"Inciting a Riot": Silent Sentinels, Group Protests, and Prisoners' Petition and Associational Rights

*Nicole B. Godfrey**

CONTENTS

INTRODUCTION

In January 1917, a group of women led by Alice Paul began a two-and-a-half year protest in support of women's suffrage.[1] As the first activists to ever picket the White House,[2] these women became known as

* Visiting Assistant Professor, University of Denver, Sturm College of Law. JD, LLM, MA. Thanks to Tammy Kuennen, Sara Hildebrand, Sarah Matsumoto, Katherine Wallat, and Tania Valdez for their helpful comments and suggestions, and thanks to Ciara Anderson, JD '20, for her invaluable research assistance. Thanks to the participants at Seattle University for their comments and questions and to the editors on the law review for their diligent work on this piece. All errors are my own.

1. DORIS STEVENS, JAILED FOR FREEDOM: AMERICAN WOMEN WIN THE VOTE 21, 59 (Carol O'Hare ed., 1995).

2. *Id.*

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the "Silent Sentinels" for their practice of standing in peaceful silence while holding banners displaying "provocative political slogans or demanding the right to vote."[3] While President Woodrow Wilson initially appeared "amused and interested"[4] in the women's protest, even ordering the White House guards to "invite them for a cup of coffee,"[5] the White House's toleration of the picketers diminished after the United States entered World War I in April 1917.[6] Shortly thereafter, the peaceful nature of the Silent Sentinels' protest changed. This change came to fruition not because of any actions taken by the women; rather, local police, with implicit support from the White House, began "arresting and jailing picketers for disorderly conduct and obstructing sidewalk traffic, even though they were doing nothing differently than they had for the past six months."[7]

While the first arrests led to little time in prison, the Silent Sentinels' persistence in continuing the protests in the face of arrest eventually led to terms of incarceration.[8] By October 1917, District of Columbia police officers had arrested at least seventy women, and some women faced terms of imprisonment as great as six months.[9] For those women facing incarceration, the District of Columbia confined them to the District Jail and the Occoquan Workhouse in Virginia.[10] In both prisons, the women continued their protest through a series of non-violent actions, including circulating petitions, organizing work strikes, and engaging in hunger strikes.[11] These group protests called attention not only to the unjust nature of the Silent Sentinels' incarceration but also the squalid and miserable conditions of the prisons, including the inedible food, unsanitary cells, vermin-infested blankets, and brutal corporal punishment.[12] Certainly, the

3. Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J.L. & POL. 339, 398 (2008) (quoting *Silent, Silly, Offensive*, N.Y. TIMES, Jan. 11, 1917, at 14).

4. STEVENS, *supra* note 1, at 67.

5. *Id.*

6. *Id.* at 67. *See infra* Section I.B. (providing further detail into how the suffragist movement brought unwelcome attention to the Wilson administration during a contentious war period in American history).

7. SUSAN WARE, WHY THEY MARCHED: UNTOLD STORIES OF THE WOMEN WHO FOUGHT FOR THE RIGHT TO VOTE 244 (2019).

8. Nicole B. Godfrey, *Suffragist Prisoners and the Importance of Protecting Prisoner Protest*, 53 AKRON L. REV. 279, 386-87 (2019).

9. WARE, *supra* note 7, at 245. There are conflicting accounts as to how many women were arrested as a result of the picketing movement. *Compare id.* (noting seventy arrests), *with* JOHANNA NEUMAN, GILDED SUFFRAGISTS: THE NEW YORK SOCIALITES WHO FOUGHT FOR WOMEN'S RIGHT TO VOTE 129 (2017) (noting five hundred arrests).

10. *See, e.g.*, WARE, *supra* note 7, at 246; J.D. ZHANISER & AMELIA R. FRY, ALICE PAUL: CLAIMING POWER 282 (2014).

11. Dodd, *supra* note 3, at 411; STEVENS, *supra* note 1, at 107, 115.

12. Godfrey, *supra* note 8, at 335–36.

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protests demonstrated the will of the nation's suffragists to persist in their advocacy until the passage of the Nineteenth Amendment, but the in-prison protests also drew the attention of federal and District of Columbia officials to the conditions in the Occoquan Workhouse and the District of Columbia jail.[13] While the protests failed to lead to reform of the prisons, they did create a small amount of transparency into the workings of the institutions that had theretofore been lacking.[14]

Unfortunately, transparency in modern prison systems is similarly absent, despite the sheer enormity of the modern criminal justice system.[15] The United States incarcerates nearly 2.2 million people today.[16] Yet the indignities suffered each day by the human beings living in American prisons and jails occur largely out of sight from the general public.[17] While intrepid journalists have published important exposés on modern American prison life in recent years,[18] the nation's prisons remain "the

13. *Id.* at 336.

14. *Id.*

15. Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/inside-amercas-black-box.html?smid=nytcore-ios-share [https://perma.cc/X88Y-FXN6].

16. Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/J9WW-X9JH].

17. Dewan, *supra* note 15; *see also* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 152–53 (2019) (cataloguing the types of indignities suffered by those incarcerated in the modern prison system).

18. *See, e.g.*, Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July/Aug. 2016), https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/ [https://perma.cc/AC84-YQLZ] (describing cells that look like tombs, guards using force on a prisoner who just had open-heart surgery as "all part of the bid'ness," and the reporters own priorities changing as "[s]triving to treat everyone as human takes too much energy"); Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html [https://perma.cc/U6N7-MLVT] (recounting tales of self-mutilation, psychosis, and suicide at the federal supermax where all prisoners are held in solitary confinement); Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and 'Frantic*,' N.Y. TIMES (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html [https://perma.cc/69GU-G8JX] (recounting the experience of federal detainees "stuck in freezing cells" with little to no power or heat for at least a week); Jennifer Gonnerman, *Do Jails Kill People?*, NEW YORKER (Feb. 20, 2019), https://www.newyorker.com/books/under-review/do-jails-kill-people [https://perma.cc/DQQ3-4CLA] (noting that the well-known New York City jail on Rikers Island "has long been notorious for its culture of brutality"); German Lopez, *America's Prisoners Are Going on Strike in at Least 17 States*, VOX (Aug. 22, 2018), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018 [https://perma.cc/JFP6-PQBF] (describing the work and hunger strike planned by prisoners across the country from August 21 to September 9, 2018); Aviva Stahl, *Force-Feeding Is Cruel, Painful, and Degrading—and American Prisons Won't Stop*, NATION (June 4, 2019), https://www.thenation.com/article/force-feeding-prison-supermax-torture/ [https://perma.cc/J347-PJHW] (describing the force-feeding tactics utilized on prisoners engaging in hunger strikes by the nation's federal supermax).

