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COMMENTS

"YOU MAY BE DOWN AND OUT, BUT YOU AIN'T BEATEN": COLLECTIVE BARGAINING FOR INCARCERATED WORKERS

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The Supreme Court's sweeping 1977 decision in Jones v. North Carolina Prisoners' Labor Union *determined that a state's reasonable interest in maintaining security in a correctional facility outweighed prisoners' freedom of association in seeking to unionize. This decision had a chilling effect on a burgeoning prisoners' union movement which had risen to prominence over the course of the 1970s. Since* Jones*, prison labor has increased and changed form: the Prison Industry Enhancement (PIE) Act of 1979 authorized private firms to sell prisoner-made goods on the open market. At the same time, prisoners continue to work in more traditional jobs within prisons, such as cooking, cleaning, and manufacturing license plates.*

After Jones*, prisoners have not been able to assert a constitutional right to associate, but they have continued to struggle for labor protections. These efforts have mostly taken the form of unauthorized prison strikes. The largest recent strike involved inmates in over seventeen states.*

Issues involving prison labor have moved to the forefront of conversations on criminal justice reform. Recently, scholars have examined the ways in which unions of incarcerated workers might make use of federal

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labor law, including the National Labor Relations Act (NLRA) to gain recognition as collective bargaining units. However, even if these efforts succeed, their impacts would be limited to incarcerated workers involved in the PIE program or to those working in private industries in private prisons. The vast majority of incarcerated workers who do not work in private industries would be excluded.

As a complementary approach, and in order to expand labor protections to those incarcerated workers who would not be covered by the NLRA, incarcerated workers may also wish to look to state labor law for protections. This Comment surveys state public employee collective bargaining statutes. Some states categorically exclude prisoners from their definition of "public employee" or do not permit any association of public employees to engage in collective bargaining. However, other states have broad definitions that could conceivably include prisoners. Advocates of incarcerated worker union organizing may wish to focus their efforts on these states. If incarcerated worker unions are able to organize under state or federal labor law, then they may eventually be able to demonstrate that such associations are beneficial rather than detrimental to maintaining order in prisons, which could help chip away at the overbroad holding in Jones.

INTRODUCTION

Jones v. North Carolina Prisoners' Labor Union, Inc.[1] seemed to signal a death-knell for labor organizing in the prison setting.[2] Writing for the Supreme Court, Justice Rehnquist held that a state's reasonable interest in maintaining security in a correctional facility outweighs the freedom of association of prisoners seeking to unionize.[3] In spite of this decision, associations of incarcerated workers have persevered over the past forty years. In August 2018, prison labor organizing gained national prominence when inmates in over seventeen states organized a major prison strike[4] in which participants called for "an immediate end to prison slavery."[5] Furthermore, they demanded that "[a]ll persons imprisoned in any place of detention . . . be paid the prevailing wage in their state or territory for their labor."[6] The striking prisoners made a series of other concrete requests, including broad reforms to prison conditions.[7]

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[1] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

[2] *See* Sidney Zonn, *Inmate Unions: An Appraisal of Prisoner Rights and Labor Implications*, 32 U. MIAMI L. REV. 613, 614 (1978) ("The continued vitality of [prisoner labor unions] is now threatened due to the recent Supreme Court decision of *Jones v. North Carolina Prisoners' Labor Union, Inc*.").

[3] *Jones*, 433 U.S. at 133.

[4] 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/YRR3-9AUF]. This strike was organized with the support of the Incarcerated Workers Organizing Committee of the Industrial Workers of the World. *Id*.

[5] Amani Sawari & Jared Ware, The Incarcerated Workers Org. Comm., *Statement regarding the ongoing Nationwide Prison Strike*, INCARCERATED WORKERS ORGANIZING COMMITTEE (Aug. 28, 2018), https://incarceratedworkers.org/news/strike-statement-press-august-28-2018 [https://perma.cc/3FGM-MTA9].

[6] *Id.*

[7] *Id.* Similarly, the union in *Jones* sought to establish labor protections and effective grievance mechanisms in prison, among other demands. 433 U.S. at 119. While the demands of the prisoners in the 2018 strike encompass more than strictly "labor" conditions, many other past incarcerated worker labor unions have also focused on hybrid goals and sought broader protections. *See* Zonn, *supra* note 2, at 614. In part, this is because of the totality of the prison experience; prison labor conditions are inextricable from other elements of prison life. Like its predecessors, the Incarcerated Workers Organizing Committee identifies itself as a labor organization, although a number of the reforms that it called for through the 2018 strike were related to prison conditions more broadly.

This Comment examines the current legal landscape for incarcerated worker organizing and posits that while constitutional arguments for prisoner labor unions are not currently a viable option, labor law may provide some protections. This premise follows in the footsteps of a recent article by Eric Fink[8] and a Note by Kara Goad.[9] Both authors have explored whether incarcerated worker unions might seek National Labor Relations Board (NLRB) certification as collective bargaining units. However, given that the vast majority of prisoners—and incarcerated workers—are held in state prisons and work directly for the prison or the state, they would not fall under the mandate of the NLRB.[10] As a result, incarcerated workers in such circumstances must look to state law in order to assert collective bargaining rights. By receiving recognition at the state level and then demonstrating that labor organizing in the prison setting is not a threat to prison security, incarcerated worker unions may be able to build a body of evidence that could one day challenge Justice Rehnquist's conclusion in *Jones*.

Part I of this Comment discusses why prisoner labor organizing is an especially important and timely issue for advocates of criminal justice reform, racial justice, and labor rights.

Part II explores the history of First Amendment freedom of association litigation surrounding incarcerated worker labor unions both before and after *Jones* and examines how the decision has impacted modern efforts to organize prison labor.

Part III examines the statutory protections that may apply to incarcerated workers under the NLRA. In order to unpack the threshold issue of whether prisoners are included in the statute's definition of "employee," this Comment reviews a number of cases brought by inmates under the Fair Labor Standards Act (FLSA), a statute with a similar definition of the term, which was passed contemporaneously with the NLRA.

Finally, Part IV analyzes the applicability of state statutes governing public employees' collective bargaining rights to incarcerated workers. Most recent scholarship on incarcerated worker labor organizing focuses on the viability of claims under the NLRA but acknowledges that even successful claims will only apply to a fraction of inmates who work in private industries. This Comment suggests that in order to build a successful movement and win protections for a larger number of incarcerated workers, those workers must seek recognition as public employees at the state level in states with robust

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[8] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953 (2016).

[9] Kara Goad, Note, Columbia University *and Incarcerated Worker Labor Unions Under the National Labor Relations Act*, 103 CORNELL L. REV. 177 (2017).

[10] 29 U.S.C. § 152(2) (Westlaw through Pub. L. No. 116-63).

collective bargaining statutes. To that end, this Comment identifies which states have public sector collective bargaining statutes that could conceivably include prisoners and examines past decisions by state employment relations boards that denied labor protections to prisoners. This will clarify the challenges that incarcerated worker labor unions may face and shed new light on how to confront them.

I. THE GROWING NEED FOR REFORM

Concerns about prison labor have become a central issue in national conversations around criminal justice. Shortly before the start of the 2018 prison strike, the California Department of Corrections and Rehabilitation tweeted, "Today, more than 2,000 volunteer inmate firefighters, including 58 youth offenders, are battling wildfire flames throughout CA. Inmate firefighters serve a vital role, clearing thick brush down to the bare soil to stop the fire's spread."[11] Further reporting revealed that these inmate firefighters were only paid two dollars per day, plus one dollar per hour, for this grueling and dangerous work.[12] During a harsh winter storm in Chicago, a photo posted to social media showing inmates shoveling snow "with no real winter gear" went viral.[13] The Cook County Sheriff's Office later issued a statement that the people in the photo had, in fact, been provided with insulated jumpsuits, gloves, hats, and boots, though they were still working outdoors in inhospitable conditions.[14] When Senator Kamala Harris announced her candidacy for the 2020 Democratic presidential nomination, journalists quickly uncovered a brief filed by the California Attorney General's office in 2014, then led by Harris, which argued against reducing California's prison population because it would shrink the state's pool of cheap labor.[15]

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[11] CA Corrections (@CACorrections), TWITTER (July 31, 2018, 6:40 PM), https://twitter.com/cacorrections/status/1024439641221419008?s=21 [https://perma.cc/55Q8-T7XS].

