owned corporation that supplies federal agencies with prison-made goods and services. This program exposed prisoners to banned poisonous metals without providing workers protection or warning, even lying to the incarcerated workers about the hazards and failing to remedy the dangers after criticism by the Department of Justice. Even when the work is not dangerous, it can be degrading and exploitative. One prison industry consisted solely in replacing the “Made in Honduras” tags on clothing with illegal “Made in America” labels. Collective bargaining can empower incarcerated workers to challenge the dehumanizing conditions forced upon them.

The economic benefits of unionizing are also important for securing incarcerated workers’ dignity. Prison reformers in the 1960s provided rehabilitative, vocational work-release programs with the explicit hope that good jobs on the inside would allow

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7 Id.
8 Id.
10 Kevin Reitz, American Exceptionalism in Crime and Punishment 1–2 (2018) (finding the United States stands alone compared to other Western countries in its criminal justice system’s severity, having higher incarceration rates; using the death penalty; administering probation, parole, and economic sanctions more; and possessing heavier “collateral consequences of conviction”).
11 U.S. Dep’t Lab., supra note 6.
12 Captive Labor, supra note 1, at 64.
14 Captive Labor, supra note 1, at 64.
15 Heather A. Thompson, Rethinking Working-Class Struggle Through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards, 8 LAB. 15, 35 (2011).
incarcerated workers to support their families and help with the incarcerated workers’ own transition to gainful employment on the outside. Incarcerated workers could use these benefits and the collective bargaining framework to secure “control over their lives,” which would allow them to “assert their particular programming and institutional needs as opposed to being passive recipients of what is available.” According to the United States Supreme Court, incarceration becomes a “cruel and unusual punishment” when it denies both the basic necessities for survival and the means for prisoners to secure these necessities for themselves, while a state violates the Fourteenth Amendment when it denies a person’s autonomy inherent to their personhood. In this way, by securing control over their own terms and conditions of imprisonment, incarcerated workers’ unions address exactly the ways in which imprisonment endangers a prisoners’ dignity in the first place. By securing their basic necessities for themselves through collective bargaining, incarcerated workers can express their autonomy while enjoying economic independence.

B. Meaningful Work Promotes Dignity.

Work is an important cultural touchstone in the United States. Employment provides people with emotional support and psychological well-being by building self-esteem, self-confidence, and security. While labor and employment law now reflects an unfettered “laissez-faire” understanding of the employment relationship, the historical development of employment law began from a recognition of the need to protect human dignity within the workplace. Relational psychology demonstrates that personal relationships profoundly affect our own sense of dignity. For this reason, occupational health psychology has increasingly focused on the ways in which stressors from the service economy worsen health. In turn, since these occupational stressors measurably impact economic productivity, companies now consider bad morale before implementing large-scale economic layoffs, or they adopt anti-bullying and harassment policies above and beyond what is required by law. Human dignity, a decent living, and a healthy workplace are intertwined with one another, and each can be strengthened through the security of the other.

Even if prison officials use labor to control and exploit their inmates, prison officials, the public, and incarcerated workers alike recognize that work remains a primary

16 Amanda B. Hughett, From Extraction to Repression: Prison Labor, Prison Finance, and the Prisoners’ Rights Movement in North Carolina, in LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON 55–56 (Eric Hatton ed., 2021). Admittedly, such work release programs were informed by racist and sexist understandings of crime and poverty as being “cultural pathologies.” Id.
20 Yamada, supra note 9, at 559.
21 Id. at 526.
22 Id. at 543 (explaining John Locke and constitutional framers “grasped the essence of dignity: they understood…that both physical and emotional injuries can cause great harm, and that power vested in large institutions can lead to harmful abuses”), 544–46 (detailing the rise of positive rights and obligations owed to individuals by their employers).
23 Id. at 548.
24 Id. at 550.
25 Id. at 553.
rehabilitative space within the American incarceration system. UNICOR markets itself “first and foremost [as] a correctional program,” highlighting the societal reentry and lower recidivism rates amongst its participants compared to the general prison population.26 Following a rights-centered litigation boom in the 1970s, the incarceration system’s focus shifted from serving “hard labor” to serving “hard time.”27 For many incarcerated people, this shift deprived them of a meaningful aspect of their lives. Parchman Farm used to be one of the most notorious work farms in the Deep South, with human rights violations so egregious that a court forced the facility to convert into a more traditional prison.28 For the people who served time under both the “hard labor” and the “hard time” eras of Parchman Farm, the feelings are ambivalent. One incarcerated man noted that while he was grateful labor abuses no longer occurred at Parchman Farm, he lamented losing that “feeling that work counted for something,” compared to the everyday boredom of “hard time.”29 Of this change, another incarcerated person said, “Awful bad as it was in most camps, that kept us tired and kept us together and made me feel better inside.”30 For these reasons, and in light of prison overcrowding making job opportunities more scarce, incarcerated workers now recognize their work as a privilege rather than punishment.31 Work provides incarcerated people with welcomed meaning and a distraction from their incarceration.

The rehabilitative qualities of working while in prison—keeping oneself busy, developing labor skills for social reentry, fostering comradery with fellow inmates—are valued by all. Incarcerated workers’ unions would only heighten these rehabilitative benefits. A collective bargaining agreement would define and regiment the skills and schedules of incarcerated workers, ensuring that their time was well spent and aimed at rehabilitation. Belonging to a union would promote social comradery amongst the prison workforce, far more than the alienating effect of typical work conditions. All the while, obligations of employers to bargain in good faith would realize UNICOR’s marketed goal of being “first and foremost a correctional program” by decreasing the incentives and means to exploit the economic productivity of incarcerated labor.32 At the very least, prisoners involved in the union can keep themselves busy by regular attendance at union meetings and trainings or service as a steward or officer for their local chapter.33 Unions protect prisoners’ dignity by securing meaningful employment for its members.

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28 Gates v. Collier, 501 F.2d 1291, 1295 (5th Cir. 1974).
30 Id.
31 Hughett, supra note 16, at 52.
32 See Fed. Bureau Prisons, supra note 26; CAPTIVE LABOR, supra note 1, at 17–19 (detailing the profits earned by state-owned prison industries, while also acknowledging the reduced recidivism rates of participants in UNICOR).
33 Blankenship, supra note 17, at 253.
C. Unions Involve Prisoners in Democratic Processes.

Through union participation, prisoners can learn and practice the skills needed to participate in democratic society. Criminal justice scholar Susan Blankenship describes a union as being “entirely dependent on its membership,”34 because

... determine[s] what goals would be pursued by the union and would act to realize the union’s goals. This could entail participating in union meetings, being involved in committees of interest, assisting with the administrative affairs of the union and simply staying informed about topics important to them.35

According to this vision of prisoners’ unions, unions provide incarcerated workers with the skills and appreciation they need to remain civically engaged.

Civic engagement secures dignity in two ways. First, it allows prisoners to develop crucial skills for returning to life on the outside. Participation in voting processes within prisons would help provide the organizing skills needed to secure “longer-term benefits to themselves and their community” on the outside, which may even contribute to lower recidivism.36 Similarly, “civic reintegration programs” reattach former offenders to the community through volunteer work, which succeeds in rehabilitating incarcerated people by providing employment training, referrals and recommendations for future employment opportunities, and community engagement for its participants.37

Second, unions have a long tradition of bringing underrepresented communities into the political process, “e.g. the poor and racial and ethnic minority groups, something especially important given the current demographics of the correctional population.”38 Prison reformers and activists during the 1960s and 1970s specifically envisioned achieving democratic control over prisons by encouraging “the idea of inmate participation through elected inmate councils.”39 Bringing traditionally underrepresented groups into the political process of unions would allow prisoners to garner political organization and influence to challenge the near-totalitarian control of prison administrators over incarceration.40

The Danish prisoners’ union (KRIM) and the Swedish union (KRUM) are “longstanding and very effective” templates for demonstrating how labor unions accomplish democratic control over incarceration.41 In these countries, the unions ensure that civil rights for custodial citizens do not end while incarcerated.42 Independent judicial ombudsmen, not prison administrators, hear the union’s internal grievances.43 KRIM and KRUM’s independent power within the Scandinavian prison systems demonstrates how

34 Id. at 250.
35 Id.
37 Id.
38 Blankenship, supra note 17, at 243.
39 LERMAN & WEAVER, supra note 36, at 82.
40 Blankenship, supra note 17, at 254.
41 LERMAN & WEAVER, supra note 36, at 90.
42 Id.
43 Id.
redevelopment of citizenship among custodial citizens through unionization also goes a long way for challenging mass incarceration and prison abuses as a whole: it forces politicians and prison administrators to recognize prisoners as “full members of the democratic community.”44 As such, the government has to remain accountable and responsive to their preferences as political equals.45 While unions secure dignity for prisoners by providing the economic conditions needed for autonomy, their civic benefits—rehabilitative skills and participation in the democratic process—also secure dignity by providing the political conditions needed for autonomy.