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black boxes of our society."[19] But, in order to fully understand the complexities and true nature of our criminal justice system—in particular, the shape and contours of the American form of punishment (i.e., incarceration)—the voices and stories of those living inside prison walls must be heard.[20]

To ensure necessary accountability of those we entrust to incarcerate the millions of Americans behind bars, incarcerated voices must be heard by not only the public but also by those in power. In 2006, the Commission on Safety and Abuse in America's Prisons released a report detailing the problematic conditions that permeated the nation's prisons and jails.[21] The report pointed to the lack of an independent, external monitor of prisons, concluding that without such a checking system, prisons are free to operate with little accountability or transparency.[22]

This lack of accountability is compounded by the fact prison systems often *punish* prisoners who seek to have their voices heard through petition or protest.[23] For example, in January 2020, three men incarcerated by the Michigan Department of Corrections penned an open letter to Michigan Governor Gretchen Whitmer and Corrections Department Director Heidi Washington, describing abusive treatment and unhealthy conditions at the Chippewa Correctional Facility in Michigan's Upper Peninsula.[24] Rather than take heed of the contents of the letter, the Michigan prison system instead issued a disciplinary ticket against at least one of the three men, convicting him of "inciting a riot" and placing him in solitary confinement

19. Dewan, *supra* note 15.

20. *See generally* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462–66 (2014) (discussing problems inherent to the lack of transparency of penal institutions); Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 460–64 (2018) (discussing the invisibility of prisons as compared to other aspects of the criminal justice system).

21. John J. Gibbons & Nicholas deBelleville Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 408–12 (2006) ("Corrections leaders work hard to oversee their own institutions and hold themselves accountable, but their vital efforts are not sufficient and cannot substitute for external forms of oversight.").

22. *See id.* at 408.

23. *See, e.g.*, ALBERT WOODFOX, SOLITARY: UNBROKEN BY FOUR DECADES IN SOLITARY CONFINEMENT. MY STORY OF TRANSFORMATION AND HOPE 278–79 (2019); Paul Egan, *U.P. Prison Inmate Wrote Complaint About Conditions. Then He Was Moved to Solitary*, DET. FREE PRESS (Feb. 11, 2020), https://www.freep.com/story/news/local/michigan/2020/02/11/chippewa-correctional-facility-michigan-prisoner-edward-walton/4721477002/ [https://perma.cc/PEE6-P7EQ]; Joseph O'Sullivan, *Inmates Sue Washington Corrections Officials After Being Put in Solitary Confinement Over Food Strike*, SEATTLE TIMES (Oct. 30, 2019), https://www.seattletimes.com/seattle-news/crime/inmates-sue-washington-corrections-officials-after-being-put-in-solitary-confinement-over-food-strike/?utm_source=The+Marshall+Project [https://perma.cc/BJ5R-Y7K5].

24. Egan, *supra* note 23.

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as punishment.[25] To support the conviction, the Michigan Department of Corrections found that the prisoner "admitted to writing a letter encouraging people on the outside to call the warden and tell her if she doesn't make changes the prisoners want that there will 'be a protest scheduled to take place at this prison to make national attention out of the situation.'"[26]

This call for protest of conditions and treatment faced by incarcerated people follows in the footsteps forged by the Silent Sentinels and their in-prison protests. But, as will be discussed in further detail below, such group petition and protest activities would likely result in similar "inciting a riot" charges in almost every modern prison system.[27] In large part, the proliferation of such scurrilous charges in the regulations governing modern prison systems is undoubtedly related to the long-standing deference afforded to prison officials by the federal courts and the associated curtailment of prisoners' First Amendment rights that results from such deference.

This Article argues for increased legal protections for prisoners who choose to engage in group protest to shed light on the conditions of their incarceration. A companion piece to a similar article that focused on prisoner free speech rights,[28] this Article uses the acts of protest utilized by the Silent Sentinels to examine why prisoners' rights to petition and association should be strengthened. By strengthening these rights, the Article argues that we will advance the values enshrined by the First Amendment's Petition Clause while simultaneously advancing the rights of the incarcerated millions with little to no political power.

The Article proceeds in three parts. First, Part I provides the historical background necessary to understand the utility of the Silent Sentinels as an example demonstrating the importance of protecting the rights to petition and association for the disenfranchised. From there, Part II provides an overview of the doctrinal law associated with prisoners' rights to petition and associate. Part II also discusses the deference to prison officials inherent to First Amendment doctrine as applied to prisoners. Finally, Part III examines how the activities of the Silent Sentinels amount to what almost all prison systems call "inciting a riot" under modern prison regulations and argues that such a result is inconsistent with the purpose and values of the First Amendment. Part III

25. *Id.*

26. *Id.* (quoting Corrections Department spokesman Chris Gautz who quoted "a letter Walton allegedly sent through the prison email system, known as JPay").

27. *See infra* Section III.A.

28. *See* Godfrey, *supra* note 8.

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concludes by cataloguing examples of modern prison protest and calling for more robust protections for such protest.

I. THE SUFFRAGISTS' PROTESTS

By the middle of the second decade of the twentieth century, the fight for women's suffrage in the United States had been raging for more than half a century.[29] Prior to the Civil War, the Equal Rights Association spearheaded the movement with a focus not only on women's rights but also the abolition of slavery.[30] By 1869, the Equal Rights Association fractured into two "separate, warring camps" that eventually led to the formation of two new organizations in 1870.[31] The American Woman Suffrage Association (AWSA) focused its efforts on securing women's right to vote at the state level.[32] In contrast, the National Woman Suffrage Association (NWSA) "espoused a radical platform of sweeping social change to improve the status of women, and advocated a constitutional amendment to guarantee women's voting rights."[33]

For twenty years, the two organizations advocated for women's rights through divergent methods, but by 1890, the two organizations merged to become the National American Woman Suffrage Association (NAWSA).[34] The NAWSA adopted the more moderate advocacy approach championed by the AWSA,[35] a move that some scholars claim brought the suffrage movement to a standstill in the early 1900s.[36] The

29. When the American movement for women's suffrage actually began is a matter of debate, for "[h]istory is defined less by what happened than by who tells the story." Sally Roesch Wagner, *Introduction* THE WOMEN'S SUFFRAGE MOVEMENT, at xxii (Sally Roesch Wagner ed., 2019). Historians often point to the 1848 Seneca Falls Convention as the start to the woman suffrage movement, but "it's also possible that a grade school student going through her local newspaper for a History Day project may someday find an account of a woman's rights meeting held before 1848, setting back that beginning marker." *Id.* at xxii-xxiii; *see also* WARE, *supra* note 7, at 15 (noting that, while "[t]he Seneca Falls Convention holds an iconic place in the history of woman suffrage, . . . it was not, as is often asserted, the first convention ever held on the question of women's rights").