[12] *See, e.g.*, Abigail Hess, *California is Paying Inmates $1 an Hour to Fight Wildfires*, CNBC (Nov. 12, 2018), https://www.cnbc.com/2018/08/14/california-is-paying-inmates-1-an-hour-to-fight-wildfires.html [https://perma.cc/9T9W-RBEG]. Despite the experience that these inmate firefighters gain in the field, their criminal history generally bars them from finding employment as a firefighter upon release. *Id.*

[13] Morgan Greene, *Viral Photo of Cook County Jail Inmates Shoveling Sparks Backlash*, CHI. TRIB. (Jan. 29, 2019), https://www.chicagotribune.com/news/local/breaking/ct-met-cook-county-jail-inmates-shoveling-cold-photo-20190129-story.html [https://perma.cc/2Q5W-9RE7].

[14] *Id.*

[15] Kate Zernike, *'Progressive Prosecutor': Can Kamala Harris Square the Circle?*, N.Y. TIMES (Feb. 11, 2019), https://www.nytimes.com/2019/02/11/us/kamala-harris-progressive-prosecutor.html [https://perma.cc/9R77-8FA3]. Senator Harris stated that she was unaware of the brief. *Id*.

Advocates for criminal justice reform have many reasons to be concerned about prison labor. First, incarcerated workers have few legal rights or labor protections possessed by their non-incarcerated counterparts.[16] As of 2016, approximately 188,400 people were incarcerated in federal prisons, and state prisons held another 1,228,800 individuals.[17] This puts a large number of people at risk of extreme exploitation. While the Department of Justice has not published its Census of State and Federal Correctional Facilities since 2005, the findings of that year's census show that nearly fifty-four percent of all inmates (state and federal) were held in facilities that operated work programs and that ninety-eight percent of federal inmates were held in facilities with work programs.[18] Federal law requires federal inmates to work if they are medically able,[19] and many states have similar policies.[20] Some states pay incarcerated workers for their labor, while others, such as Texas, which has the largest state prison population in the United States, do not.[21] Even where prisoners are paid, they "work under unusually intense conditions for unusually low wages."[22] This has led many to characterize prison labor as "modern-day slavery"[23] or as a form of "superexploitation."[24]

Second, prison labor is an issue of racial justice. Prison labor in North America has its roots in seventeenth-century Pennsylvania and expanded over the course of the nineteenth century under the theory that labor could lead to moral reform,[25] but it took on strong racial undertones following the

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[16] Fink, *supra* note 8, at 955.

[17] DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS BULL. NO. NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 12 (2018).

[18] JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005 5 (2008).

[19] WORK PROGRAMS, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custodyand_care/work_programs.jsp [https://perma.cc/P8R2-L2TS] (last visited Oct. 10, 2019).].

[20] *See, e.g.*, N.C. GEN. STAT. § 148–26 (2017).

[21] Jason Renard Walker, *Unpaid Labor in Texas Prisons Is Modern-Day Slavery*, TRUTHOUT (Sept. 6, 2016), https://truthout.org/articles/unpaid-labor-in-texas-prisons-is-modern-day-slavery/ [https://perma.cc/L82U-JT5M].

[22] Fink, *supra* note 8, at 964.

[23] Walker, *supra* note 21.

[24] Fink, *supra* note 8, at 963. The concept of "superexploitation" originated in Marxist theory, but also has a broader definition reflecting a population working under intense conditions for extraordinarily low wages, facing extreme social exclusion, and experiencing a long-term state of subordination. *Id*. at 963–64.

[25] Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 347–50 (1998). In William Penn's 1682 *Frame of Government for Pennsylvania*, he wrote, "all prisons shall

Civil War.[26] The Thirteenth Amendment, which abolished slavery, infamously created an exception in the case of prison labor: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[27] As the post-war Reconstruction Era came to an abrupt end, many Southern states exploited this exception by enacting vagrancy statutes, which made it a criminal offense not to work.[28] These laws were selectively applied to African Americans, allowing a form of racial hierarchy and labor exploitation to continue after slavery's abolishment.[29]

During the Jim Crow era, vagrancy laws expanded and labor conditions deteriorated as Southern states contracted out convicts to private entities.[30] In her landmark examination of mass incarceration, *The New Jim Crow*, Michelle Alexander writes, "Death rates were shockingly high, for the private contractors had no interest in the health and well-being of their laborers, unlike the earlier slave-owners who needed their slaves, at a minimum, to be healthy enough to survive hard labor."[31] The context of prison labor has changed over the years, but minorities remain overrepresented in the prison system, and as a result, in the prison labor pool.[32]

Third, prison labor is—as the term suggests—a labor issue. Some contemporary progressive commentators argue that unions should take a proactive stance in support of incarcerated workers in the name of defending working class interests beyond the narrower interests of any individual

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be work-houses, for felons, vagrants, and loose and idle persons." William Penn, *Frame of Government of Pennsylvania*, *The Avalon Project*, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY (2008), https://avalon.law.yale.edu/17th_century/pa04.asp [https://perma.cc/FCG3-WXM9]. After the American Revolution, Philadelphia's Walnut Street Jail served as an early experiment in the modern penitentiary, with prisoners producing goods for private contractors, while supervised by the state. Garvey at 349. Prison labor expanded in the early 1800s, with the establishment of New York's Auburn Prison and Pennsylvania's Cherry Hill Prison. *Id.* at 349–50.

[26] MICHELLE ALEXANDER, THE NEW JIM CROW 28 (rev. ed. 2010).

[27] U.S. CONST. amend. XIII, § 1.

[28] ALEXANDER, *supra* note 26, at 28.

[29] *Id.*

[30] *Id*. at 31.

[31] *Id.*

[32] The NAACP estimates that African Americans are incarcerated at a rate five times greater than the rate at which whites are incarcerated. NAACP, CRIMINAL JUSTICE FACT SHEET, https://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/2XFK-QN7B].

union's members.[33] However, the historical relationship between incarcerated workers and labor unions has been much more fraught and complicated. There have been two primary reasons why labor unions have taken a stand against prison labor. At first, in the mid-nineteenth century, unions distanced themselves from prison labor because of "the need to preserve the dignity of free labor."[34] Later, unions objected to the "economic menace of prison labor" as prison industries became more profitable and posed a competitive threat to organized labor outside prison walls.[35] This threat led unions to call for reforms to prison labor around the turn of the twentieth century, including paying prisoners the prevailing wage, limiting the number of hours inmates could work, and banning prison-made goods from entering inter-state commerce.[36] Though labor unions called for prison labor reform out of their own self-interest, their advocacy sometimes simultaneously helped advance prisoners' interests.[37] However, apart from the Industrial Workers of the World's ("IWW") Incarcerated Workers Organizing Committee, which helped organize the 2018 prison strike,[38] there is little evidence of the broader labor movement taking up the cause of prison labor in recent years.

Based on these three issues—concerns about mass exploitation, racial justice, and labor rights—advocates from many sectors have good reason to support prisoner labor organizing. After all, prisoner-led organizing, both within and outside of the labor context, has an impressive track record. For

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[33] *See* James Kilgore, *Mass Incarceration and Working Class Interests: Which Side Are the Unions On?*, 34 LAB. STUD. J. 356, 357 (2013).

[34] Garvey, *supra* note 25, at 359.

[35] *Id*.

[36] *Id.* at 361–62.

[37] Recent cases continue to highlight the complicated relationship between labor unions and incarcerated labor. In *Washington Water Jet Workers Association v. Yarbrough*, an association of workers using water jet cutting technology sued a company that contracted prison labor to do similar work. 90 P.3d 42 (Wash. 2004). A persistent challenge for linking prison labor concerns to the broader labor movement has been the power of correctional officers unions, which have resisted calls for prison reform. *See* Mike Elk, *The Next Step for Organized Labor? People in Prison*, THE NATION (July 11, 2016), https://www.thenation.com/article/the-next-step-for-organized-labor-people-in-prison/ [https://perma.cc/6F76-NCB2]; James Ridgeway & Jean Casella, *Big Labor's Lock 'Em Up Mentality*, MOTHER JONES (Feb. 22, 2013), https://www.motherjones.com/politics/2013/02/biggest-obstacle-prison-reform-labor-unions/ [https://perma.cc/2U88-4GNJ]. Some are more optimistic about the prospects of uniting correctional officer unions with the interests of prisoners, at least in limited circumstances. *See* Austin McCoy, *Prison Guard Unions and Mass Incarceration: Prospects for an Improbable Alliance*, 26 NEW LAB. F. 74, 79 (2017) ("[P]rivatization has at times served as fertile ground for prison worker and inmate solidarity, as . . . in the case of privatized food service [in Ohio prisons].").