D. Unionization Secures Dignity through Reintegrative and Collective Identity.

In addition to providing an institutional framework for incarcerated workers to learn the civic skills needed to participate in a democratic society, unions offer incarcerated workers the chance to internalize their democratic potential and forge a new collective identity with their fellow workers. Before and during the founding of the United States, political leaders intended the American prison system to be a progressive institution, a recognition of the offender’s inherent moral equality even in punishment.46 As noted by sociologist Bruce Western, “Like other welfare institutions [such as reformatories, asylums, public schools, hospitals, and rudimentary schemes of social insurance], the prison was conceived to rescue the citizenship of the unfortunate, the poor, and the deviant.”47 Consequently, prisons were reserved for those who enjoyed the rights-bearing status of American citizenship: for the enslaved, Native Americans, immigrants, and married white women, restricting political freedom was the baseline and could not be conceptualized as punishment or a rehabilitative opportunity.48 The brutality of carceral logics, therefore, hinges on an ironic recognition that people possess an inherent freedom and moral equality worth saving. The prison project, at least according to this original purpose, sought to promote democratic citizenship defined as “basic human equality associated with . . . full membership of a community.”49 This original understanding of prison and punishment captures the need to respect incarcerated workers’ dignity: the goal should be to instill in prisoners a sense of community and belonging.

Rather than instilling community and belonging in prisoners, however, prisons sow division between prisoners and foster anti-social identities. Prisons often operate along existing racial tensions.50 For this reason, prison scholar Ruth Wilson Gilmore situates prisons within society’s broader race-building project, the dehumanizing processes through which society classifies people around divisive identities and against “the enemy.”51 Accepting these easily ascribed identity classifications cannot be a method for disrupting

44 Id. at 238.
45 Id. at 60.
47 Id.
49 WESTERN, supra note 46, at 193.
51 GILMORE, supra note 48, at 243–44.
the dehumanizing process. Instead, people must forge their identities along coalitions of shared experience. Gilmore offers “the convict race” as an example of a novel identity adopted by prison activists to describe the diverse brotherhood of caged men. She concludes, “As ever, solidarity in the present is a precondition for any future less bleak than the past quarter century.” Only solidarity can disrupt the division fostered by imprisonment.

Unions are not mere economic or political tools used to challenge bosses; unions socially cement their members in solidarity. Solidarity describes the union’s ability to “promote a sense of shared obligation to self and others, and . . . a spirit of community among members.” Prison organizing of the 1970s crumpled when hateful in-fighting threatened prisoner unity, as discussed below. Unions provide an alternative framework for prisoners to understand their own identity and their relationship with fellow prisoners. Union identity can supplant the racial classifications prisoners ascribe to themselves and disrupt the individualizing forces imposed on prisoners by carceral discipline.

Blankenship writes, “Unlike the inmate code that promotes ‘doing one’s own time,’ the core value of unions is solidarity. The core value is pro-social in that it recognizes the interdependence of union members and the responsibility they have to one another and to the larger community to which they belong.” Through solidarity, unions provide a commitment to community and appreciation for social belonging needed for dignity.

The shared appreciation of familial bond within the labor movement and prison activism underscores the ways in which incarcerated workers’ unions are crucial for securing dignity within prison walls. Union members recognize each other as “brothers and sisters,” across union lines and employment status. Mary Harris Jones, one of the most effective labor organizers in American history, only answered to “Mother Jones” and referred to the miners she organized as her “children” and “boys.” Mother Jones’s activism focused on the importance of parenthood to protect child welfare, mobilizing sympathy for working children to pass child labor laws and wage improvements for parents. Establishing the symbolic motherhood between workers and women activists became a central strategy of the labor movement, with other women like Ella Reeve Bloor, Leonora O’Reilly, and Mary Skubitz adopting the “Mother” moniker.

In the prison context, the group Mothers Reclaiming Our Children (Mothers ROC) organized in 1992 with the mission “to be seen, heard, and felt in the interest of justice.” As mothers of incarcerated children in California, Mothers ROC created a network of “cooperative self-help” by instructing custodial families about the carceral process through

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52 Id. at 244.  
53 Id. at 244–45.  
54 Id. at 245.  
55 Yamada, supra note 9, at 556.  
57 Blankenship, supra note 17, at 261.  
61 Tonn, supra note 59, at 2.  
62 GILMORE, supra note 48, at 181–82.
a number of means, including leafleting around carceral institutions and facilities, distributing flyers, holding meetings at schools or training centers, and passing messages through word-of-mouth by their incarcerated sons. The use of familial relations as both a descriptor and a basis for organizing prisoners and workers alike demonstrates the genuine interconnectedness and love that social organizations like unions achieve for their members. The basis of the union relationship becomes a shared appreciation for the group, destroying all differences threatening solidarity. As Mothers ROC recognized, dignity for incarcerated people means we must foster an appreciation for the humanity of “all children, regardless of race, age, residence, or alleged crime.” By creating a familial-like bond between workers, unions achieve dignity predicated on a deep respect for another’s inherent humanity, despite any other divisions.

II. PRIOR PRISONERS’ UNIONIZATION EFFORTS FAILED BECAUSE THEY IGNORED THE IMPORTANCE OF DIGNITY.

A. Prisoner-Led Collective Actions Boomed During the Postwar Period.

Though the unionization of incarcerated workers seems radical now, incarcerated workers in the United States have a “long tradition” of using strikes and other forms of collective action to express their grievances about incarceration and labor. The first nationwide explosion of prison labor protests occurred following the Second World War, beginning in 1947 when 500 Connecticut prisoners engaged in a work stoppage and sixty-nine Wisconsin prisoners held an eight-hour strike. Collective actions by incarcerated workers continued on a nearly annual basis, with the actions of each passing year growing in number of participants, seriousness of actions, and scale of their demands. Collective action escalated precipitously between 1947 and 1968. In 1949, 600 Cleveland prisoners went on a sit-down strike to establish a complaint committee that could settle their grievances. In 1968, 850 prisoners joined a strike in Richmond, Virginia for higher wages. During this decade, Louisiana prisoners in Angola and State Rock Quarry engaged in mass self-mutilations, choosing to slit their heel tendons rather than engage in the “endless hours [of work] forced upon them.” These collective actions had some prison officials reconsidering the efficacy of prison labor. After a string of 1968 protests, work stoppages, factory destructions, and strikes led by organizers of what would become the North Carolina Prisoners’ Labor Union (NCPLU) cost the North Carolina prison system $42,000, one prison administrator asked, “What’s to prevent them from shutting this operation down?”

63 Id. at 183.
64 Id.
66 Thompson, supra note 15, at 1498; Striking the Right Balance, supra note 65, at 1498.
67 Thompson, supra note 15, at 21–22.
69 Id.
70 Id.
71 Id.
72 Hughett, supra note 16, at 57.
73 Id.
During the 1960s and 1970s, prisoners increasingly built on these postwar work stoppages and protests to demand union recognition. Calls for prisoners’ union recognition began in California’s San Quentin and Folsom prisons in 1963 and 1970 respectively, where a series of strikes culminated in a 2400-prisoner hunger strike that lasted nineteen days, explicitly demanding the prisoners’ right to form and join labor unions. Though the California prison system successfully crushed these early hunger strikes, the prisoners’ collective action inspired California prisoners to form the United Prisoners Union (UPU), with the goal of organizing the entire California prison system and incarcerated laborers around the country under a national organization. With the slogan “Power to the Convicted Class”, the UPU reached prisoners as far as New York and Connecticut, where more than 1800 prisoners in Green Haven signed authorization cards for UPU membership.