30. STEVENS, *supra* note 1, at 13.

31. *Id.* at 13–14.

32. *Id.* at 14.

33. *Id.*

34. Though beyond the scope of this piece, much controversy surrounded the circumstances leading up to the merger of the AWSA and NWSA in 1890. *See generally* THE WOMEN'S SUFFRAGE MOVEMENT 314–20 (Sally Roesch Wagner ed., 2019).

35. STEVENS, *supra* note 1, at 15.

36. *See* Sally Roesch Wagner, *Afterward* to THE WOMEN'S SUFFRAGE MOVEMENT 484 (Sally Roesch Wagner ed., 2019) ("When the merger favored the AWSA organizational structure, the grassroots process of the NWSA was lost. As the NAWSA leadership entrenched power at the top, disgruntled suffragists dropped out of the organization, often forming their own. State workers on the ground fought the national leadership's dictating their course of action and withholding money if the states didn't fall into line. Campaigns were disrupted and lost as a result. A grassroots movement had been turned into a top-down authoritarian organization worthy of any corporation.").

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NAWSA focused on campaigning state-by-state, and despite some early successes in Colorado, Idaho, and Utah in the 1890s, "from 1896 to 1910, no other state responded to NAWSA's extensive state campaign work."[37] Known as the doldrums, "[n]ot a single suffrage victory, state or national, was achieved" during this time period.[38] All of this began to change during the second decade of the twentieth century when Alice Paul returned to the United States from Great Britain armed with the lessons she had learned from her British counterparts.[39]

A. Alice Paul and Lessons Learned from the Suffragettes

A Quaker by birth, Alice Paul began her advocacy for suffrage rights in 1907 after hearing Christabel Pankhurst speak at the University of Birmingham in the United Kingdom.[40] Leaders of the suffrage cause in Great Britain, Emmeline Pankhurst and her daughters Christabel and Sylvia began "employing a more militant approach to suffrage campaigning in 1905."[41] After hearing Christabel's speech, Ms. Paul joined the Women's Social and Political Union (WSPU)—the organization founded by the Pankhursts.[42] With the WSPU, Ms. Paul participated in marches and demonstrations with the British suffragettes, activities which led to her arrest on seven occasions.[43] Three of these arrests led to imprisonment where Ms. Paul joined her fellow suffragettes in a series of hunger strikes.[44] On at least one occasion, prison officials force fed the hunger-striking women.[45]

While Ms. Paul's experience with the WPSU no doubt had a profound influence on her, she shied away from some of the more militant tactics employed by the Pankhursts in England.[46] Staying true to her

37. Dodd, *supra* note 3, at 361.

38. Roesch Wagner, *supra* note 29.

39. STEVENS, *supra* note 1, at 17. While the focus of this piece is on the protests coordinated and led by Alice Paul and the National Women's Party, I do not mean to suggest that the NAWSA played no role in securing the right to vote for women in the United States. Because of the American constitutional scheme, the NAWSA's state-by-state approach undoubtedly contributed to the passage and ratification of the Nineteenth Amendment, which required approval by thirty-six states. *Id.* at 20; *see also* ELAINE WEISS, THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE 1 (2019); Dodd, *supra* note 3, at 361 (describing NAWSA's "decentralized, state-by-state campaign for women's suffrage, either by state constitutional amendment or state legislative enactment").

40. *See* Dodd, *supra* note 3, at 356.

41. *Id.*

42. *See id.* at 356–57.

43. *Id.* at 357.

44. *Id.* at 357–58.

45. *Id.* at 358.

46. WEISS, *supra* note 39, at 62 (describing the Pankhurst "forces" as "attack[ing] shops and office windows with hammers, plant[ing] small bombs in postboxes, and set[ting] fire to government property").

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Quaker background, Ms. Paul's "militant" tactics never grew more violent than "[h]oisting a picket sign, chaining wrists to a fence, and burning paper."[47] Nevertheless, Ms. Paul's tutelage by the Pankhursts provided her "invaluable experience in organizing parades, developing a network of supporters, opening new local offices, and facing arrest for their protests."[48] Ms. Paul brought this experience with her when she returned home to the United States in January of 1910.[49]

B. The Silent Sentinels' Protests

For two years after her return from Europe, Ms. Paul stayed out of the American suffrage battle; instead, she focused on her doctoral research at the University of Pennsylvania.[50] But by 1912, Ms. Paul found herself ready to join the American suffragists and "persuaded the staid NAWSA, headquartered in New York, to permit her to organize a lobbying arm in Washington, D.C. Known as the Congressional Union, its sole purpose was to lobby for a federal woman suffrage amendment."[51] For the Congressional Union's first public protest, Ms. Paul chose to organize her fellow suffragists in a parade set to occur the day before President Woodrow Wilson's first inauguration in March 1913.[52] The parade consisted of "some 8,000 college women, professional women, working women, and middle-class members of the NAWSA" who marched through the streets of the nation's capital surrounded by the hundreds of thousands of people in town for the inauguration.[53] While the "predominantly male crowd watching the parade as it passed down Pennsylvania Avenue jeered, taunted, spat upon, and roughed up the women," the police sat idly by, failing to protect the women.[54] Nonetheless, Ms. Paul viewed the parade as a rousing success, largely because of the publicity garnered.[55]

In the wake of the parade's success, Ms. Paul began "intensive lobbying campaigns" aimed at garnering support from both the Democratic Party-controlled Congress and White House.[56] Ms. Paul's tactics, however, began to clash with the NAWSA leadership, leading the Congressional Union to withdraw from the NAWSA to form the National

47. *Id.*
48. Dodd, *supra* note 3, at 358.
49. *See id.* at 359.
50. *Id.*
51. STEVENS, *supra* note 1, at 18.
52. *Id.*
53. *Id.*
54. *Id.* at 18–19.
55. *Id.*
56. *Id.*