[38] *See* Sawari & Ware, *supra* note 5.

example, prisoner movements played a crucial role in convincing the Supreme Court to recognize that prisoners had any legal rights whatsoever.[39] Despite implicating numerous constitutional issues, the Supreme Court rarely addressed issues concerning prisoners' rights for nearly two centuries.[40] Then, in the early 1960s, courts began to show an increased willingness to weigh in on prisoners' constitutional rights, due in large part to the growing prisoner rights movement.[41] As noted by the Center for Constitutional Rights and the National Lawyers' Guild, "[P]risoners did not begin to win many important court decisions until the prison movement grew strong."[42]

Following the Attica Prison Uprising of 1971, the prisoners' rights movement "evolved into three primary branches: a prison abolitionist movement . . . ; a prison union movement that attempted to deliver the tactics of labor mobilization behind bars; and a legal, civil rights, and social struggle over prison overcrowding and the denial of prisoners' rights."[43] Each branch brought its own set of court cases, with the prisoner labor union movement seeing some hopeful signs from the courts between 1972 and 1977.[44]

In 1977, though, *Jones* dashed these hopes. The decision signaled the end of an era in which the Supreme Court had taken a few modest steps to expand the protection of prisoners' First Amendment rights.[45] Writing for the Court in *Jones*, Justice Rehnquist said that prisoners' freedom of association "must give way to the reasonable considerations of penal management."[46] If prison administrators felt that a prisoner labor union

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[39] Jack E. Call, *The Supreme Court and Prisoners' Rights*, 59 FED. PROB. 36, 36 (1995).

[40] *See id.* This hands-off approach stemmed from concerns about separation of powers, the Court's lack of expertise in matters related to prison administration, and federalism. *Id.*

[41] *Id.* Another reason that the 1960s saw an increasing number of cases brought by prisoners was a reinterpretation of 42 U.S.C. § 1983 in *Monroe v. Pape*, which determined that § 1983 was intended to give a remedy to parties deprived of constitutional rights by officials' abuse of their respective positions. 365 U.S. 167, 187 (1961). This opened the door for prisoners to bring claims in court that would not have been previously heard, and forms the backbone of much modern prison litigation. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 15 (Kris Markarian ed., 3d ed. 2014); THE CENTER FOR CONSTITUTIONAL RIGHTS & THE NATIONAL LAWYERS' GUILD, THE JAILHOUSE LAWYER'S HANDBOOK 5 (Rachel Meeropol & Ian Head eds., 5th ed. 2010) [hereinafter *Jailhouse Lawyer's Handbook*].

[42] *Jailhouse Lawyer's Handbook*, *supra* note 41, at 5.

[43] Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States through the Lens of the Prisoners' Rights Movement*, 102 J. AM. HIST. 73, 75–76 (2015).

[44] This string of cases will be discussed in greater detail in Part II.A., *infra*.

[45] Bradley B. Falkof, Comment, *Prisoner Representative Organizations, Prison Reform, and* Jones v. North Carolina Prisoners' Labor Union: *An Argument for Increased Court Intervention in Prison Administration*, 70 J. CRIM. L. & CRIMINOLOGY 42, 50 (1979).

[46] Jones v. N.C. Prisoners' Union, 433 U.S. 119, 132 (1977).

would be a threat, they were constitutionally permitted to take reasonable steps to forestall that threat, including barring the union from meeting or recruiting members or prohibiting bulk mailings from the union.[47] This decision essentially halted litigation around incarcerated workers' labor unions.

In the years since *Jones*, prison labor has both increased and changed form, beginning with the PIE Act of 1979, which allows some firms to sell prisoner-made goods on the open market.[48] Since the enactment of the PIE Act, more private enterprises have begun to use prison labor.[49] In addition to working for private industries, inmates still work in more traditional jobs within prisons, such as food service, maintenance, and making road signs and license plates.

Presently, incarcerated people face many risks for organizing behind bars, an act which mostly takes place covertly as a matter of necessity. For instance, they may be put on a Security Threat Group list that could negatively impact their chance of early release or parole.[50] Reprisals against prisoners who organize reflect a fear on the part of prison administrators that prison organizing may lead—or be connected—to violence. Indeed, in *Jones*, Justice Rehnquist expressed concern that prisoner unions would disrupt "prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment."[51] In the years following the decision, the perception of prisons as hotbeds of violent gang activity has only grown.[52] However, some scholars have noted that incarcerated worker unions can provide a constructive outlet for prisoners to express grievances and may lead to correctional and rehabilitative benefits.[53] Indeed, countries such as Denmark and Sweden permit inmate unions, and union activity there

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[47] *Id.*

[48] Justice System Improvement Act of 1979, Pub. L. No. 96–157, § 827, 93 Stat. 1167 (1979) (codified as amended at 18 U.S.C. § 1761). Prior to the enactment of the PIE Act, the Hawes-Cooper Act of 1929 and the Ashurst-Sumners Act of 1935 had barred private companies from using prison labor and from allowing states to profit from the interstate sale of prison-made goods. Garvey, *supra* note 25, at 366.

[49] Garvey*, supra* note 25, at 372.

[50] *Organizing the Prisoner Class: An Interview with IWOC*, IT'S GOING DOWN (Apr. 30, 2016), https://itsgoingdown.org/organizing-prisoner-class-interview-iwoc/ [https://perma.cc/HDG2-M5VX].

[51] *Jones*, 433 U.S. at 132.

[52] *See* Graeme Wood, *How Gangs Took Over Prisons*, THE ATLANTIC (Oct. 2014), https://www.theatlantic.com/magazine/archive/2014/10/how-gangs-took-over-prisons/379330/ [https://perma.cc/WE9S-XTKH].

[53] *See, e.g.*, Luis Jorge DeGraffe, *Prisoners' Unions: A Potential Contribution to the Rehabilitation of the Incarcerated*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221, 233–34 (1990).

has been linked to lower rates of recidivism.[54] However, it will be difficult for prisoners in the United States to make a case for the rehabilitative benefits of organizing. After *Jones*, incarcerated workers seeking to organize face a catch-22: they will be hard-pressed to show that their unions do not pose a threat to prison stability and security unless they are first permitted to organize.[55]

II. FREEDOM OF ASSOCIATION FOR INCARCERATED WORKERS

A. THE HISTORY OF CONSTITUTIONAL LITIGATION REGARDING INCARCERATED WORKER LABOR UNIONS

Inmates in California established the first modern incarcerated worker labor union in 1970 following strikes at Soledad Prison and Folsom Prison.[56] These strikes coalesced into the United Prisoners' Union, an association of California prisoners that focused on a wide range of issues including indeterminate sentences, worker's compensation, minimum wage, parole board policy, and medical care.[57] The movement spread, and by 1972, three groups in California worked to form local prisoner unions while other groups took root in New York, Massachusetts, and Pennsylvania.[58]

As the prisoner labor union movement gained momentum in the early 1970s, some federal courts seemed poised to accept that these unions should be afforded constitutional protections. However, the proposed standards for freedom of association afforded to these unions varied from court to court.

One early district court case, *National Prisoners Reform Association v. Sharkey*, provided injunctive relief to a group of prisoners whose warden had blocked them from forming an association.[59] In its decision, the court wrote, "There is a high probability that, on the merits, it will be found that there is a First Amendment right to associate . . . for the reasons that plaintiff has organized," including improving prison conditions.[60] Balanced against this potential First Amendment right, the court found that the defendant prison warden had not "come near to presenting that minimum quantum of evidence needed to demonstrate the presence of an important government interest."[61] Even at the lowest level of scrutiny, states must demonstrate that the disputed

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[54] *Id.* at 225.
[55] Zonn, *supra* note 2, at 630.
[56] *Id.* at 621.
[57] Frank Browning, *Organizing Behind Bars*, 10 RAMPARTS 40, 43 (1972).
[58] *Id.* at 42.
[59] Nat'l Prisoners Reform Ass'n v. Sharkey, 347 F. Supp. 1234, 1239 (D.R.I. 1972).
[60] *Id.* at 1238.
[61] *Id.*

conduct furthers a legitimate interest.[62] In this case, the court found the prisoners' constitutional interest more compelling than the government's interest, especially since the defendant prison warden explicitly stated that he did not view the organization as a threat.[63] The defendant did not appeal the decision, so no higher court ruled on the merits of the case.

In *Goodwin v. Oswald*, a group of prisoners filed suit after prison officials intercepted letters between them and their lawyers discussing the foundation of a union.[64] Despite the fact that the contents of the letters dealt with a union, Judge Smith, writing for the court, avoided ruling on the legality of such an organization:

> We are not faced on this appeal with the question of the constitutionality or legality of unions or other organizations of prisoners . . . . We do not therefore intimate any views as to the legality, desirability, dangers, or possible benefits of any type of prisoner collective bargaining on prison working conditions or of any other organized representation of prisoners.[65]

Rather than ruling on prisoners' freedom of association, the decision turned on the fact that the prison withheld letters sent by the prisoners' lawyers, implicating the Sixth Amendment right to counsel.[66] The Second Circuit agreed with the trial court that "the letter was a communication of legal advice, not a call to illegal action, and that its optimism about the formation of a union was carefully hedged with cautionary instructions to obey all prison rules in the interim . . . ."[67] Thus, as in *Sharkey*, the court avoided determining whether or not prisoners had a First Amendment freedom of association to form a union.