In March 29, 1970, incarcerated workers in Cranston, Rhode Island formed the National Prisoners’ Reform Association (NPRA), one of the most successful prisoner labor organizations in American history. The NPRA eventually possessed an office in their Rhode Island prison and their own telephone line to reach other state prisons to charter outside prisoners’ membership. By 1973, prisoners formed unions in states across the country, including Delaware, Maine, Massachusetts, Michigan, Minnesota, Ohio, Pennsylvania, Wisconsin, and Washington, D.C. The North Carolina Prisoners’ Labor Union (NCPLU), subject of the Jones v. North Carolina Prisoners’ Labor Union, Inc. case, was one of these labor unions seeking collective bargaining recognition in North Carolina’s prison system. With a $1000 grant from the North Carolina chapter of the AFL-CIO, the NCPLU modeled their labor organizing on the traditional labor union strategy. This strategy taught prisoners to leverage their labor to financially strain North Carolina’s prison system in order to pave the way for a collective bargaining agreement and internal grievance procedure. CPLU organizers, seeking national affiliation with the UPU, recognized that they were in a unique position to unionize their state’s prison system, since the North Carolina prison system “remained tied in part to their labor on the roads and in the state’s prison industries.” Thus, the United States’ incarcerated labor movement of the 1960s and 1970s aimed its earlier collective actions of the postwar period towards establishing collective bargaining relationships.

Amidst this increased interest in prisoners’ unions during the 1970s, a few prison administrators experimented with jointly running prisons alongside the people they incarcerated. NPRA’s administration of Walpole Prison is perhaps the most famous of

74 Thompson, supra note 16, at 22–23.
75 Id. at 23.
76 Id.
77 Id.
78 Id.
79 Id. at 24.
80 The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is an American federation of 60 national and international labor unions, representing 12.5 million workers. The AFL-CIO provides training, lobbying efforts, and other resources to support its affiliated unions. See About Us, AFL-CIO, https://aflcio.org/about-us [https://perma.cc/V5TV-RQ5U] (last visited Dec. 21, 2023).
82 Id.
83 Hughett, supra note 16, at 60.
these reform attempts. Massachusetts’s Department of Corrections recognized NPRA as the democratically elected representative of Walpole’s incarcerated population for the purposes of collective bargaining.\textsuperscript{84} When Walpole guards went on strike from March 15 until around April 5, 1973, NPRA became the de facto administrator of Walpole.\textsuperscript{85} In a lot of ways, the prison improved under the democratic leadership of NPRA. NPRA created a school curriculum in Walpole with partnership from Harvard University.\textsuperscript{86} They built an honor system amongst the prisoners to prevent theft, assaults, and murders.\textsuperscript{87} Predicated on solidarity, the code held, “We are all brothers. Don’t do anything that you would not do to your brother.”\textsuperscript{88} The honor system worked. During the three days the guards were officially on strike, there were no outbreaks of violence, murders, or rapes.\textsuperscript{89} NPRA replaced the guard’s “arbitrary discipline system” with dispute resolution services to settle conflicts between prisoners through mutual agreement.\textsuperscript{90}

\section*{B. Collective Actions Devolved into Riots When Movements Abandoned Dignity.}

Unfortunately, these prisoners’ collective actions usually did not lead to productive collective bargaining relationships. During this same boom of collective action, prisoners experienced a boom in prison riots. In the period between 1971 and 1986, prisoners held over 300 prison riots.\textsuperscript{91} The Attica Riot, perhaps the most infamous prison riot in American history, took place at the start of this period. Attica prisoners’ collective action began as a “well-organized” strike of 450 prisoners in the prison’s metal shop, where incarcerated workers earned between 6 and 29 cents per day working on cabinets and lockers that eventually sold for $60 to $70.\textsuperscript{92} Political organization and collective action by Black activists in the prison continued from June through September 1971.\textsuperscript{93} Then, in early September of that year, violent skirmishes between prisoners and guards broke out, culminating in a prison-wide riot where prisoners took control of the prison.\textsuperscript{94} In the end, state police rushed the prison, dispersing prisoners with gas and unloading on the crowd with a “50-second barrage” of shots from automatic weapons and shotguns.\textsuperscript{95} All told, thirty-nine men were killed in the state police’s counter-assault, ten of whom were hostages held by Attica rioters.\textsuperscript{96}

The Walpole democratic experiment likewise ended in violence, when fears of triggering another Attica led state police to keep prisoners on lock down for nearly two

\begin{itemize}
\item \textsuperscript{84} JAMIE BISSONETTE, WHEN THE PRISONERS RAN WALPOLE: A TRUE STORY IN THE MOVEMENT FOR PRISON ABOLITION 11–12 (2008).
\item \textsuperscript{85} Id. at 141–53.
\item \textsuperscript{86} Id. at 142–43.
\item \textsuperscript{87} Id. at 143.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id. at 141. This was quite the accomplishment at Walpole, a notoriously dangerous prison at that time. The guards’ contract provided “Industrial Accident pay” to guards stabbed by prisoners. Thompson, supra note 15, at 26.
\item \textsuperscript{90} BISSONETTE, supra note 84, at 143.
\item \textsuperscript{92} Thompson, supra note 15, at 22.
\item \textsuperscript{93} USEEM & KIMBALL, supra note 91, at 26–27.
\item \textsuperscript{94} Id. at 28–34.
\item \textsuperscript{95} Id. at 54.
\item \textsuperscript{96} Id. at 50, 54.
\end{itemize}
weeks.\textsuperscript{97} That June, in the face of increased tensions with prison administration and the guards’ own work stoppages during their contract negotiations with the state, two prisoner-on-prisoner murders occurred.\textsuperscript{98} By 1974, racial tensions within NPRA leadership and crackdowns against prisoner organizing dissolved any prison unionization efforts within Walpole Prison.\textsuperscript{99}

Previous attempts at achieving broad unionization for incarcerated workers thus failed because the movement lost appreciation for the dignity it sought to secure. While the riots of the 1970s were not directly due to prisoners’ increased political and union organization over this time period,\textsuperscript{100} the institutionalization of these organizations as “representatives” of incarcerated people (especially divided along existing gang affiliations) created heightened opportunities for mass violence when prison administrators curtailed these organizations’ “free rein to intimidate and exploit other inmates.”\textsuperscript{101} Prison administrators responded to this violence by tightening their control even further. As Blankenship explains,

> From a political standpoint, perhaps the prisoners’ union movement of the 1970s was ultimately a victim of its success. By demonstrating the ability to organize and alter institutional practices—however slight this may have been compared to the power of prison administrators—prisoners’ unions presented a challenge to the control of prison administration.\textsuperscript{102}

Administrators’ unwillingness to cede any power over their prisons was not helped by prison organizers’ often militant brand of activism. In the words of one Walpole organizer, if the Department of Corrections rejected NPRA demands at the negotiating table, “[w]e would say, ‘We riot!’ or ‘We go on strike!’ They wanted to teach us give-and-take, but we did not have time for that shit. If we were asking for something, we needed it. It was non-negotiable.”\textsuperscript{103}

A complete unwillingness to compromise carries legitimate threats of violence against guards and prisoners alike. When a violent riot broke out in an Albuquerque prison in 1980, prison authorities allowed the riot to “burn itself out,” lest New Mexico experienced its own.\textsuperscript{104} As a result, guards and prisoners remained at the mercy of rioters, who tortured and killed any opposition to their reign.\textsuperscript{105} This violent example illustrates how prison activism of this decade failed when it abandoned broad solidarity for violent factionalism. In contrast, the initial successes of the NPRA and similar unions across the country demonstrate that prisoners’ unions can peacefully and effectively protect incarcerated people from abuse and exploitation if organizers properly center their right to organize according to the ideals of human dignity.

\textsuperscript{97} BISSONETTE, supra note 84, at 137, 194 (noting a prison riot in New Hampshire and the earlier Attica rebellion left “a specter of chaos” among reporters, prison administrators, and the public near Walpole prison).
\textsuperscript{98} Id. at 197–98 (detailing the burning of a prisoner on June 12, then the stabbing of another on June 19).
\textsuperscript{99} Id. at 217.
\textsuperscript{100} USEEM & KIMBALL, supra note 91, at 229.
\textsuperscript{101} Id. at 230.
\textsuperscript{102} Blankenship, supra note 17, at 246.
\textsuperscript{103} BISSONETTE, supra note 84, at 208.
\textsuperscript{104} USEEM & KIMBALL, supra note 91, at 217.
\textsuperscript{105} Id.
C. Outside Organizers and Courts Over-professionalized Prisoner Discontent at the Expense of Incarcerated Workers’ Dignity.