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Women's Party (NWP) in 1916.[57] Shortly after this split, in January 1917, the NWP began a two-and-a-half-year protest in support of women's suffrage.[58] This protest started outside the White House gates where a dozen women gathered carrying purple, white, and gold banners; they became the first group of American citizens to ever picket the White House.[59] Earning the moniker "Silent Sentinels," the women stood in peaceful silence while holding banners with slogans like, "Mr. President, what will you do for women's suffrage?" and "How long must women wait for liberty?"[60]

For the first several months, the White House picketing lines remained largely peaceful.[61] President Wilson mostly ignored the picketers, merely tipping his hat or smiling at them as he passed on his way in and out of the White House.[62] As the women persisted in their daily protest throughout the winter months, the President ordered the White House "guards to invite them for a cup of hot coffee," an invitation the Silent Sentinels declined.[63] In all, the President seemed to view the protest as "a trifling incident staged by a minority of the radical suffragists" and remained "confident in his national power."[64] In effect, he tolerated the picketers' presence but saw no need to change his own political agenda in response to the protest.

President Wilson's toleration evaporated by April 1917, however, when the United States entered World War I.[65] While many expected the NWP to suspend its picketing campaign in support of the war effort, Ms. Paul and other NWP leaders decided to continue their protest because "in doing so the organization serve[d] the highest interests of the country."[66] This decision lost the NWP a sizable portion of its membership, but the strategy ultimately succeeded in keeping public attention on the cause of suffrage.[67] The United States' war effort also gave the suffragists a new advocacy angle: they became determined to highlight the hypocrisy inherent in President Wilson's championing of democracy around the

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 59; *see also* Rivera Sun, *Silent Sentinels Start Suffrage Protest on Jan 10th, 1917*, RIVERA SUN (Jan. 8, 2016), http://www.riverasun.com/silent-sentinels-start-suffrage-protest-on-jan-10th-1917/ [https://perma.cc/F9A7-MKBX].

61. STEVENS, *supra* note 1, at 59–66.

62. *Id.* at 61.

63. *Id.*

64. *Id.*

65. *Id.* at 67.

66. Dodd, *supra* note 3 (quoting CHRISTINE A. LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928, at 111–12 (2000)).

67. *Id.* at 401 n.264.

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world while denying democratic participation to half of his own citizens.[68] With this goal in mind, the suffragists created new banners meant to embarrass President Wilson and his administration. Specifically, the suffragists utilized those banners whenever a foreign envoy visited the White House.[69] This new strategy turned out to be a tipping point that would ultimately cause the suffragists to be arrested en masse, an outcome that generated even more publicity for the NWP and its cause.[70]

On June 20, 1917, the Wilson administration hosted a Russian envoy at the White House.[71] When the envoy arrived at the White House gates, the suffragists stood holding a banner seeking to draw on the sentiments espoused during the Russian Revolution.[72] The banner read:

> To the Russian Envoys, we the women of America tell you that America is not a democracy. Twenty million American women are denied the right to vote. President Wilson is the chief opponent of their national enfranchisement. Help us make this nation really free. Tell our government it must liberate its people before it can claim free Russia as an ally.[73]

This banner drew the ire of an angry passerby, who tore it down.[74] When the women returned the next day with a similar banner, a group of boys destroyed the second banner, too.[75] On each day, police officers stood idly by, watching the destruction of the banners.[76] With these actions, the peaceful nature of the Silent Sentinels' daily protest forever changed.

On June 22, 1917, two days after the destruction of the first banner, "local police, apparently with the tacit support of the Wilson administration, started arresting and jailing picketers for disorderly conduct and obstructing sidewalk traffic, even though they were doing nothing differently than they had for the past six months."[77] Police only arrested two picketers on that first day of arrests, and local officials quickly dismissed the charges levied against them.[78] However, the arrests continued over the next several days.[79] On June 26, 1917, D.C. officials arrested six women for "obstructing the traffic," tried them, and sentenced

68. *Id.* at 400.
69. *Id.*; *see also* STEVENS, *supra* note 1, at 74.
70. STEVENS, *supra* note 1, at 73.
71. *Id.*
72. WARE, *supra* note 7, at 244.
73. STEVENS, *supra* note 1, at 74.
74. *Id.*; WARE, *supra* note 7.
75. STEVENS, *supra* note 1, at 74.
76. *Id.*
77. WARE, *supra* note 7, at 244.
78. STEVENS, *supra* note 1, at 76; Dodd, *supra* note 3, at 404.
79. STEVENS, *supra* note 1, at 76.

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them to a $25 fine after returning a guilty verdict.[80] When the women refused to pay the fine, the court ordered they be incarcerated in the D.C. jail for three days.[81] Thus began a series of arrests and incarcerations for the Silent Sentinels that would last for the next several months, drawing critical attention across the nation.[82]

C. In-Prison Petitions and Protests

The first incarcerated Silent Sentinels spent only minimal time in the District Jail, but by July 17, 1917, local officials had arrested, tried, convicted, and sentenced sixteen picketers to sixty days at the Occoquan Workhouse in Virginia.[83] The Occoquan Workhouse in Lorton, Virginia, is an infamous prison known for its squalid conditions.[84] The Women's Workhouse at Occoquan opened in 1912 and confined "poor women of color, imprisoned for crimes such as disorderly conduct and prostitution. The women of the workhouse did laundry for the facility, while others worked in the gardens."[85] The suffragists confined to Occoquan found themselves facing horrible conditions.[86] Prison officials served the women inedible food with worms in it, gave them blankets that had not been washed or cleaned for a year, withheld communication from the outside world, and subjected them to ruthless forms of punishment, including "physical intimidation and violence."[87] The prison superintendent and his son meted out particularly brutal punishments, including beating the

80. *Id.*

81. Dodd, *supra* note 3, at 404.

82. *See, e.g.*, STEVENS, *supra* note 1, at 162, 168, 172–73, 179.