Other district court decisions sought to balance the First Amendment rights of the prisoner against the state's interest involved in restricting that right, following *Pell v. Procunier*.[68] In this vein, the District Court of Connecticut applied the *Pell* balancing test in *Paka v. Manson* and found that

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[62] *See*, *e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968).

[63] *Id.*

[64] Goodwin v. Oswald, 462 F.2d 1237, 1238–39 (2d. Cir. 1972).

[65] *Id*. at 1239.

[66] *Id*. at 1240.

[67] *Id*.

[68] Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[C]hallenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.").

the state had a compelling interest in restricting the activities of a prisoners' union in the name of prison security.[69]

Despite the lack of a definitive answer from a higher court about the constitutional protections afforded to incarcerated worker labor unions, these lower court cases—and other contemporary First Amendment prison cases heard by the Supreme Court, such as *Procunier v. Martinez*[70]—signaled that federal courts might apply more exacting scrutiny to some First Amendment rights of prisoners, including freedom of association. However, *Jones* deviated from this trend by dramatically curtailing prisoners' freedom of association.

B. *JONES* AND ITS CHILLING EFFECT ON PRISONER LABOR UNIONS

In *Jones*, a group of inmates formed a labor union which sought to improve working conditions in a North Carolina prison through collective bargaining.[71] The union also hoped to serve as a mechanism to address broader inmate grievances.[72] However, the prison administration adopted policies barring the union from meeting, both declining to deliver bulk mailings of union publications and preventing inmates in the union from recruiting new members.[73] A week before these regulations were set to take effect, the union sued, claiming that the prison's actions violated its members' First and Fourteenth Amendment rights.[74]

The district court found in favor of the union, but the Supreme Court overturned this ruling.[75] The Court reasoned, based on *Pell*, that inmates do not possess those First Amendment rights that are supposedly "'inconsistent

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[69] Paka v. Manson, 387 F. Supp. 111, 122 (D. Conn. 1974). Zonn notes that this decision had "aggravating circumstances which weighed heavily in favor of the State's interest," including the fact that one of the organizers of the union was found to be in possession of a letter describing a fictitious violent incident, which may have threatened the internal security of the prison. Zonn, *supra* note 2, at 626 n.90.

[70] *See, e.g.,* Procunier v. Martinez, 416 U.S. 396, 413–14 (1974) (finding that restrictions on censoring prisoners' mail by imposing restrictions upon prisoners' mailing rights are justified if the practice furthers an "important or substantial governmental interest unrelated to the suppression of expression," and if the limitations on First Amendment freedoms are no greater than necessary to protect the governmental interest).

[71] Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 122 (1977).

[72] *Id*.

[73] *Id*. at 121.

[74] *Id*.

[75] *Id*. at 136.

with [their] status as a prisoner . . . ."[76] Justice Rehnquist wrote for the majority:

> [N]umerous associational rights are necessarily curtailed by the realities of confinement. They may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations . . . possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment.[77]

To the Court, the fact that the union wanted to present grievances to the administration and engage in adversarial collective bargaining provided sufficient grounds for barring its activity so long as the prison officials felt that these activities threatened prison security.[78] Under this decision, then, prison systems can promulgate policies prohibiting union organizing.

Jones determined that the First Amendment did not protect prisoner labor unions, but it did not formally ban them either. Chief Justice Burger clarified this point in his concurrence, writing, "In determining [that the Constitution permits prison officials to prevent unions from organizing], we do 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."[79] Thus, while *Jones* has effectively resulted in the widespread elimination of incarcerated worker unions, it leaves a door open for groups like the IWOC who wish to pick up the mantle of inmate labor organizing today.[80] Unions may still operate where permitted, and groups of prisoners may still find ways to persuade prison officials that organizing to present grievances is a worthwhile goal and not counter to penological or rehabilitative goals.

The *Jones* decision was understandably viewed as a backslide on the modest expansion of prisoners' rights started in *Martinez*[81] (though *Jones*

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[76] *Id*. at 129 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

[77] *Id*. at 132.

[78] *Id*. at 133.

[79] *Id*. at 137 (Burger, C.J., concurring).

[80] Indeed, in addition to its more clandestine efforts in organizing the 2018 prison strike, a group of prisoners affiliated with the Incarcerated Workers Organizing Committee (IWOC) has filed with the Industrial Workers of the World (IWW) to officially become the Incarcerated Workers Industrial Union 613, a branch of the IWW. IWOC, *First Incarcerated Worker Industrial Union Branch Forming*, IT'S GOING DOWN (Jan. 18, 2018), https://itsgoingdown.org/first-incarcerated-worker-industrial-union-branch-forming/ [https://perma.cc/7MRN-Y6R6]. There have been no subsequent updates since the January 2018 announcement. The author has contacted several local IWW chapters, as well as the national organization, in order to learn more about this effort, but has not received further information about the Incarcerated Workers Industrial Union 613.

[81] *See* Procunier v. Martinez, 416 U.S. 396, 413–14 (1974).

approvingly cited *Martinez*).[82] Justice Rehnquist did not engage in the *Martinez* analysis, which would have required the Court to examine whether less restrictive limitations might be possible for any given restriction on prisoners' First Amendment rights.[83] He also did not examine *Jones* under various other standards that could have been applied, "such as a clear and present danger test [or a] compelling state interest test . . . . Instead, the Court applied the less exacting standard of a rational basis test," as noted by Sidney Zonn, who appraised the impact and significance of *Jones* in 1978.[84] This less exacting standard ultimately had a chilling effect on prisoners' unions.

C. PRISONERS' UNION LITIGATION AFTER *JONES*

A number of cases at the state and federal levels in the years after *Jones* reflect the damage this case caused to First Amendment freedom of association litigation over prison labor organizing. On the heels of *Jones*, the District Court for the Middle District of Florida issued its decision in *Brooks v. Wainwright*.[85] *Brooks* went even further than *Jones*, not only arguing that prison administrators could limit prisoners' freedom of association, but essentially saying that prisoners had no freedom of association whatsoever.[86]

Slightly more encouragingly, the California Supreme Court weighed in on an attempted prisoner union at Soledad Prison in *In re Price*.[87] While the decision cited *Jones*, reasoning that the wardens had not violated any constitutional right in restricting the union's activity,[88] the case hinged on the potentially more generous California Penal Code Section 2600, which states, "A person sentenced to imprisonment in a state prison . . . may during that period of confinement be deprived of such rights, and only such rights, as

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[82] *See, e.g.*, Falkof, *supra* note 45, at 47; Zonn, *supra* note 2, at 630.

[83] *Martinez*, 416 U.S. at 420.

[84] Zonn, *supra* note 2, at 628.

[85] Brooks v. Wainwright, 439 F. Supp. 1335 (M.D. Fla. 1977). Interestingly, this case concerned one of the lead organizers of the prison union from *Jones*, Wayne Brooks, who attempted to organize another prisoners' union after being transferred to a prison in Florida. *Id.* at 1336. This case is also notable because Brooks enlisted the United Hotel, Motel and Lounge Employees Union as an intervenor to argue that prisoners qualified as public employees. *Id*. at 1337. However, the court found that Florida state law expressly bars state inmates from the definition of public employees. *Id.* at 1339.

[86] *Id*. at 1340 ("[O]ne of the first and most basic freedoms that inmates relinquish is the freedom of association. Were it not so, incarceration would be meaningless and impossible, since prisoners could come and go as they pleased under the guise of exercising the First Amendment liberty to association with whom they wished.").

[87] *In re* Price, 600 P.2d 1330 (Cal. 1979).

[88] *Id*. at 1332.

[are] reasonably related to legitimate penological interests."[89] The court found that the prison administrators had legitimate security concerns in mind when they barred the prisoners' union from meeting.[90] However, the court wrote, "[O]ur conclusion is not carved in stone and should not be interpreted as a permanent prohibition against reasonable prisoner activities proposed by the union."[91] This indicates that, despite a lack of constitutional protections from federal courts, prisoner unions may successfully litigate in some state courts under the right conditions.[92]

A 1993 case, *Rowland v. California Men's Colony*, provides the final word at the federal level on the scope of prisoners' rights to association.[93] In *Rowland*, a prisoners' organization sanctioned by the warden attempted to sue the warden *in forma pauperis* in response to changes to prison policy.[94] Litigation *in forma pauperis* permits an indigent plaintiff to initiate a lawsuit without prepaying filing fees or other court costs.[95] The Supreme Court held that only natural persons may qualify for treatment *in forma pauperis*.[96] While this case concerned prisoners' rights to association, its holding was based on statutory, not constitutional, rights.[97] As a result, the Court did not directly follow (or even cite) *Jones*. However, *Rowland* indicates that the Supreme Court has continued to view prisoners' freedom of association unfavorably, even outside of the constitutional context, in the decades after *Jones*.