In light of Attica and other prison riots, outside organizers and the legal community increasingly turned towards professionalized and institutionalized mechanisms to mediate prisoner discontent. In 1964, the Supreme Court reinterpreted § 1983 of the Civil Rights Act to allow state prisoners to file federal lawsuits against state officials who violated their constitutional rights.\(^{106}\) In response, between 1966 and 1972, the number of constitutional cases focusing on prison conditions increased by 1400%, even while state prison populations decreased.\(^{107}\)

Internal grievance procedures arose out of the § 1983 litigation boom. Federal judges preferred grievance procedures because they would reduce § 1983 caseloads to allow more prompt litigation for abused prisoners.\(^{108}\) Civil liberties attorneys from legal organizations like the American Civil Liberties Union (ACLU) appreciated how grievance procedures could provide prisoners redress over their “real and pressing problems” within prisons that did not rise to the level of constitutional violations.\(^{109}\) Prison administrators preferred internal grievance procedures because they allowed the administrators—“as professionals”—“to dictate the best means for prisoners to voice their concerns.”\(^{110}\) State attorneys viewed grievances as a pretrial shield against prisoner-filed cases.\(^{111}\) From all sides, a fundamental distrust of prisoners’ collective action motivated these justifications for reducing caseload, professionalizing prison administration, and allowing for redress of day-to-day issues: lawyers feared prisoners’ frustrations over unaddressed grievances “would erupt into violence.”\(^{112}\)

The legal community’s distrust of prisoner collective action culminated with *Jones v. North Carolina Prisoners’ Labor Union, Inc.* in 1977.\(^{113}\) In this case, the Supreme Court held the First Amendment does not provide prisoners with the right to solicit union membership, distribute union authorization cards, hold union meetings, or send pro-union mailings to incarcerated workers.\(^{114}\) The *Jones* Court, responding to the legal community’s desires to implement stronger internal grievance procedures, held that prison administrators must be given “wide ranging deference” to determine the restrictions on prisoners’ rights necessary to preserve the legitimate policies and goals of the incarceration system.\(^{115}\) The Court concluded, “There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid

\(^{106}\) Cooper v. Pate, 378 U.S. 546, 546 (1964); see 42 U.S.C. § 1983 (mandating “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).

\(^{107}\) Hughett, supra note 16, at 894.

\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) Id. at 912 (emphasis added).

\(^{111}\) Id. at 894–95.

\(^{112}\) Id.


\(^{114}\) Id. at 130–34.

\(^{115}\) Id. at 125–26.
an imminent threat of institutional disruption or violence.”\textsuperscript{116} Contemporaneous critiques of Jones understood the decision would “halt the prisoners’ union movement in the United States.”\textsuperscript{117} The same concerns about the inherent danger in prisoner collectivism and the corresponding need to defer to prison administrators motivated Congress to pass the Prison Litigation Reform Act (PLRA) of 1996, which requires prisoner litigants to exhaust administrative remedies under their prison’s own internal grievance procedure before filing a suit in federal prison.\textsuperscript{118}

Professionalization and institutionalization dampen the democratic spirit inherent to human dignity. Internal grievance procedures, deferred to by the courts and blessed by PLRA, are now the primary vessel through which prisoners can air their complaints about their incarceration.\textsuperscript{119} This turn towards internal grievances restricts prisoners’ dignity and opportunity for self-improvement in a multitude of ways. First, it places the decision to remedy prison abuses in the hands of the abusers themselves, ensuring prisoners’ complaints receive no proper consideration.\textsuperscript{120} Second, the Jones Court’s presumption of deference to prison administrators and grievances “foreclose[s]” constitutional protections for the unionization of incarcerated workers.\textsuperscript{121} Third, in light of prisoners’ highly restricted First Amendment freedoms to engage in public debate, prison organizers retooled their prison unions into “reform organizations” that retreated from prior goals of building “radical transformations in American punishment practices” to secure their own dignity behind bars.\textsuperscript{122} As political scientists Vesla Weaver and Amy Lerman describe of the 1970s institutionalist reforms, “Not only did the focus on and expansion of procedural rights effectively make an end-run around thicker democratic forms leaving antidemocratic practices intact, it invited new developments that further scaled back responsiveness, accountability, and voice.”\textsuperscript{123} The shift from collective action to grievance procedures withholds from prisoners their autonomy inherent to dignity.

A major reason why such professionalized and institutionalized reforms cannot reproduce human dignity on behalf of prisoners is the disconnect between outside advocates and prisoner organizers. Though NCPLU members cooperated with and participated in federal lawsuits to challenge dehumanizing conditions within their prison, their primary “idea about how to resolve problems behind bars” was unionization and collective bargaining.\textsuperscript{124} Nevertheless, because North Carolina labor law might have

\footnotesize{\textsuperscript{116} Id. at 136.  
\textsuperscript{118} LERMAN & WEAVER, supra note 36, at 74–75.  
\textsuperscript{119} Hughett, supra note 81, at 915.  
\textsuperscript{120} Id. at 914.  
\textsuperscript{121} Id. at 895, 915 (“Within days of the ruling, Department of Corrections (DoC) officials issued new policies making it nearly impossible for prisoners to organize.”).  
\textsuperscript{122} Id. at 913–15.  
\textsuperscript{123} LERMAN & WEAVER, supra note 36, at 63.  
\textsuperscript{124} Hughett, supra note 81, at 898–99.}
prevented prisoners from bargaining collectively, ACLU lawyers working on behalf of the NCPLU characterized the prisoners’ union as “a reform organization’ committed to working ‘legally and peacefully’ to implement changes behind bars” to minimize the NCPLU’s potential for encouraging collective action.125

Outside organizers at Walpole also sought socially palatable results while prisoner organizers primarily sought union recognition. Ralph Hamm, a prisoner-organizer for NPRA, considered the personal growth and lives he saved through collective bargaining his greatest achievements.126 Edward Rodman, on the other hand, an external organizer trained by the Episcopal Divinity School in Cambridge, Massachusetts, erased collective bargaining from the story of Walpole entirely, reflecting only on the benefits his external organizing provided in the struggle for black liberation.127 Outside organizers, under their own professional and institutional constraints, will pacify prisoner demands for the sake of respectability or practical remedies for individual litigants. Gilmore notes that the recent proliferation of anti-prison activist groups has professionalized the movement, creating people “so specialized and entrapped by funding streams that they have become effectively deskill ed when it comes to thinking and doing what matters most”: raising bona fide challenges against the prison state, not reforms that ultimately strengthen carceral institutions.128 In this way, begging for improvements from professional organizers or prison administrators will not work. If prisoners are to secure dignity, they must demand it themselves.

D. Structuring Unions Around Dignity Avoids the Pitfalls of Past Incarcerated Workers’ Movements.

By formally structuring incarcerated workers’ unions according to dignity, a new unionization effort could avoid the 1970s’ dual pitfalls of rioting and over-professionalization of prison reform. Unions avoid violence while preserving autonomy in four ways, largely corresponding to the four ways unions secure dignity. First, collective bargaining is responsive to prisoners’ problems. Internal grievances arose out of the backlog of prison litigation and inadequate legal remedies.129 Riots occurred when prison administrators failed to run their prisons according to their legitimate authority and proper standards.130 Collective bargaining agreements (themselves operating largely through internal grievance procedures) would ensure incarcerated workers’ concerns are addressed and remedied where possible according to a legitimate, agreed-upon procedure.