83. Dodd, *supra* note 3, at 404–05.

84. *See* Wilson Korges, *The Lasting Legacy of Suffragists at the Lorton Women's Workhouse*, FOLKLIFE (Mar. 21, 2018), https://folklife.si.edu/magazine/lasting-legacy-of-suffragists-at-lorton-occoquan-womens-workhouse [https://perma.cc/AX7W-AJTT]. Workhouses in general have largely been known as places for the destitute. Seán McConville, *The Victoria Prison: England, 1865-1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 117 (Norval Morris & David J. Rothman eds., 1995). Arising as a form of punishment in Europe in the late sixteenth century, the workhouse punishment regime revolved around forced labor, wherein prisoners were expected to put in ten-to-twelve-hour days (with Sundays reserved for religious worship) and produce a certain fixed output of product. Pieter Spierenburg, *The Body and the State: Early Modern Europe*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 45, 61 (Norval Morris & David J. Rothman eds., 1995). Institutions of "strict control" with a "harsh disciplinary regime," workhouse conditions (e.g., unpalatable food provided in only minimal amounts, hard labor, shameful uniforms, and boards rather than beds for sleep) were deliberately meant to deter prisoners from returning. Patricia O'Brien, *The Prison on the Continent: Europe, 1865-1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 178, 182 (Norval Morris & David J. Rothman eds., 1995); *see also* McConville, *supra*, at 128. The conditions at Occoquan proved no different than these traditional workhouses. WARE, *supra* note 7, at 246.

85. Korges, *supra* note 84.

86. WARE, *supra* note 7, at 246.

87. *Id.*; *see also* STEVENS, *supra* note 1, at 96.

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women, limiting their food to bread and water, and utilizing a form of punishment known as "the greasy pole."[88]

> This method of punishment consisted of strapping girls with their hands tied behind them to a greasy pole from which they were partly suspended. Unable to keep themselves in an upright position, because of the grease on the pole, they slipped almost to the floor, with their arms all but severed from the arm sockets, suffering intense pain for long periods of time.[89]

Exploiting the integrated nature of the workhouse and pre-existing racial tensions, prison officials also forced women of one race to brutally attack women of another race, threatening punishment for refusal.[90]

Given the conditions at Occoquan, it should be no surprise that the initial sentences to the workhouse in July 1917 caused quite a stir, particularly given the "well-connected women" associated with the suffrage movement.[91] The convicted suffragists included the daughter of a former ambassador and secretary of state, the wife of a Progressive Party leader, and other society figures.[92] The husbands of many of the women "turned to [President] Wilson in outrage," and the sentences to Occoquan garnered enormous press coverage.[93] By July 19, 1917, President Wilson had issued pardons to the women.[94]

Nevertheless, the women continued their picketing and more arrests followed.[95] By August 17, 1917, local police officers arrested six more suffragists, each sentenced to thirty days at Occoquan.[96] The arrests continued in the subsequent weeks, and on September 4, 1917, local officials arrested a group and sentenced them to sixty days at Occoquan.[97] President Wilson issued no further pardons, and the women garnered no special treatment in the prison, finding conditions of "poor sanitation, infested food, and dreadful facilities."[98]

> As far as possible the women intended to abide by the routine of the institution, disagreeable and unreasonable as it was. They performed the tasks assigned to them. They ate the prison food without protest. They wore the coarse prison clothes. But at the end of the first week

88. STEVENS, *supra* note 1, at 96, 99.
89. *Id.* at 99.
90. *Id.*
91. Dodd, *supra* note 3, at 405.
92. *Id.*
93. *Id.* at 406–07.
94. *Id.* at 407.
95. *Id.* at 407–08.
96. *Id.* at 408.
97. *Id.*
98. *Id.* at 411.

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> of detention they became so weak from the shockingly bad food that they began to wonder if they could endure a diet of sour bread, half-cooked vegetables, and rancid soup with worms in it.[99]

Meanwhile, local officials, with White House support, continued to arrest the picketers and sentence them to longer and longer sentences.[100] The publicity of the suffragists' incarceration, "the reports of [the] dreadful conditions in [the] jail," and the resignation of a close confidant of President Wilson in September—a resignation made in solidarity with the picketers—led to "unprecedented demonstrations of support in Congress."[101] By September 14, 1917, one month after the second large set of prisoners arrived at Occoquan, Senator Andrieus A. Jones, the Chair of the Senate Committee on Woman Suffrage, visited Occoquan.[102] One day later, the House of Representatives reported the Nineteenth Amendment out of committee.[103]

As it became clear that the arrests would continue, the women would receive longer and longer sentences, and the publicity garnered by the arrests put pressure on Congress, the suffragists moved their protest inside prison walls.[104] Claiming to be political prisoners, the women sought to intensify the pressure the picketing placed on the Wilson Administration by highlighting the injustice of their plight.[105] The women began circulating a petition within Occoquan—"the first organized group action ever made in America to establish the status of political prisoners."[106] Catching wind of the petition, prison officials moved many women to solitary confinement.[107] The petition demanded (1) that the suffragists be treated as political prisoners; (2) that the suffragists be allowed to congregate together and all be released from solitary confinement; (3) that the suffragists be afforded the opportunity to meet with their lawyers; (4) that the suffragists be allowed to receive food from the outside; and (5) that the suffragists be provided writing material and books, letters, and newspapers.[108]

In the petition, the suffragists also highlighted the horrid conditions within Occoquan, stating that they did not immediately create the petition "because on entering the workhouse [they] found conditions so very bad

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99. STEVENS, *supra* note 1, at 95.
100. Dodd, *supra* note 3, at 410.
101. *Id.* at 405, 410–11.
102. *Id.* at 411.
103. *Id.*
104. *Id.*
105. STEVENS, *supra* note 1, at 95.
106. *Id.*
107. *Id.* at 107.
108. *Id.* at 107–08.

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that before [they] could ask that the suffragists be treated as political prisoners, it was necessary to make a stand for the ordinary rights of human beings for all the [prisoners]."[109] After garnering signatures for the petition, the suffragists smuggled it out of Occoquan for delivery to the commissions of the District of Columbia.[110] In addition to the petition, the suffragist prisoners also announced a prison work strike.[111]

Rather than respond in any meaningful way, prison officials and district commissioners transferred the signatories out of Occoquan to the District Jail, placing each in solitary confinement.[112] Conditions at the District Jail proved no better than conditions at Occoquan: built in the 1870s, the jail's cells measured six-by-nine feet, so small that the women could touch each side with their fingerprints, arms outstretched.[113] The tiny cells were infested with vermin, including rats and bed bugs, and each cell contained an open toilet, which, when combined with the prison's practice of closing the windows from the late afternoon until morning, created a stifling environment with no fresh air.[114] The windows in the cells locked, and jail officials punished any woman who attempted to open a window.[115] The jail served food no more palatable than the food at Occoquan, and the women survived on bread, water, and molasses (occasionally provided by jail officials).[116]