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[89] CAL. PENAL CODE § 2600 (West 2012). This statute can be interpreted similarly to the tests enacted in *Pell* and *Martinez*. The California Supreme Court has also interpreted this statute to permit inmates to wear lapel pins representing prisoners' unions, unless the Director of Corrections can cite "past disruption caused by acquiring and wearing Union buttons" or "specific reasons for predicting disruptions." *In re* Reynolds, 599 P.2d 86, 88 (Cal. 1979). While the prison may bar union meetings, it may not bar the expressive act of wearing a pin or a badge. *Id*.

[90] *In re* Price, 600 P.2d at 1333. It is also worth noting that this case was not tried on the basis of any state or federal labor law. As discussed in Sections III and IV, *infra*, even in the absence of associational rights, labor law may provide an avenue for incarcerated workers to gain labor protections.

[91] *Id*.

[92] In Section IV, *infra*, I survey different state laws about whether prisoners may be considered public Employees. It would be an interesting future project to survey different state constitutional rights to freedom of association *vis-à-vis* prisoners' unions. However, this is beyond the scope of the argument presented in this piece.

[93] Rowland v. Cal. Men's Colony, 506 U.S. 194 (1993).

[94] *Id*. at 196–97.

[95] 28 U.S.C.S. § 1915(a)(1) (LexisNexis 2019).

[96] *Rowland*, 506 U.S. at 197.

[97] *Id*. at 211.

Following these discouraging post-*Jones* cases in which prisoners found no constitutional protections for their organizing, litigation around prisoners' unions ceased entirely. No subsequent court case has challenged the core holding of *Jones*.

D. CONTEMPORARY EFFORTS AT PRISONER UNIONIZATION: THE INCARCERATED WORKERS ORGANIZING COMMITTEE AND THE NATIONWIDE PRISON STRIKE

Although *Jones* effectively stalled further litigation on constitutional protections for prison labor unions, prisoner organizing has continued, as demonstrated by the 2018 prison strike, its predecessor in 2016, and a major 2013 prisoner hunger strike in California involving nearly 30,000 inmates.[98]

The Incarcerated Workers Organizing Committee (IWOC), the entity behind the 2016 and 2018 strikes, is a committee within the IWW that helps support incarcerated people with self-organizing efforts.[99] It seeks to "directly challenge prison slavery, work conditions, and the system itself: break cycles of criminalization, exploitation, and the state-sponsored divisions of our working class."[100] In addition to organizing strikes and advocating on behalf of prison labor, it makes use of other forms of protest such as work stoppages and hunger strikes.[101] These efforts have the potential to create operational disruptions to the industries within prisons that rely on prison labor.[102] Because of the liminal status of prisoners—and the ways in which they do not fall within traditional labor power dynamics—they must resort to these varied tactics in order to seek to assert their rights.

The IWOC is not IWW's first attempt at organizing prisoners. In 1987, the IWW initiated its Prison Organizing Project, which sought to represent 400 Ohio inmates in collective bargaining.[103] In this early attempt at post-*Jones* prisoner organizing, the Ohio State Employment Relations Board refused to recognize the prisoners as public employees, and the effort

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[98] Rory Carroll, *California Prisoners Launch Biggest Hunger Strike in State's History*, THE GUARDIAN (July 9, 2013), https://www.theguardian.com/world/2013/jul/09/california-prisoners-hunger-strike [https://perma.cc/2WB3-9MMP].

[99] *Organizing the Prisoner Class: An Interview with the IWOC*, *supra* note 50.

[100] *IWOC Preamble*, INCARCERATED WORKERS ORGANIZING COMMITTEE, https://incarceratedworkers.org/iwoc-preamble [https://perma.cc/D5CL-ZWZG].

[101] *About*, INCARCERATED WORKERS ORGANIZING COMMITTEE, https://incarceratedworkers.org/about [https://perma.cc/4GY2-2CKL].

[102] Laignee Barron, *Here's Why Inmates in the U.S. Prison System Have Launched a Nationwide Prison Strike*, TIME (Aug. 22, 2018), http://time.com/5374133/prison-strike-labor-conditions/ [https://perma.cc/LVK3-2MUV].

[103] *IWW Chronology (1984-1989)*, INDUSTRIAL WORKERS OF THE WORLD, https://iww.org/about/chronology/9 [https://perma.cc/6XXN-DH7N].

failed.[104] Unlike this early effort, the IWOC is not seeking formal union recognition at present; rather, the IWW facilitates various organizing efforts behind bars.[105]

Because of the limits imposed on prisoners' freedom of association in *Jones*, IWOC members have resorted to creative and informal methods to recruit members and gather support for their strike. To recruit members, IWW members have combed through prison databases and sent inmates unsolicited letters.[106] This need for direct outreach is a result of *Jones*' holding concerning bulk mail: as long as other methods of outreach are available, prohibitions on bulk mailings from unions do not violate First Amendment rights.[107] Similarly, incarcerated IWOC members have mostly relied on word of mouth to share information about the prison strike.[108]

Though *Jones* limited prisoner labor unions' options in court, prison labor organizing has persevered and come to new prominence, though organizers have had to shift their tactics.

III. FEDERAL STATUTORY LABOR PROTECTIONS FOR INCARCERATED WORKERS

A. THE NATIONAL LABOR RELATIONS ACT

Although *Jones* found that prisoners had no constitutionally protected First Amendment right to association, a federal labor statute may provide protections to certain categories of incarcerated workers, including a statutory right to unionize. Some have hypothesized that incarcerated workers may be protected under the NLRA.[109] As noted by Eric M. Fink, one of the first legal scholars to address incarcerated worker unions in a law review article since the late 1970s, "The significance of *Jones* lies more in

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[104] *Id*. Discussed in greater detail in Part IV.C., *infra*.

[105] *Id*.

[106] Cheryl Corley, *U.S. Inmates Plan Nationwide Prison Strike to Protest Labor Conditions*, ALL THINGS CONSIDERED: NPR (Aug. 21, 2018, 6:16 PM), https://www.npr.org/2018/08/21/640630606/u-s-inmates-plan-nationwide-prison-strike-to-protest-labor-conditions [https://perma.cc/RZ93-JFPJ]. Immediately following *Jones*, a law review publication noted, "The Court did not decide whether prison administrators could extend the ban on union mail to cover individual mailings from outside organizers to individual inmates." Regina Montoya & Paul Coggins, Case Comment*, The Future of Prisoners' Unions:* Jones v. North Carolina Prisoners' Labor Union, 13 HARV. C.R.-C.L. L. REV. 799, 825 (1978). There has been no subsequent litigation on this specific issue, but it appears that in at least some states, direct mailing has proven to be an effective outreach tactic.

[107] Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 130 (1977).

[108] Corley, *supra* note 106.

[109] Fink, *supra* note 8, at 966.

what the Court did not decide. The majority did not hold that [the Union's] members were not statutory employees."[110]

If workers are found to be statutory employees under the NLRA, they "shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."[111] However, while federal courts have determined that inmates on work release programs may be included in a class of statutory employees alongside non-incarcerated peers in identical jobs, and as a result engage in collective bargaining,[112] federal courts have never determined whether incarcerated workers in prison industries are statutory employees.[113]

The NLRA's definition of employee is expansive: "The term 'employee' shall include any employee, and shall not be limited to the limited to the employees of a particular employer . . . ."[114] The NLRA, however, does not cover public employers or employees.[115] As a result, any analysis of whether incarcerated workers may be covered under the NLRA has focused on those inmates employed either in private industries in private prisons[116] or in the PIE program.[117]

Though the NLRA is silent on whether incarcerated workers may be considered statutory employees, a number of federal cases have examined the circumstances under which incarcerated workers may be considered employees under the FLSA, which includes a number of labor protections including minimum wage requirements. As noted by Kara Goad, the FLSA uses a similar definition of "employee" as the NLRA and is thus useful for understanding the circumstances under which incarcerated workers may be considered to be statutory employees.[118]

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[110] *Id*. at 972. This issue did not arise in *Jones* because North Carolina law bars collective bargaining by state employees, and all the prisoners in the union were employed solely in prison operations. *Id*.

[111] 29 U.S.C. § 157 (Westlaw through Pub. L. No. 116-63).

[112] Speedrack Prods. Grp. v. N.L.R.B., 114 F.3d 1276, 1282 (D.C. Cir. 1997).

[113] Goad, *supra* note 9, at 187.