Second, collective bargaining provides prisoners with a method of nonviolent conflict mediation. Before adoption of the National Labor Relations Act (NLRA), labor conflicts were often violent and deadly.131 An original purpose of the act was to reduce this “industrial strife” by channeling labor conflicts through collective bargaining and legally

125 Id. at 908.
126 Ralph Hamm, A Final Word in BISSONETTE, supra note 84, at 1, 1–2.
127 Edward W. Rodman, A Foreword to BISSONETTE, supra note 84, at 3, 3–7.
128 GILMORE, supra note 48, at 242.
129 Hughett, supra note 81, at 894.
130 USEEM & KIMBALL, supra note 91, at 217–19.
131 Brandon Nida, Demystifying the Hidden Hand: Capital and the State at Blair Mountain, 47 HIST. ARCHAEOLOGY 52, 52–63 (2013) (detailing the violent strikes and battles fought in West Virginia’s coal country during the early 20th century, including the Battle for Blair Mountain between 10,000 strikers and 3,000 mine defenders).
protected dissent. By formally recognizing incarcerated workers’ unions, labor law will impose good-faith requirements on both prisoners and administrators. Within this bargaining relationship, prisoners’ non-negotiable attitudes and administrators’ dismissive attitudes towards prisoner grievances will only create unreconcilable, unproductive tensions. In the spirit of productive collective bargaining, prison administrators should avoid us-versus-them mentalities of prison control that misinterpret every collective action as an Attica-type rebellion. Prisoners under a collective bargaining agreement in turn will not be motivated to seize the prisons like 1970s rioters. When NPRA accomplished recognition as Walpole’s elected labor union, NPRA specifically explained they had no desire to take complete control over or administer the prison. Collective bargaining allows prisoners and guards alike to mediate their tensions through structured negotiation, alleviating the need to violently challenge the autonomy of one another.

Third, prisoners would maintain control over the negotiation process. Unlike current grievance procedures under the PLRA regime, grievance procedures under a collective bargaining relationship will not be unilaterally controlled by the very people accused of abuses. Furthermore, prisoners would not need to defer to the judgments of outside lawyers and organizers representing their interests, who may seek to pacify or individualize prisoner claims at the expense of prisoners’ collective and radically transformative interests. In other words, the recognition of prisoner unions would ensure the responsibility of prison advocacy is not abdicated to third-party professionals.

Fourth, union solidarity alleviates reproduction of racial tensions that doomed previous unionization attempts. Prisoner organizing efforts demonstrate that incarcerated organizers’ collective actions will devolve to needless violence when prisoners abandon broad solidarity in favor of existing racial tensions or criminal gang affiliations. By funneling collective action through elected, rotating representatives for the purposes of collective bargaining, prisoners’ unions can “reduce the potential for creations of fiefdoms and envy or resentment of those inmates in these positions.” Through solidarity and recognition of their union, incarcerated workers will overcome impulses to use existing racial or gang affiliations as shorthand for determining who is “with” and “against” prisoner leadership.

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133 See NLRA § 8, 29 U.S.C. § 158(d) (defining the obligation to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment”).
134 BISSONETTE, supra note 84, at 137 (noting a prison riot in New Hampshire and the earlier Attica rebellion left “a specter of chaos” among reporters, prison administrators, and the public near Walpole prison).
135 Id. at 169–70.
136 Id. at 217; USEEM & KIMBALL, supra note 91, at 49 (detailing the killings of a reputed racist inmate and a reported informant, as well as the “house arrest” of seven white inmates generally opposed to the riot), 230 (noting prisoners in Walla Walla lost self-control over their prison when a racist biker gang held the prison hostage).
137 Blankenship, supra note 17, at 250.
III. LEGAL SCHOLARS CONTINUE TO OVERLOOK THE IMPORTANCE OF DIGNITY WHEN DISCUSSING INCARCERATED WORKERS’ RIGHT TO ORGANIZE.

In 1972, in the aftermath of the Attica prison riot, legal scholar Paul Comeau offered collective bargaining between prison administrators and a prisoners’ labor union as a method for reducing tensions between parties and promoting rehabilitation for prisoners. Comeau had assumed prisoners retained the right to unionize under the First Amendment’s protections for the freedoms of speech, press, and assembly. At the time of Comeau’s writing, such an assumption seemed warranted: during the 1960s and 1970s, the Supreme Court increasingly extended constitutional rights and protections to prisoners. However, in 1977, the *Jones* case foreclosed appeals to the First Amendment to secure prisoners’ right to unionize.

Scholarship on prisoner unions remained quiescent for about the next thirty years. In 2008, Noah Zatz highlighted the lack of prison labor protections to illustrate that employment law operates to define and set the boundaries between labor markets that are “economic” (and thereby entitled to employment protections) and “noneconomic” (and thereby entitled to no employment protections). Zatz described how courts maintain a general presumption that there is an “inability to separate inmate labor from the institutional context of the prison [that] renders it a nonmarket relationship, and thus a noneconomic relationship, and thus not an employment relationship.” In light of the foreclosure of constitutional claims post-*Jones* and Zatz’s analysis of the economic boundary of employment law, contemporary scholarship sympathetic to the incarcerated labor movement emphasizes the “economic” character of prison labor to bring prisoners’ unions within the bounds of existing labor and employment statutes, particularly the NLRA, which protects workers’ rights to engage in collective action and join unions for the purposes of collective bargaining.

Eric Fink argued that the Prison Enhancement Certification Program (PIE) and UNICOR programs, as public and private corporations that utilize prison labor to earn profits, most obviously satisfy the NLRA’s statutory qualifications for employment relations. These corporations conduct enough business to satisfy jurisdictional limits to

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139 Id. at 969.
143 Id. at 882.
145 PIE produces “goods for sale on the open market,” either through an employer model (i.e. industry performed in the prison) or customer model (i.e. prisons contract with private companies to employ prisoners). Fink, *supra* note 13, at 959.
146 UNICOR is a government-owned corporation that employs prisoners to supply federal agencies with goods and services. *Id.* at 961.
147 Id. at 956.
qualify as “interstate commerce” under the NLRA. The PIE program in particular seems ripe for statutory oversight as a program where private businesses can contract prison labor to produce goods on the open market. The program’s organic statute defines payments to prisoners as “wages” and requires voluntary participation by prisoners, both compelling reasons for considering PIE participants as employees in “both a real and legal sense.”

With language mirroring the court’s economic test, Fisk concluded, “Businesses that opt to employ inmate labor presumably do so because it is economically advantageous. They should not be able to evade labor law (nor other worker-protection laws) by the expedient of moving their operations behind prison walls.” Kara Goad likewise located prisoners’ right to unionize in the NLRA, citing the Columbia University case where the National Labor Relations Board (NLRB), the federal agency that administers the NLRA, suggested the NLRA protects working relationships even if those relationships were not primarily employment relationships.

Despite this scholarship, federal labor law never directly addressed the question of whether prison laborers possess the rights to unionize and collectively bargain under the NLRA. The NLRB, however, has signaled that it will not extend NLRA coverage to workers where “novel and unique circumstances” threaten industrial stability and make it hard to reconsider controlling precedent. This is true even if the workers would otherwise qualify as “employees” under the common law.

Beyond the agency’s own unwillingness to extend union recognition into novel situations, the biggest problem with securing the right of prisoners to unionize under the NLRA is that the NLRA solely covers private-sector employees and generally excludes government employees. This means the vast majority of incarcerated workers will not qualify as employees under the NLRA, since most are employed directly by their prison facilities or by another state entity. For this reason, Keith Armstrong argued prisoners’ unions should look to applicable state labor laws, not the federal NLRA, to assert their right to unionize.

The issue with unionizing under state laws is that the organizing potential for incarcerated workers will vary greatly between the states. Five states ban collective bargaining altogether for public employees. Another five explicitly exclude incarcerated

149 Fink, supra note 13, at 959.
150 Id. at 969.
151 Id. at 967–68.
152 Goad, supra note 148, at 191. See generally Trustees of Colum. Univ. in the City of N.Y., 364 N.L.R.B. 1080 (2016).
153 Fink, supra note 13, at 966. But see Winsett-Simmonds Eng’rs, Inc., 164 N.L.R.B. 611, 612 (1967) (finding the incarcerated workers in a work-release program shared a “common interest” with the free-world laborers they worked alongside and therefore could belong to the union).
155 Id.
157 Fink, supra note 13, at 956; Goad, supra note 148, at 196; Keith Armstrong, “You May Be Down and Out, But You Ain’t Beaten”: Collective Bargaining for Incarcerated Workers, 110 J. CRIM. L. & CRIMINOLOGY 593, 596 (2020); CAPTIVE LABOR, supra note 1, at 9–10 (detailing private industries only employ 4860 incarcerated workers, less than 1% of prison labor).
158 Armstrong, supra note 157, at 596.
159 Id. at 616.
workers from their definition of “public employee.” Another seven states do not have any statutes related to collective bargaining in the public sector, or limit collective bargaining to set public employees (usually firefighters, police officers, and teachers). Three states do not have these statutes, but by executive order or attorney general guidelines leave local municipalities with the discretion to regulate collective bargaining. This means twenty states foreclose incarcerated workers from statutory recognition entirely.