In protest of these conditions and the suffragists' placement in solitary confinement, Alice Paul, who had been arrested on October 20, 1917, and sentenced to seven months, began a hunger strike, drawing on the lessons learned during her years working with the Pankhursts.[117] To Ms. Paul and the others who joined her, the hunger strike was "the ultimate form of protest left."[118] Rather than heed the demands of the suffragists, however, the jail administrators began force-feeding the hunger strikers.[119]

In response to the force-feeding, suffragists on the outside increased the number of picketers at the White House gates.[120] This increase led to the largest arrest of picketers participating in the protest campaign. On November 11, 1917, officials arrested forty-one Silent Sentinels.[121] After

109. *Id.* at 108.
110. Dodd, *supra* note 3, at 411.
111. STEVENS, *supra* note 1, at 107.
112. *Id.* at 108.
113. ZHANISER & FRY, *supra* note 10, at 282.
114. *Id.* at 282–83; *see also* STEVENS, *supra* note 1, at 113.
115. STEVENS, *supra* note 1, at 113.
116. *Id.* at 114.
117. Dodd, *supra* note 3, at 415.
118. STEVENS, *supra* note 1, at 115.
119. *Id.* at 118–19.
120. Dodd, *supra* note 3, at 413.
121. *Arrest 41 Pickets for Suffrage at the White House*, N.Y. TIMES, Nov. 11, 1917, at 1.

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conviction, the women arrived at Occoquan on November 15, 1917, ushering in what suffragists would later call the "Night of Terror."[122] From the moment the women arrived at the prison, prison officials subjected them to rough man-handling and physical beatings.[123] Prison officials threw the women into dark, dirty cells with iron beds and open toilets that flushed only from the outside.[124] Throughout the night, the women experienced "forced stripping, physical violence, shackling with manacles to prison bars, and threatened use of straightjackets and gags."[125] Prison officials provided the women with no food for almost twenty-four hours and denied the women visitation with their attorney and family members.[126] Many of the women immediately began a hunger strike.[127] In an effort to break the will and morale of the hunger strikers, the Occoquan officials isolated them from one another, interrogated them, informed them that no one from the outside cared about their plight, lied to them that their attorney quit fighting for their case and cause, and instructed them that their compatriots had given up the fight.[128] The women "suspected the lies and remained strong in their resistance."[129]

Eventually able to consult with their lawyer, the women filed a petition for a writ of habeas corpus, arguing that their confinement at Occoquan was illegal because Occoquan fell outside the territorial confines of the District of Columbia, where they had been convicted and ordered to serve their sentences.[130] They also argued that their sentencing papers authorizing imprisonment as punishment indicated they should be confined in the District Jail.[131] On November 23, 1917, Judge Edmund Waddill of the United States District Court for the Eastern District of Virginia held a hearing on the writ petition.[132] The women filed into the courtroom looking "haggard, red-eyed, and sick," some too weak to walk to their seats and some bearing "the marks of the attack on the 'night of terror.'"[133] Judge Waddill, "alarmed by the writ's description of the women's treatment, calling it 'bloodcurdling' if true," granted the

122. Dodd, *supra* note 3, at 413.
123. *Id.*
124. STEVENS, *supra* note 1, at 122–23.
125. WAGNER, *supra* note 34, at 339 (citing *Accuse Jailors of Suffragists*, N.Y. TIMES, Nov. 17, 1917, at 1).
126. STEVENS, *supra* note 1, at 124.
127. *Id.* at 124–26.
128. *Id.* at 126.
129. *Id.*
130. *Id.* at 127, 130.
131. *Id.*
132. *Id.* at 128.
133. *Id.* at 129.

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petition.[134] The judge found "that the suffragists had been illegally imprisoned at Occoquan (rather than the District Jail) and that they could be paroled on bail or finish their terms at the District Jail."[135] In a show of solidarity with the women already serving sentences in the jail, twenty-two women chose to finish their sentences and joined the hunger strike already in progress when they arrived.[136] Faced with thirty hunger-striking women, the jail released all of the women on November 27 and 28, 1917.[137] By March 4, 1918, the D.C. Circuit Court of Appeals invalidated the women's convictions.[138]

Thereafter, as congressional momentum built behind the passage of the Nineteenth Amendment, the women paused their picketing for a short while.[139] On January 10, 1918, "exactly forty years to a day from the time the suffrage amendment was first introduced into Congress and exactly one year to a day from the time the first picket banner appeared at the gate of the White House," the House of Representatives passed the Nineteenth Amendment.[140] However, when it became clear that the Senate would stall the Amendment's passage, the women again gathered at Lafayette Monument, directly across from the White House, with their banners in tow on August 6, 1918.[141] District officials arrested forty-eight women at the protest, charged them with and convicted them of "holding a meeting in public grounds" and "climbing a statue," and sentenced them to ten (for holding a public meeting) or fifteen (for climbing a statue) days.[142]

District officials transported twenty-six of these women to an abandoned building that used to serve as a men's workhouse until it "ha[d] been declared unfit for human habitation in 1909."[143]

> This place was the worst the women had experienced. Hideous aspects which had not been encountered in the workhouse and jail were encountered here. The cells were damp and cold. The doors were partly of solid steel with only a small section grating, so that a very tiny amount of light penetrated the cells. The cots were of iron, without any spring and with only a thin straw pallet to lie upon. So frightful were the nauseating odors which permeated the place, and

134. ZHANISER & FRY, *supra* note 10, at 294.
135. Dodd, *supra* note 3, at 415 n.346.
136. STEVENS, *supra* note 1, at 130.
137. *Id.* at 129.
138. Hunter v. District of Columbia, 47 App. D.C. 406, 410 (D.C. Cir. 1918).
139. STEVENS, *supra* note 1, at 137–40.
140. *Id.*
141. *Id.* at 141.
142. *Id.* at 129.
143. *Id.*

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> so terrible was the drinking water from the disused pipes, that one prisoner after another became violently ill.[144]

Picking up right where they left off during their last prison stint, the suffragists immediately restarted their protests: all but two very elderly women declared a hunger strike upon arrival.[145] Within five days, district officials once again released the women early, prior to the completion of their sentences.[146]