[114] 29 U.S.C. § 152 (Westlaw through Pub. L. No. 116-63).

[115] *Id*. § 152(2).

[116] *See* Goad, *supra* note 9, at 197.

[117] *See* Fink, *supra* note 8, at 968–69.

[118] Goad, *supra* note 9, at 188. The Fair Labor Standards Act defines an employee for most purposes as "any individual employed by an employer." 29 U.S.C. § 203 (2009) (Westlaw through Pub. L. No. 116-63).

B. PRISONERS AS STATUTORY EMPLOYEES UNDER THE FLSA

Until the 1980s, most courts did not find inmates to be employees under the FLSA.[119] Claims by incarcerated workers against the private entities for which they worked were generally dismissed due to a lack of "control" on the part of the private entity.[120] However, beginning with *Carter v. Dutchess Community College*,[121] several circuits reversed summary judgment and motions to dismiss, finding that inmates were not excluded as a class from FLSA protections. The court in *Carter* wrote, "We believe that courts should refrain from exempting a whole class of workers, based on technical labels, from the coverage of the FLSA . . . ."[122] As a result of this holding, prisoners are not expressly excluded from FLSA coverage.[123] Rather, a court must consider "how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent."[124] This indicates a broadening of the ways courts may be willing to examine prospective employer-employee relationships for control.

The Fifth Circuit came to a similar conclusion in *Watson v. Graves*, a case in which a Louisiana sheriff hired out prisoners to local companies for twenty dollars per day.[125] One local company kept the prisoners out for extended shifts and did not adequately compensate them for the additional time, among other labor abuses.[126] The court cited *Carter*, finding that inmate status does not *per se* prevent inquiry into FLSA coverage.[127] However, in this case, the court went a step further: not only did it reverse the lower court's grant of summary judgment, it actually rendered judgment in favor of the inmates on their FLSA claims due to the egregiousness of the violation, and only remanded in part so that the district court could calculate how much the inmates were owed under the FLSA.[128] Applying the "economic realities test" established in *Goldberg v. Whitaker House Cooperative, Inc.*[129], which requires an examination of the substantive realities of the relationship between two parties, rather than resorting to

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[119] Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 872 (2008).

[120] *Id*.

[121] Carter v. Dutchess Cmty. Coll., 735 F.2d 8 (2d Cir. 1984).

[122] *Id*. at 13.

[123] *Id*.

[124] *Id*. at 14.

[125] Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990).

[126] *Id.* at 1551.

[127] *Id.* at 1554.

[128] *Id.* at 1550.

[129] Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28 (1961).

"mere forms or labels," in order to determine whether an employee is protected by the FLSA, the court found the inmates to be employees.[130] They were entirely unsupervised by prison officials over the course of their employment, and the private company dictated their work schedules.[131]

In *Hale v. Arizona*, the Ninth Circuit examined whether Arizona inmates working in the state prison enterprise, ARCOR, could be considered employees under the FLSA.[132] The court found that in the years since *Carter*, Congress had amended the FLSA twice and did not explicitly exempt prisoners from the Act's coverage either time.[133] The court interpreted this silence as evidence of congressional intent not to categorically exclude prisoners—even those working within prison walls, but for a private employer.[134] However, the court found that the FLSA's obligations did not apply to the appellees in this case because of the employment program in question.[135] ARCOR was explicitly structured to meet the state requirement that inmates perform "hard labor" as a form of punishment, and prisoners working in the program did so for penological purposes.[136] Because of this, the court did not discuss which types of prison labor might affirmatively constitute employment.

Ultimately, these cases reinforce the fact that incarcerated workers are not excluded from federal labor protections. They may, in fact, be considered statutory employees when working for private companies that exercise control over various aspects of their employment, pursuant to other state statutory requirements. Based on this, it may similarly be possible for the NLRB to consider incarcerated workers to be statutory employees in certain circumstances.

For a brief period of time, it appeared that the NLRB was increasingly disposed to consider unconventional work relationships to be employment for the purpose of union recognition. In a 2017 Comment, Kara Goad wrote that reasoning of the 2016 NLRB decision in *Columbia University*, which held that graduate student assistants were employees under the NLRA, could potentially also encompass incarcerated workers.[137] In *Columbia University*, the NLRB found that the only economic component necessary to establish an

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[130] *Watson*, 909 F.2d at 1554.
[131] *Id.*
[132] Hale v. Arizona, 993 F.2d 1387, 1389 (9th Cir. 1993).
[133] *Id.* at 1392 n.8.
[134] *Id.* at 1392–93 n.8.
[135] *Id.* at 1398.
[136] *Id.*
[137] Goad, *supra* note 9.

employment relationship is payment on the part of the employer.[138] Goad wrote of the decision, "[A]s 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."[139] While the dual role examined in *Columbia University* was student/employee, an extension of this reasoning could have permitted incarcerated worker unions to argue that their relationship with correctional institutions also served a dual role: part rehabilitative/penological and part employment.[140] This would have been a promising avenue for incarcerated workers unions to pursue.

However, in September 2019, the NLRB proposed a new rule overturning *Columbia University*, declaring that graduate student employees' relationship with their universities is "primarily educational" rather than economic.[141] The comment period for the new rule ended on January 15, 2020, and parties had an additional two weeks to respond to comments.[142] If this new rule takes effect, it would weaken the case that incarcerated workers should be allowed to unionize due to their dual role as inmates and workers. As a result, it appears that a brief window of opportunity is closing.

IV. STATE PUBLIC SECTOR LABOR PROTECTIONS FOR INCARCERATED WORKERS

A. STATE AND LOCAL-LEVEL COLLECTIVE BARGAINING: WORTH ANOTHER LOOK

As mentioned in the previous section, a favorable finding by the NLRB would likely apply to prisoners employed in private industries in privately-operated prisons, and possibly those involved in the PIE program. However, the vast majority of incarcerated workers labor outside of those two systems and are instead employed directly by the state.[143] Because the NLRA only

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[138] Trs. of Columbia Univ. in N.Y., 364 N.L.R.B. No. 90 at *5 (2016).

[139] Goad, *supra* note 9, at 191.

[140] *Id.* at 192–93.

[141] Braden Campbell, *New NLRB Rule Would Block Grad Student Unions*, LAW360 (Sept. 20, 2019), https://www.law360.com/articles/1197432 [https://perma.cc/Q6C7-NB6A].

[142] Vin Gurrieri, *NLRB Adds Month To Comment Period For Grad Student Rule*, LAW360 (Nov. 26, 2019), https://www.law360.com/articles/1223851/nlrb-adds-month-to-comment-period-for-grad-student-rule [https://perma.cc/S3FW-96Z4].

[143] Approximately 870,000 inmates worked full time in 2014. Beth Schwartzapfel, *The Great American Chain Gang: Why Can't we Embrace the Idea that Prisoners Have Labor Rights?*, AM. PROSPECT (May 28, 2014), http://prospect.org/article/great-american-chain-gang [https://perma.cc/8YZ4-5RFX]. However, as of June 2019, only 5,367 inmates worked in PIE programs. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PRISON INDUS.

applies to private employees, a favorable finding of inmate employee status—even one that leads to a "pilot project" of inmate unionization, as envisioned by Fink[144]—would only have limited applicability to the broader prisoner population. Inmates working directly for the prison or for the state would not benefit. As a result, the vast majority of incarcerated workers in state prisons would need to seek labor protections through other means, namely "the hodge-podge of state and local legal frameworks" governing collective bargaining for public-sector workers.[145]

Though state and local organizing requires action on many fronts and would likely be a more intensive effort than seeking recognition at the NLRB, state labor relations boards overseeing public employees could be a valuable place for incarcerated workers unions to focus their energy. This is because incarcerated worker unions would have more bites of the apple when seeking collective bargaining recognition. An unfavorable decision by the NLRB might lead to a definition of "employee" that clearly excludes prisoners.[146] While such a decision would only apply to those incarcerated workers employed by private employers, it would be a major national setback for the incarcerated workers' organizing movement as a whole.

On the other hand, if one state's labor relations board rejects a union's application, the impact would be limited to that state. This would still pose a setback (and, of course, prevent prisoners in that state from benefiting from engaging in collective bargaining), but it can also help organizers and lawyers in other states understand what the state of play might be. Furthermore, because each state's public employee relations laws are distinct, incarcerated worker unions can tailor their approaches accordingly. If one state or several states positively recognize state incarcerated workers

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ENHANCEMENT CERTIFICATION PROGRAM CERTIFICATION & COST ACCOUNTING CTR LISTING, STATISTICS FOR THE QUARTER ENDING JUNE 30, 2019 1 (2019), https://4c99dc08-46a7-4bd9-b990-48103d668bb3.filesusr.com/ugd/74ff44_b4e2fdf1e2e1449cada258d32ad758ec.pdf [https://perma.cc/4SWG-P9X6].