Even among the thirty remaining states, there remain legal and political hurdles that make unionization exceedingly difficult. Wisconsin infamously stripped public-sector workers of collective bargaining rights and the right to strike back in 2011. Other states’ Labor Relations Boards or equivalent labor authorities have expressly rejected unionization efforts from incarcerated workers in the past. Still others may permit unionizing without any express limitation on incarcerated workers, but they generally carry anti-union sentiments that hamstring the collective actions available to public sector unions. Especially absent an NLRB decision signaling a reason to depart from conventional reasoning that excludes prisoners from employment relationships, prisoners seeking union recognition under their applicable state’s labor laws would need to secure the fortunate combination of broad statutory definitions for who qualifies as a “public employee” and what collective actions remain protected, a sympathetic labor authority willing to interpret incarcerated work as an employment relationship, and a generally union-friendly culture to ensure full union protection.

Aside from practical and legal limitations for finding a right to unionize under existing statutory frameworks or the First Amendment, prior legal frameworks and scholarship overlooked the ways in which labor unions are more than forms of political or economic expression. The solidarity achieved through incarcerated workers’ unions is, at its base, the recognition of one another’s humanity in collective action against oppression. When Blankenship “revisited” inmate labor unions in 2005, she approached the idea, not as a question of labor law, but as a tool to instill democratic principles in incarcerated

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160 Id.
161 Id. at 617.
162 Id.
164 Armstrong, supra note 157, at 620 (noting Michigan and Ohio’s labor boards expressly rejected prisoners as “public employees”); Hughett, supra note 81, at 907 (finding New York and Massachusetts also denied recognition for prisoners’ bargaining units).
165 For example, Armstrong specifically points to North Dakota as “an interesting place for incarcerated workers unions to test the waters,” given the state statute’s broad statutory definition for “employee” and their Department of Corrections experimenting with “Scandinavian-style reforms.” Armstrong, supra note 157, at 618 n.158. However, Armstrong admits that North Dakota has never experienced a prisoner labor movement. Id. at 618. North Dakota is no union-friendly state, either, having the seventeenth lowest union density in terms of union membership and bargaining-unit positions (6.4% and 7.6% of the employed, respectively, compared to the national averages of about 9.39% and 10.7%, respectively). Union Affiliation of Employed Wage and Salary Workers by State, 2021–2022 Annual Averages, U.S. BUREAU LAB. STAT. (Jan. 19, 2023), https://www.bls.gov/news.release/union2.t05.htm [https://perma.cc/G29H-CLUN].
166 Goad, supra note 148, at 197–98 (arguing prisoners should focus on unionizing under the NLRA because this would encourage other states to adopt similar rulings and trigger potential preemption concerns).
citizens. Legal scholar Amanda Hughett’s work followed this thread by understanding Jones as a concerted effort to deny prisoners their collective power. As prison strikes threatened the administrative budget of North Carolina’s incarceration system, state officials shifted prison funding away from prison labor profiteering and towards General Assembly funding to intentionally disempower prisoners and reconstitute prison labor as a privilege instead of punishment. Meanwhile, civil liberties lawyers, courts, and prison administrators alike stifled prison organizing by funneling complaints about incarceration into internal grievance procedures, instead of through prisoners’ own collective actions or litigation efforts. By centering the importance of collective action for incarcerated citizens, Blankenship and Hughett’s scholarship highlights why legal discussions of incarcerated workers’ right to unionize cannot overlook dignity.

IV. Structuring Labor Law for Incarcerated Workers Around Dignity Provides a Workable and More Accurate Legal Basis for Incarcerated Workers’ Unions.

Given the crucial link between incarcerated workers’ dignity and the need for prisoner unions, prisoners’ legal right to unionize should be structured around prisoners’ inherent dignity. Conceptualizing incarcerated workers’ right to unionize as a right to dignity provides two main benefits. First, appealing to dignity draws from existing Supreme Court precedent establishing the unenumerated right to dignity under the Fifth, Eighth, and Fourteenth Amendments. Second, the right to dignity more accurately captures the significance of the right to unionization than the frameworks employed under the First Amendment or existing labor laws, especially concerning incarcerated workers. This section explains each of these benefits as subparts below.

E. Every American Possesses a Right to Dignity.

References to the importance of dignity within the Constitution occurred early in our constitutional history, with one framer noting in 1793 that dignity underlies the concepts of authority, sovereignty, and citizenship in democratic society. Though some references to “the dignity of man” or “the dignity of the individual” continued to occur throughout the United States’s early political history and jurisprudence, the Supreme Court first invoked the term “human dignity” as such in 1946, in Justice Murphy’s dissent in In re Yamashita. Since this first invocation of a constitutional right to human dignity, the Supreme Court proceeded to invoke human dignity in another twenty-six cases through 1982, by Justices of varying jurisprudential persuasions. However, in each invocation, “the Justices added the phrases without any explanation or citation to other cases. Often
the use of a phrase was made with express or implicit expectation that human dignity…is a fundamental constitutional right and legal principle.”

In total, between 1925 and 1982, human dignity or equivalent phrases occurred in 136 cases and 187 opinions, though its constitutionality remained undefined. Though the references to human dignity subsequently cooled during the Burger and Rehnquist Courts, the Roberts Court resurrected the importance of dignity in their constitutional interpretation, invoking it in thirty-four cases through 2011 without clear articulation of what dignity actually means.

In an article in 2011, Rex Glensy identified the Court’s problem of increasingly invoking a right to dignity while keeping this term vague and undefined. To illustrate just how expansive and incoherent dignity became in American jurisprudence, courts referenced dignity in the contexts of constitutional theory, criminal law, free speech law, intellectual property law, and entertainment law. Even within these discrete bodies of law, the Supreme Court has not applied these references to dignity consistently. In the Constitutional context, as noted by legal scholar Leslie Meltzer Henry, “The Supreme Court has invoked the term in connection with the First, Fourth, Fifth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments.” The inability of the Court to provide a coherent, consistent, and specific definition of the right to dignity left critics wondering whether dignity has any utility at all. However, as Glensy points out, the assumptions of self-worth and human autonomy are so central to democratic society that human dignity must serve as a sort of “pivotal right” through which the notions of justice, fairness, and other basic rights flow.

Shortly after publication of Glensy and Henry’s articles in 2011, the Court—primarily thanks to a series of Justice Kennedy opinions—finally identified the dignity interests inhered in the Fifth, Eighth, and Fourteenth Amendments with some degree of specificity. Brown v. Plata is the first of these cases, decided in 2011. In Brown v. Plata, Justice Kennedy thoroughly detailed the inhumane conditions of overcrowded Californian prisons, which failed to provide the basic medical care necessary to prevent needless suffering and death. In addition to medical neglect, the overcrowding posed administrative and safety threats, since the prison population became much harder to monitor and control. The Court held this needless suffering and death rose to a violation of the Eighth Amendment’s prohibition against cruel and unusual punishments, on the grounds that “prisoners retain the essence of human dignity inherent in all persons.” Justice Kennedy reasoned that the need to protect prisoners’ human dignity is heightened in prison, since incarceration removes from the prisoner all means for providing for their

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175 Id. at 158.
176 Id. at 159.
179 Id. at 66.
180 Henry, supra note 177, at 172–73 (emphasis removed).
181 Glensy, supra note 178, at 68.
182 Id. at 68–69.
183 Brown v. Plata, 563 U.S. 493, 501–04 (2011) (noting that “as many as 54 prisoners may share a single toilet” and one inmate had been held in a cage for nearly 24 hours, catatonically standing in a pool of his own urine, because prison officials had “no place to put him”).
184 Id. at 520.
185 Id. at 509.
own survival. Thus, Justice Kennedy concluded, “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”

In 2015, two more opinions, *Davis v. Ayala* and *Obergefell v. Hodges*, further developed the constitutional basis for a right to dignity. In *Davis*, Justice Kennedy wrote a separate concurring opinion responding “only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case,” namely that the petitioner had spent twenty-five years in solitary confinement. Though Justice Kennedy did not refer to dignity directly in this opinion, he placed great weight on the psychological, dehumanizing toll of solitary confinement. Like in the *Plata* decision, Justice Kennedy challenged the abdication of prison administration to the expertise of policymakers and correctional officers, criticizing the way in which the legal community and society as a whole shuts away prisoners “out of sight, out of mind” once they adjudicate on innocence or guilt. Society’s willful blindness towards incarcerated people underscores how, for Kennedy, the complete disempowerment of prisoners at the hands of prison administrators carries real concerns for promoting and restoring incarcerated people’s inherent dignity.