In the months that followed, the women's protests continued, and the district police made periodic arrests.[147] With each arrest, conviction, and sentence, the women continued their practice of hunger striking in prison.[148] While their in-prison petitioning and protests advanced their cause, it also brought attention, albeit limited, to the conditions of confinement at Occoquan and the District Jail.[149] The suffragists' press coverage eventually led to a congressional investigation into the conditions at Occoquan and, "after receiving one too many protest letters about the suffragists plight," President Wilson requested an inquiry into Occoquan's conditions.[150] While the President's secretary, and right-hand man, confirmed the women's poor treatment, the President rejected his opinion, instead tasking a district commission with the assignment of preparing an investigative report on conditions.[151] The commissioners "did little more than interview the prison officials," and the report ultimately kowtowed to political pressure.[152] However, the inquiry nonetheless brought a small amount of transparency to the prison that had theretofore been lacking.[153]

The suffragists' in-prison protest strategies are often replicated by prisoners in the modern American carceral state. Yet, much like the suffragists' experience, today's prisoners often face extreme punishment and retaliation for protest activities like petitioning and striking, particularly when the prisoners attempt to engage in any form of group protest. Prison officials mete out such punishment and retaliation with impunity largely because of the deference afforded to prison officials under modern First Amendment doctrine as applied to prisoners. The next section discusses this doctrine and its attendant deference.

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144. *Id.* at 144.
145. *Id.*
146. *Id.*
147. *See, e.g.*, *id.* at 162, 168, 172–73, 179.
148. *Id.* at 162.
149. *Id.* at 98.
150. ZHANISER & FRY, *supra* note 10, at 288.
151. *Id.*
152. Dodd, *supra* note 3, at 423–24; *see also* ZHANISER & FRY, *supra* note 10, at 288.
153. ZHANISER & FRY, *supra* note 10, at 288.

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II. THE FIRST AMENDMENT AND PRISONER PETITION AND ASSOCIATIONAL RIGHTS

Among other rights,[154] the First Amendment protects "the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[155] These rights are severely restricted and essentially non-existent in prison. While there are obvious and valid reasons to exclude gang membership from constitutional protections,[156] prisoner membership in other groups, both formal and informal, is also often excluded from constitutional protection.[157] Most importantly, pursuant to the Supreme Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[158] prison officials have unfettered discretion to ban prisoner organizations that oppose or criticize prison policies. Moreover, even when a prison system allows a prisoner organization to exist, the prison may restrict the activities of those organizations whenever it sees fit with little to no judicial oversight.[159]

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154. In a companion piece to this Article, I focused on the First Amendment right to free speech and used the example of the suffragist prisoners to argue for a more robust right to speech for prisoners. *See generally* Godfrey, *supra* note 8.

155. U.S. CONST. amend. I.

156. *See* Westefer v. Snyder, 422 F.3d 570, 575 (7th Cir. 2005) (holding that segregation of gang members and subsequent transfer to supermax prison did not violate First Amendment); Harbin-Bey v. Rutter, 420 F.3d 571, 576–79 (6th Cir. 2005) (upholding designation of prisoners who received and sent mail and publication with gang references as a "Security Threat Group" leader with restrictions on visiting, community placement, and other privileges); Stewart v. Almeida, 418 F. Supp. 2d 1154, 1162–63 (N.D. Cal. 2006) (upholding "gang validation" procedure that usually resulted in gang members placement in SHU); Koch v. Lewis, 96 F. Supp. 2d 949, 960–66 (D. Ariz. 2000) (upholding requirement that gang members renounce gang membership and inform on other members to get out of segregation), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005).

157. *See, e.g.*, Burnette v. Phelps, 621 F. Supp. 1157, 1159–60 (M.D. La. 1985) (finding prisoners who wanted to speak to other prisoners in the dining hall had no First Amendment associational right to challenge a rule prohibiting speaking); Dooley v. Quick, 598 F. Supp. 607, 612 (D.R.I. 1984) (finding that prisoners had no associational right to challenge prison rules limiting how and when prisoners may see each other so long as there is some opportunity for human contact), *aff'd*, 787 F.2d 579 (1st Cir. 1986); *see also* Brew v. School Bd. of Orange Cnty., 626 F. Supp. 709, 716–18 (M.D. Fla. 1985) (finding no associational claim for work release prisoner and teacher who wanted to fraternize on school premises), *aff'd*, 802 F.2d 1397 (11th Cir. 1986). *But see* Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir. 1984) (holding that claim that prison hospital ordered other prisoners not to associate with plaintiff and threatened to punish plaintiff for such association "arguably" stated a claim for denial of freedom of association). Notably, even religious organizations have less constitutional protection under the First Amendment. *See* Fraise v. Terhune, 283 F.3d 506, 518–23 (3d Cir. 2002) (allowing prison officials to classify the Five Percenters as a "Security Threat Group" and to segregate any prisoner who refuses to renounce all ties with the group); *In re* Long Term Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 466–69 (4th Cir. 1999).

158. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

159. *See, e.g.*, Preast v. Cox, 628 F.2d 292, 294 (4th Cir. 1980) (upholding rule that prisoner groups receive official recognition before engaging in joint activities even though denial of recognition would be unreviewable by the court); Akbar v. Borgen, 803 F. Supp. 1479, 1485–86 (E.D. Wis. 1992) (upholding rule forbidding "unsanctioned" group activity on its face and as applied to a prisoner seeking to form a Muslim organization); Hudson v. Thornburgh, 770 F. Supp. 1030, 1036 (W.D. Pa.

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While the group associational rights of prisoners are unequivocally limited, the status of prisoners' right to petition is not as clear. Some courts have found that a prisoner's right to petition is a protected right,[160] while others allow prison systems to restrict or ban prisoner petitions.[161] The ambivalence of the federal courts regarding a prisoner's right to petition runs contrary to the historical importance of the right to petition as a crucial means of redress for the disenfranchised.[162] Regarded as "among the most precious of the liberties safeguarded by the Bill of Rights,"[163] the right to petition has long-been used by groups with little to no political power as a way to participate in democracy.[164] For example, historically, prisoners have been able to use the right to petition to instigate legislative investigations into prison conditions.[165] However, as discussed in detail below, prisoners' right to petition is significantly curtailed today. Before turning to that discussion, we must first examine why prisoners' associational rights are so curtailed and the

1991) (upholding prison system's decision to disband Association of Lifers because prison officials determined the group's existence posed a security threat); Salahuddin v. Coughlin, 591 F. Supp. 353, 361 (S.D.N.Y. 1984) (upholding ability of the prison system to restrict the associational rights of prisoners involved in the Inmate Liaison Committee). *But see* Nicholas v. Miller, 189 F.3d 191, 194–95 (2d Cir. 1999) (per curiam) (declining to award summary judgment on associational claim where prison prohibited the formation of the Prisoners' Legal Defense Center); Castle v. Clymer, 15 F. Supp. 2d 640, 665–66 (E.D. Pa. 1998) (holding that prison system could not transfer a prisoner for his activities in a Lifers organization that the prison authorized).