144 *See* Fink, *supra* note 8, at 956.

145 MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. AND POL'Y RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES, 3 (2014). As stated in a recent student Note, "Further research is certainly necessary to develop a fuller, more nuanced treatment of the various state and federal statutory schemes that impact prison strikes." Yoseph T. Desta, *Note: Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1502 (2019). This Comment aims to provide a fuller, more nuanced treatment of one aspect of state law governing prison labor organizing.

146 While there is no *stare decisis* in NLRB decisions, circuit courts have held that "the Board may not depart . . . from its usual rules of decision to reach a different, unexplained result in a single case." NLRB v. Int'l Union of Operating Eng'rs, Local 460 F.2d 589, 604 (5th Cir. 1972). Furthermore, the Board refers to its prior decisions as "precedent." Goad, *supra* note 9, at 187.

as public employees and permit them to form unions, incarcerated workers can start building an evidence base that prisoner labor unions do not inherently pose a threat to the security of prisons. Thus, if a case challenging *Jones* ever makes its way back up to the Supreme Court, incarcerated workers unions will have more ammunition to demonstrate that the state's interest in limiting prisoners' rights to association may not be as compelling as it seemed to Justice Rehnquist at the time of *Jones*.

Below, this Comment examines the range of state statutes governing public sector collective bargaining, analyzing which ones might be amenable to recognizing incarcerated workers in state prisons as statutory employees.[147] Next, this Comment examines several state labor relations board decisions that rejected incarcerated workers unions in the 1970s and 1980s, unpacking the lessons from these decisions in order to develop arguments that incarcerated labor organizers can advance in the present day.

B. PUBLIC EMPLOYEE COLLECTIVE BARGAINING LAWS ON THE STATE LEVEL: CHALLENGES AND POSSIBILITIES FOR INCARCERATED WORKERS

State labor laws vary, and some are more restrictive than others. By examining the range of public sector collective bargaining statutes on the books, advocates and organizers can gain a better understanding of where best to focus their energy to advance the cause of incarcerated worker unions.

A number of states statutorily ban collective bargaining for all public employees. These include North Carolina, Texas, and Virginia.[148] Additionally, the Georgia and South Carolina Supreme Courts have found that collective bargaining is illegal for most public employees.[149] State statutes in Delaware, Iowa, Florida, Maine, and Oregon explicitly exclude inmates from their definition of "public employee."[150] In these states, then,

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[147] The question of whether state incarcerated workers may be considered public employees is a threshold issue. There may be other state statutes in addition to public employee collective bargaining statutes that could provide barriers or opportunities to organize.

[148] *See* N.C. GEN. STAT. §§ 95–98 (LEXIS through Sess. L. 2019-3); TEX. LOCAL GOV'T CODE ANN. § 174.002 (Westlaw through 2019 Legis. Sess.); VA. CODE ANN. § 40.1–57.2 (LEXIS through 2019 Legis. Sess.).

[149] *See* Bd. Pub. Educ. For Savannah and Chatham, 204 S.E.2d 138 (Ga. 1974); Branch v. City of Myrtle Beach, 532 S.E.2d 289, 292 (S.C. 2000) ("Unlike private employees, public employees in South Carolina do not have the right to collective bargaining.").

[150] *See* 19 DEL. CODE ANN. § 1302 (LEXIS through 82 Del. Laws ch. 218); FLA. STAT. § 477.203(3)(f) (LEXIS through 2019); IOWA CODE § 20.4 (2019 Legis. Sess.); ME. REV. STAT. ANN. tit. 26, § 979(6)(k) (Westlaw through 1st Reg. Sess. 2019); OR. REV. STAT. § 243.650(19) (LEXIS through 2019 Sess.).

no pathway exists for state inmates engaged in prison labor to gain recognition as public employees for the purpose of collective bargaining.

Some states, such as Alabama, Mississippi, and West Virginia, have no statutes whatsoever related to collective bargaining.[151] Other states only have statutes related to collective bargaining for very limited sets of public employees, such as firefighters, police officers, and teachers, but have no framework or employment relations board to adjudicate labor claims brought by public employees more broadly.[152] Thus, it would not be fruitful for incarcerated worker unions to seek formal recognition in these states either, although the result of such efforts is less certain than in the states with wholesale bars on public sector collective bargaining.

Arizona, Colorado, and Idaho do not have statutes on public sector collective bargaining, but they do have executive orders or attorney general guidelines that permit the practice.[153] Generally, these guidelines leave regulation of collective bargaining to the discretion of the municipality.[154] This too would limit the viability of incarcerated workers unions gaining formal recognition and labor protections. It might also lead to a fragmented approach on the part of advocates and organizers with no clear statewide precedent emerging across municipalities.

This leaves thirty states that statutorily permit collective bargaining and have definitions of "public employee" that do not explicitly exclude prisoners. Of these, many have generic definitions, with few exceptions or qualifications. One characteristic example from Alaska states, "'public employee' means any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools."[155] In states with similar statutes, incarcerated worker unions should make the case to the state labor relations board that they are public workers in much the same way that incarcerated workers in private industries might petition the NLRB.

Among those states that permit collective bargaining for public employees, some have especially expansive definitions. This may open up even greater opportunities. For example, North Dakota's Public Employees Relations Act defines an employee as "any person, whether employed, appointed, or under contract, providing services for the state, county, city, or

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[151] SANES & SCHMITT, *supra* note 145, at 12, 40, 65.

[152] IND. CODE § 36-8-22 (Burns, LEXIS through 1st Reg. Sess. of 121st Gen. Assembly); KY. REV. STAT. ANN. § 67A.6902 (LEXIS through 2019); 11 OKLA. STAT. § 51–101 (Westlaw through 1st Reg. Sess.); TENN. CODE ANN. § 49–101 (2019).

[153] SANES & SCHMITT, *supra* note 145, at 14, 18, 26.

[154] *Id*. at 27.

[155] ALASKA STAT. § 23.40.250(6) (LEXIS through 2019 S.L.A.).

other political subdivision, for which compensation is paid."[156] While the section includes six exceptions to its definition of public employee, none of these include prisoners.[157] Under the canon of construction *expresio unius est exclusio alterius*, the omission of prisoners from the excluded classes of public employee indicates that they could be included in the definition of public employees. However, it does not appear that prisoner labor unions have ever sought to form in North Dakota.[158]

A smaller subset of states have much more restrictive definitions of public employees that—while not explicitly excluding prisoners—may pose additional obstacles. These include California, Hawaii, Maryland, and Vermont.[159] For example, Vermont's code grants much more discretion to its labor relations board: exempt from the definition of public employee is any group "determined after a hearing by the Board, upon petition of any individual desiring exclusion, of the employer, or of a collective bargaining unit, to be in a position that is so inconsistent with the spirit and intent of this chapter as to warrant exclusion."[160] California, Hawaii, and Maryland each have very clearly defined lists of who is and who is not a public employee. Although incarcerated workers do not appear on either the list of included or excluded public employees, their absence leaves less interpretive leeway for the Boards in these states, even if they were amenable to extending public employee benefits to incarcerated workers. As a result, incarcerated workers unions may not wish to prioritize these states in their organizing. This is a

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[156] N.D. CENT. CODE § 34-11.1-01(3) (LEXIS through 2019 Reg. Legis. Sess.).

[157] *Id*.

[158] In addition to its broad statutory definition of a public employee, North Dakota may be an interesting place for incarcerated workers unions to test the waters for several reasons: the current head of North Dakota's Department of Corrections is experimenting with Scandinavian-style prison reforms; it also has less of a history of race-based prison gangs due to its homogeneity. *See* Dashka Slater, *North Dakota's Norway Experiment*, MOTHER JONES (July 2017), https://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/ [https://perma.cc/AP39-R9PN]. However, just because North Dakota's prison system might be reasonably amenable to reforms, other stakeholders such as the courts and the labor relations board would also have to be favorably disposed to incarcerated worker unions. The political calculus involved in determining whether these entities or their counterparts in other states might be open to recognizing collective bargaining rights for incarcerated workers is beyond the scope of this Comment.

[159] *See* CAL. GOV'T CODE § 3513 (Deering 2018); HAW. REV. STAT. § 89–6 (Westlaw through Act 286 of 2019 Legis. Sess.); MD. STATE PERS. & PENS. CODE § 3–102 (LEXIS through 2019 Reg. Sess.); VT. STAT. ANN. TIT. 3, § 902 (LEXIS through 2019 Reg. Sess. (excluding changes made by Vermont Legis. Council)).