In *Obergefell*, the Court extended the right to dignity beyond the Eighth Amendment’s “cruel and unusual” concerns into the purview of the equal protection and due process clauses of the Fifth and Fourteenth Amendments. Justice Kennedy established that marriage is a fundamental right because “[t]he lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.” As such, the Western world’s denial of same-sex marriage, criminalization of gay intimacy, and treatment of homosexuality as a mental illness infringed on gay people’s “dignity in their own distinct identity.” The opinion went on to define the dignity of marriage as falling within the individual’s freedom of choice, by finding marriage to be a “bond between two men or two women who seek to marry and in their autonomy to make such profound choices.” The Court concluded, “The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other.’” As such, the Court extended the right to marry by identifying the human dignity interests inherent within the due process clauses of the Fourteenth and Fifth Amendments.

The Court then tied the denial of human dignity and the right to marriage to the Fourteenth Amendment’s Equal Protection Clause, by reasoning that gay marriage bans

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186 *Id.* at 510.
187 *Id.* at 511.
189 *Id.*
191 *Davis*, 576 U.S. at 287–88 (Kennedy, J., concurring).
192 *Id.* at 288.
194 *Id.* at 660–61.
195 *Id.* at 665–66.
196 *Id.* at 672 (citing United States v. Windsor, 570 U.S. 744, 763 (2013)).
197 *Id.* at 672 (“The Due Process Clause and the Equal Protection Clause are connected in a profound way...”).
“demean[] gays and lesbians”198 and “disparage their choices and diminish their personhood.”199 Thus, in addition to structuring analyses of whether prisoners’ inhuman and arbitrary abuses by prison officials rise to “cruel and unusual punishment,” the dignity interests of autonomy and self-identity fall within people’s inherent rights to equality and liberty.200 By extension, a prisoner’s right to dignity should not be limited to their Eighth Amendment protections. Dignity structures Fifth and Fourteenth Amendments’ due process protections for all citizens. Legal scholar Jonathan Simon remains an ardent supporter of enshrining a right to dignity within prisoner rights litigation, despite recognizing that, with the retirement of Justice Kennedy, the precedent for the constitutional right to dignity is probably endangered by the current court composition.201 Nevertheless, Brown v. Plata, Davis v. Ayala, and Obergefell remain good law,202 and the dignity framework remains useful for providing “a vocabulary robust enough to convey our affirmative desires for security.”203 By using this robust vocabulary, we can signal to the democratically accountable branches that we want a criminal justice system (and our society overall) to affirm the inherent dignity of all.

For this reason, society’s engagement with a right to dignity may achieve “long-term success … as a legal tool against mass incarceration” if the abolitionist movement succeeds in “enrich[ing] … the cultural meaning of dignity.”204 In this way, even if the courts are unwilling to recognize the right to dignity within the Constitution under existing precedent, emphasizing the importance of human dignity within criminal justice reform will solidify dignity as a cognizable legal interest. This understanding of the right to dignity echoes Glensy’s conception of how dignity ought to be understood by the courts: “Any useful proposal for the application of dignity rights within the ambit of domestic law must certainly encompass all law, and not just that which stems from the Constitution.”205 Dignity serves as the value through which all rights flow, not a right-in-itself that prisoners must identify within specific articles of the Constitution.

By broadening social calls to protect prisoners’ right to dignity, legislators and courts will have no choice but to provide greater legal oversight over the dehumanizing conditions of prisoners’ work conditions. At the very least, like Simon and Glensy suggested, the right to dignity provides a useful vocabulary or framework for explaining why it is important to legally protect incarcerated workers’ right to unionize. Just as prisoners lose their freedom, but not their personhood, so too should dignity protect incarcerated workers’ right to organize even while they remain imprisoned.

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198 Id. at 670.
200 Id.
201 Id.
203 Simon, supra note 201, at 172.
205 Glensy, supra note 178, at 70.
F. Dignity Provides a More Accurate Description of Incarcerated Workers’ Unionization than the First Amendment or Existing Labor Laws.

The Jones Steel case established the constitutionality of the NLRA by underscoring the role of dignity in unionization.206 The Court specified that the right to self-organize and select representatives for collective bargaining or mutual protection “is a fundamental right,” just as employers may organize their own businesses through the selection of their officers and agents.207 Captured within this fundamental right are values of self-determination, equality, and democracy—collected in shorthand by the constitutional right over “the freedom of choice.”208 The Court found unions and collective bargaining secure workers’ freedom of choice through self-empowerment, in language that wholly maps onto dignity’s protection of self-autonomy:

[Labor unions] were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.209

Out of this necessity for labor unions, the Court concluded that the NLRA “safeguard[s]” workers’ constitutional right over the “freedom of choice.”210 The constitutional foundations for American labor law parallel dignity. Obergefell uses “right to personal choice” to describe the right to dignity,211 like the freedom of choice identified by the Jones Steel Court. The Eighth Amendment’s right to dignity analysis centers on the alienation of prisoners from their productive capabilities to procure the means to their own survival,212 the same motivation for workers joining unions as identified in Jones Steel. The constitutional basis for labor law and the right to dignity, therefore, stem from the same broader interests in protecting people’s self-autonomy and securing basic necessities.

The purpose of unionization is to protect dignity and challenge the hegemonic power of employers through solidarity. The first stanza of the song “Solidarity Forever,” perhaps the labor movement’s most famous battle cry, reads: “When the union’s inspiration/through the workers blood shall run/There can be no power greater/anywhere beneath the sun/Yet what force on Earth is weaker/Than the feeble force of one but/The union makes us strong.”213 Unionization, then, is a tool to rebalance political and economic power relations through workers’ collective empowerment. It provides democratic control over the workplace while also lifting individual workers’ voices up through a collective

207 Id. at 33.
208 Id. at 34.
209 Id. at 33.
210 Id. at 34.
213 Ralph Chaplin, Solidarity Forever, in LITTLE RED SONGBOOK 25 (9th ed. 1916).
identity. Shoehorning the right to organize under the First Amendment misconceives unionization as a mere act of political expression or assembly, rights predicated on the premises of republican, electoral politics (i.e., building voting power to elect public officials).\textsuperscript{214} The Jones Court recognized this mismatch between First Amendment protections and unionization, writing that union membership solicitation entails “a good deal more than the simple expression of individual views” about unionization.\textsuperscript{215} This difference reveals unionization is closer to a right to dignity, a right predicated on a recognition of humanity’s inherent autonomy, compared to the First Amendment’s concerns with free expression for political discussion. As Glensy notes, the expansive right to dignity within American democracy and law cannot be “bound to the constitutional text,” since dignity “eschew[s] easy definitional formulations” and extends to issues “in the context of private disputes involving common law or statutory rules.”\textsuperscript{216} In this way, dignity more accurately describes incarcerated workers’ right to unionization, compared to appeals to the First Amendment or existing statutory frameworks.

\section*{V. WHERE WE GO FROM HERE: SECURING INCARCERATED WORKERS’ RIGHT TO UNIONIZE BY RECOGNIZING THEIR DIGNITY.}

Even if courts post-Jones and PLRA defer greatly to prison authorities over prison administration, the principle holds that “a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”\textsuperscript{217} The right to dignity, enshrined in the Fifth, Eighth, and Fourteenth Amendments and baked within fundamental conceptions of American democracy, inherently belongs to incarcerated workers of this country. The right to unionize, as the way workers achieve dignity through economic freedom, civic participation, meaningful work, and social belonging, must likewise belong to prisoners.

However, there remains the question of how incarcerated workers could even practically assert their right to unionize or achieve collective bargaining recognition, in light of the restricted First Amendment rights of prisoners and PLRA’s requirement to exhaust internal grievance procedures before pursuing constitutional claims in court. Unionization through litigation does not seem promising. Though processing these claims through NLRB labor law rather than constitutional claims will be much more deferential to workers,\textsuperscript{218} incarcerated workers clearly covered by the NLRA is a tiny proportion of the total incarcerated worker population (less than 20%).\textsuperscript{219} Furthermore, in light of work being seen as a “privilege” for incarcerated workers, what prisoner would be willing to

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\textsuperscript{214} Bartnicki v. Vopper, 532 U.S. 514, 533–34 (2001) (holding one of the “core purposes” of the First Amendment is to protect debate on public issues); James Madison, Report on the Virginia Resolutions (1799), reprinted in FREEDOM OF SPEECH IN THE HISTORY OF IDEAS: LANDMARK CASES, HISTORIC ESSAYS, AND RECENT DEVELOPMENTS 64, 72 (Vincent Blasi ed., 2016) (“The value and efficacy of this right [to elect members of government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.”).
\textsuperscript{216} Glensy, supra note 178, at 70.
\textsuperscript{218} Goad, supra note 148, at 200–01.
\textsuperscript{219} Armstrong, supra note 157, at 596; CAPTIVE LABOR, supra note 1, at 27.
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jeopardize wages, good time credits, and severe punishment by organizing.\footnote{Hughett, supra note 16, at 52–53.} Perhaps the solution for incarcerated workers is to pursue Fink’s recommended course of action: focus on organizing the worker programs most obviously applicable to federal labor laws (i.e., PIE and UNICOR) first.\footnote{Fink, supra note 13, at 956.} Then, incarcerated workers employed directly by state facilities may use this NLRB precedent to petition their own states’ labor boards for union recognition. Otherwise, Congress or state legislatures, or both, may need to adopt more comprehensive labor laws to protect incarcerated workers, or the courts should be more proactive in protecting prisoners’ right to dignity.

In the spirit of protecting prisoners’ autonomy, prison activists and organizers must decide for themselves where to focus their energy.\footnote{In fact, there may be a resurgence of revolutionary unions within prisons, particularly since 2018 and in light of the pandemic. See Armstrong, supra note 157, at 600; Ware State Prison Slave Rebellion on August 1st, 2020, INCARCERATED WORKERS ORG. COMM. (Aug. 4, 2020), https://incarceratedworkers.org/news/ware-state-prison-slave-rebellion-august-1st-2020 [https://perma.cc/EW8K-RBNQ]; National Solidarity Events to Amplify Prisoners Human Rights, INCARCERATED WORKERS ORG. COMM. (Feb. 13, 2020), https://incarceratedworkers.org/news/national-solidarity-events-amplify-prisoners-human-rights [https://perma.cc/86R2-DUBR].} Because prison riots result from prison dysfunction and a perceived illegitimacy of prison authority, union organizers must be sensitive to how the size and character of their unit will affect how representative their group is of the whole and their corresponding collective bargaining successes.\footnote{See USEEM & KIMBALL, supra note 91, at 218–19.} The smaller the labor union, the easier internally organizing the collective bargaining unit around shared demands will be, but the weaker the union’s power will be at the bargaining table. The bigger the bargaining unit, the more powerful threats of collective action will be during negotiations, but the harder it will be to maintain internal solidarity and cohesion around shared policies.

Letting prison organizers decide their unionizing goals for their particular needs can guide a new labor law regime predicated on dignity. The United States’ labor laws arose, after all, out of Congress’s own judgment of what did and did not work about workers’ and employers’ own solutions to their industrial strife.\footnote{29 U.S.C. § 151 (“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce. . .”; “Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce. . .”).} Based on prisoners’ own decisions and collective actions, post hoc labor laws could be crafted to deal with any lingering imbalances between the prisoner union and administration that pose the risk of riots or over-professionalization.

In crafting labor law around the actions of internal prison organizers, our legal system must avoid the trap of structuring union recognition around individualized rights and entitlements, since dignity cannot be so easily fit within “definitional formulations.”\footnote{Glensy, supra note 178, at 70.} The Walpole union specifically avoided employing a rights-based framework, choosing to “articulate their position” as a “struggle. . .about the way [the National] defined their relationship with the world they lived in, and how they would negotiate meeting their needs and honoring their responsibilities within the confines of their captivity.”\footnote{Bissonette, supra note 84, at 211.} The organizing

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\footnote{Hughett, supra note 16, at 52–53.} \footnote{Fink, supra note 13, at 956.} \footnote{In fact, there may be a resurgence of revolutionary unions within prisons, particularly since 2018 and in light of the pandemic. See Armstrong, supra note 157, at 600; Ware State Prison Slave Rebellion on August 1st, 2020, INCARCERATED WORKERS ORG. COMM. (Aug. 4, 2020), https://incarceratedworkers.org/news/ware-state-prison-slave-rebellion-august-1st-2020 [https://perma.cc/EW8K-RBNQ]; National Solidarity Events to Amplify Prisoners Human Rights, INCARCERATED WORKERS ORG. COMM. (Feb. 13, 2020), https://incarceratedworkers.org/news/national-solidarity-events-amplify-prisoners-human-rights [https://perma.cc/86R2-DUBR].} \footnote{See USEEM & KIMBALL, supra note 91, at 218–19.} \footnote{29 U.S.C. § 151 (“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce. . .”; “Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce. . .”).} \footnote{Glensy, supra note 178, at 70.} \footnote{Bissonette, supra note 84, at 211.}
lesson learned from Walpole is “[m]ovements must recognize the dangers of adopting rights-based platforms. Once the rights are defined, the movement is always left with the onerous task of obtaining and defending them rather than advancing broader causes. This restricts creativity and actual problem solving.”

This describes the central misunderstanding of the Court’s *Jones* decision and the ACLU lawyers who brought the case: while litigation tried to frame prisoner unionization as a claim to legal rights to which *individuals* are entitled, prisoners understood their organization as a means to challenging the status quo, regardless of their legal authority to do so.

While dignity best explains why these incarcerated workers had a legal right to challenge prison abuses through collective bargaining, I intentionally offer no detailed list of entitlements around which courts or prison administrators may constrain prisoners’ collective voice. I am reminded of a former co-worker’s explanation of labor law and politics, “The state doesn’t determine if workers have a union, the workers do. We had unions before we had a collective bargaining law. Workers will be heard, with or without a law governing them.” Experience bears this out: “Workers were more likely to be unionized when doing so was legally unprotected [by the NLRA], than they are today, after eighty years of federal legal protection.” The right to unionize is inherent to human dignity, existing prior to the law. Laborers (incarcerated or otherwise) always retain their worker power through collective action; labor law is just a matter of deciding how we want to structure collective action to reduce potentially deadly strife.

Understanding incarcerated workers’ right to unionize according to dignity provides some legal structure for union recognition and protection, while preserving the understanding that no law creates a right to unionize.

Federal labor laws ignore over two-thirds of all prisoners in this country engaging in some form of work as part of their incarceration. Supreme Court precedent provides no First Amendment protections for their unionization efforts, and prior unionization efforts largely resulted in rioting and the over-professionalization of internal grievance procedures. All of these hinderances on future collective action stem from a misunderstanding of what unions are and what they accomplish: unions are worker collectives formulated to secure material and economic improvements, provide meaningful work, improve civic engagement, and formulate a collective identity built upon solidarity. In a word, unions provide dignity to workers.

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227 Id. at 216.
228 Our discussions of dignity, after all, often place individuals at the center of the concept, “as if they were demigods,” at the expense of solidarity’s collective interests. Simon, *supra* note 201, at 172.
229 Text Message Interview with Union Representative (Mar. 22, 2023, 6:59 AM) (on file with author).
231 Text Message Interview with Union Representative, *supra* note 229; see also Diana S. Reddy, “*There is No Such Thing as an Illegal Strike*”: *Reconceptualizing the Strike in Law and Political Economy*, 130 YALE L. J. F. 421, 424–25 (Jan. 2021) (“Labor activists have long proclaimed, ‘There is no such thing as an illegal strike, only a[n] unsuccessful one[,]’”).