[160] VT. STAT. ANN. TIT. 3, § 902.

shame because of California's long, rich history with prison organizing[161] and its large prison population.[162]

Though state statutes governing collective bargaining for public employees take a range of approaches—from banning collective bargaining wholesale to having broad definitions of who may be considered a public employee—there is considerable opportunity for incarcerated workers in thirty states. Each one of these states' public employee relations boards will likely take a different approach to interpreting its statute as it applies to incarcerated workers. To that end, it is useful to consider the past decisions of some of these agencies.

C. STATE LABOR BOARD DECISIONS ON INCARCERATED WORKERS

The issue of whether incarcerated workers are state employees has come up in front of the labor boards of at least four states, only one of which has found in favor of their collective bargaining rights.

In the successful petition, the Massachusetts State Labor Relations Commission approved members of the National Prisoners Reform Association (NPRA) at Walpole Prison as a collective bargaining unit, noting that "the prisoners did perform work for which they were paid by the state."[163] The Commission went on to identify thirty-one different work assignments engaged in by prisoners.[164] This shows that it is not entirely fantastical to imagine that some states may approve collective bargaining for incarcerated workers.

To determine which approaches and arguments may work today, it is also informative to examine the three unsuccessful cases and understand the reasons that state labor boards have declined to find inmates to be public employees.

In the earliest of these cases, incarcerated workers at Green Haven Prison petitioned New York's Public Employment Relations Board to be recognized as public employees.[165] The Board found that incarcerated

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[161] *See* Part II.A., *supra.*

[162] As of 2017, California had approximately 115,000 prisoners. *California's Prison Population*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, https://www.ppic.org/publication/californias-prison-population/ [https://perma.cc/2QK3-E5VJ].

[163] Heather Ann Thompson, *Rethinking Working Class Struggle through the Lens of the Carceral State: Toward a Labour History of Inmates and Guards*, *in* GLOBAL CONVICT LABOUR 411 (Christian Giuseppe De Vito & Alex Lichtenstein eds., 2015).

[164] *Id*.

[165] *In re* Prisoners' Labor Union at Green Haven, 1973 WL 340350 6 PERB ¶ 3033 (NY PERB 1973).

workers had many attributes of an employee relationship with the state Department of Corrections, but that New York's "Taylor Law," which provided labor protections to public employees, was not intended to cover prisoners.[166] This decision came, in part, from examining New York's State Corrections Law, which says that state employment law applies to inmates on work-release programs.[167] Because of the recognition that employment law applied to prisoners in this specific circumstance, the Public Relations Board found that inmates were excluded in more general circumstances.[168] Based on this decision, incarcerated workers seeking recognition as public employees in any state will want to consider whether other state labor statutes make exceptions for certain classes of inmates but not for others.

Michigan's Employment Relations Commission took a different approach in evaluating the merits of a prisoners' labor union, finding an employment relationship but dismissing the petition for lack of statutory jurisdiction.[169] The union appealed, and ultimately the Michigan Court of Appeals found that the primary relationship between incarcerated workers and the Department of Corrections was rehabilitative and penological, not vocational.[170] As a result, Michigan's Public Employment Relations Act did not cover the union, and their disputes instead had to be resolved within the Department of Corrections.[171]

At the federal level, the NLRB has oscillated on the issue of whether employees may have more than one type of relationship with their employer (most recently, away from embracing the dual-relationship argument).[172] However, the NLRB's decisions are not binding over state labor relations boards because of their distinct mandates. As discussed above in the case of the NPRA in Massachusetts, some state labor relations boards may be more favorably inclined to find incarcerated workers both inmates and laborers.

Finally, Ohio's State Employment Relations Board (SERB) found that inmates were not public employees.[173] When the inmates appealed, a state

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[166] *Id*.

[167] *Id*.

[168] *Id*.

[169] *In re* Prisoners' Labor Union at Marquette, Case No. R72 E-163, 8 (Mich. Empl. Rel. Comm., March 22, 1974). Importantly, in this case, Commission Chairman Robert G. Howlett wrote, "[T]here may be more than one relationship between an institution and personnel who perform work within its confines," indicating that incarcerated workers may be considered both employees and prisoners. *Id.* at 6.

[170] Prisoners' Labor Union v. State, 61 Mich. App. 328, 336 (Mich. Ct. App. 1975).

[171] *Id*. at 336–37.

[172] *See* Gurrieri, *supra* note 142.

[173] Perotti v. State Emp't Relations Bd., No. 1742, 1989 WL 62930, at *1 (Ohio Ct. App. June 5, 1989).

court agreed that the SERB did not have jurisdiction over the inmates.[174] The main reason for this was that the relationship between the inmates and the prison was not voluntary, and thus incarcerated workers could not be considered employees under state law.[175] While the Sixth Circuit, which includes Ohio, has not weighed in the matter, the Second, Fifth, and Ninth Circuits have found that incarcerated workers' status as inmates does not exclude them per se from labor protections.[176] Indeed, these circuits have found that voluntariness is not the most critical factor, and instead that "determination of employee status focuses on economic reality and economic dependence."[177] The majority of the decisions on this matter came after Ohio's ruling and could provide some strong counterarguments to challenge Ohio's Appeals Court's finding that voluntariness alone is sufficient to exclude inmates from labor laws.[178]

Ultimately, these cases illustrate the range of statuses that states may ascribe to incarcerated workers under state collective bargaining statutes and indicate several arguments that modern incarcerated worker unions could advance to seek legal recognition. The approach in any of the thirty states that permit collective bargaining and do not explicitly exclude prisoners will surely vary widely based on the nature of the individual union, the totality of a state's other laws governing corrections, past decisions by the state labor board, and state-level jurisprudence around the definition of a public employee. However, the broader point is that in some states, incarcerated workers may be able to pass the threshold issue of being recognized as public employees—though it will surely be an uphill battle in most cases.[179]

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[174] *Id*.

[175] *Id*. at *2. Interestingly, this decision contrasts the language in Ohio's Workmen's Compensation Law (Ohio Rev. Code § 4123) to Ohio's Public Employment Collective Bargaining Act (Ohio Rev. Code § 4117), stating that there is a distinction between the broad definition of "labor" in the former and a narrower definition of "employment" in the latter. *Id*.

[176] *See* Section III.B, *supra*, discussing FLSA decisions on labor protections for incarcerated workers.

[177] Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990).

[178] Of course, there is a difference between an "employee" under the FLSA and a "public employee" under state labor laws. However, these decisions may at least provide evidence to a state labor board that the factors by which they determine employee status must be broadened. After all, they signal a shift at the federal level from a "control" test, in which voluntariness was a factor, to a more holistic "economic realities" test when determining employee status.

[179] It is worth noting that even if incarcerated workers meet the threshold definitional requirement of being considered an "employee" under the NLRA or a "public employee" under state labor laws, there will be numerous other subsequent issues for them to navigate. Prisoners lack many of forms of leverage that unions are able to wield to their advantage.

CONCLUSION

Justice Brandeis wrote that states may "serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country."[180] Incarcerated worker unions can use the differences in state collective bargaining statutes and various state labor boards' attitudes to their advantage. By gaining certification under state collective bargaining statutes, workers can build a body of knowledge demonstrating the viability of prisoner labor organizing. Unions in different states can experiment with distinct approaches to seeking recognition from their state labor relations board and learn from each other's successes and failures.

Between seeking state-level recognition as public employee collective bargaining units and seeking federal private-sector recognition through the NLRB, incarcerated workers have numerous avenues to pursue in order to achieve labor protections and union recognition. Following such recognition, successful and peaceful negotiations between unions and prison administrators can ultimately create an evidence base that can one day be used to rebut the argument advanced by Justice Rehnquist in *Jones* that "the presence, perhaps even the objectives, of a prisoners' labor union is detrimental to the order and security in the prisons."[181]

By utilizing the complementary approaches of seeking recognition under federal and state labor laws, incarcerated workers can chart a path forward that allows them to address concerns about power imbalances, racial inequity, and labor exploitation posed by prison labor. While incarcerated workers may not presently have a constitutional freedom of association, they have other tools at their disposal with which they can seek to assert their rights. As Pete Seeger sang in *Talking Union*, a song describing the steps workers must take to start a union, "You may be down and out, but you ain't beaten."[182]

Katherine E. Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 682, 701 (2018). For instance, incarcerated workers are unable to picket during a labor dispute, and they do not have the option of seeking out other types of employment behind the prison walls. *Id*. As a result, incarcerated worker unions will need to be creative as they seek out other ways to gain leverage in negotiations.

[180] New State Ice Co. v. Liebmann, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting).

[181] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977).

[182] PETE SEEGER AND THE ALMANAC SINGERS, *Talking Union on* THE ORIGINAL TALKING UNION & OTHER UNION SONGS (Smithsonian Folkways Recordings 1955).