160. *See, e.g.*, Bridges v. Russell, 757 F.2d 1155, 1156–57 (11th Cir. 1985); Haymes v. Montanye, 547 F.2d 188, 191 (2d Cir. 1976); Stoval v. Bennett, 471 F. Supp. 1286, 1290 (M.D. Ala. 1979).

161. *See, e.g.*, Duamutef v. O'Keefe, 98 F.3d 22, 24 (2d Cir. 1996) (allowing a prohibition on petitions because of the existence of a grievance process); Nickens v. White, 622 F.2d 967, 971–72 (8th Cir. 1980) (upholding a regulation prohibiting "mass protest petition" given the existence of alternative methods for individual prisoners to express their views (e.g., correspondence and the grievance process)); Williams v. Stacy, 468 F. Supp. 1206, 1209–11 (E.D. Va. 1979) (allowing prohibition of petition that described prison guards as "Nazis" and "maniacs" and warning of "another Attica").

162. *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011).

163. *See* United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

164. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2181–82 (1998) (noting the historical use of petitions by prisoners to address both individualized grievances related to their convictions but also to lead "to such legislative action as the investigation of the treatment of prisoners); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 153 (1986) (noting that "unrepresented groups—notably women, felons, Indians, and, in some cases, slaves—represented themselves and voiced grievances through petitions").

165. Higginson, *supra* note 164, at 147 n.27 (recounting an "occurrence in Georgia" where "[t]he House, acting on petitions which alleged inhuman prison treatment, 'immediately resolved itself into a Committee of the Whole House upon said Petition,' and went in a body to the jail to look into the matter" (quoting RALPH VOLNEY HARLOW, HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825 97 (1917))).

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deference afforded to prison officials in relation to all infringements on prisoners' First Amendment rights.

A. Jones v. North Carolina Prisoners' Labor Union, Inc.

For more than a century after the adoption of the Bill of Rights, the American federal courts refused to entertain claims challenging prison conditions.[166] Federal courts remained steadfastly unwilling to interfere in the internal management of prisons by using an approach that later became known as the "hands-off" doctrine.[167] This doctrinal approach to prisoners' constitutional rights changed, however, in the late nineteen sixties and early nineteen seventies when prisoners began organizing in protest of the institutional conditions of the prisons that confined them.[168]

While the courts began recognizing the enforceability of certain constitutional rights for prisoners, American politics began to sharply shift focus "to maintaining civic order and fighting crime."[169] In reaction to this wave of prisoner activism, prison systems began to expend enormous effort trying to limit prisoners' ability to meet and organize within prison walls:

> They attempted to ban meetings of [prisoners] within prisons. They tried to forbid the sending or receiving of union-related material through the prison mail system. They also singled out specific prisoner labor leaders for time in segregation. However, the biggest thorn in their side was [prisoner] claims to the right to unionize. If [prisoners] could join a union, then they would have rights. If they had rights, then prison officials would no longer have carte blanche to extract prisoners' labor as they saw fit.[170]

166. Godfrey, *supra* note 17, at 165.

167. *Id.* (quoting Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 169, 191 (Norval Morris & David J. Rothman eds. 1995)).

168. *See* Godfrey, *supra* note 17, at 165 (noting the federal courts' abandonment of the hands-off doctrine in the late sixties and early seventies); Heather Ann Thompson, *Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, *in* 8 LABOR: STUDIES IN WORKING-CLASS HISTORY OF THE AMERICAS 15, 30 (2011) [hereinafter Thompson, *Working-Class Struggle*] (noting that prisoner activism escalated in the 1960s and early 1970s). *See generally* Heather Ann Thompson, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY (2016) [hereinafter Thompson, ATTICA] (recounting the history and aftermath of the 1971 prison riot in Attica Correctional Facility in Attica, New York).

169. Thompson, ATTICA, *supra* note 168, at 18. The racism and racial subjugation inherent to the politics of the War on Crime and the War on Drugs have been well-documented and analyzed. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, *passim* (2010).

170. Thompson, *Working-Class Struggle*, *supra* note 168, at 30.

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Prison officials' efforts to quell prisoner organizing and protest activities culminated in the 1977 Supreme Court decision in *Jones v. North Carolina Prisoners' Labor Union*.[171]

Jones concerned the activities of the North Carolina Prisoners' Labor Union (NCPLU), founded in 1974 to

> secure meaningful rehabilitation programs, to defend human and civil rights of prisoners, to arrange for community based support groups to appear before legislative bodies in the interests of prison reform, to educate the public through the publication of a union newspaper and through news releases, to retain attorneys for the protection of prisoners' legal rights, and for the advancement of prisoners' economic, political, social, and cultural interests.[172]

By the time the *Jones* case reached the Supreme Court, the NCPLU had approximately 2,200 members living in forty different correctional institutions across the state of North Carolina.[173] The organization took pride in its multi-racial composition, and its Board of Directors included "seven white persons, six black persons and one American Indian."[174]

In reaction to the formation of the NCPLU,[175] North Carolina prison officials promulgated an administrative regulation that (1) prohibited prisoners from soliciting others to join a prisoner union, (2) prohibited any prisoner union from using North Carolina Department of Correction property, (3) called for the permanent exclusion of any person entering a correctional unit with the purpose of organizing, and (4) prohibited correctional officers from negotiating with any prisoner union.[176] Pursuant to this regulation, prison officials took several actions that interfered with the operation of the NCPLU.[177] First, prison officials censored any incoming mail, whether sent by prisoners or non-prisoners, that related to solicitation of union members.[178] Second, prison officials censored the NCPLU's bi-monthly newsletter, preventing its introduction into any North Carolina prison by disposing of it or returning it to the sender.[179]

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171. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

172. Brief for Appellee at 5, Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (No. 75-1874), 1976 WL 181714, at *7.

173. *Id.*

174. *Id.*

175. Notably, despite legally incorporating as a labor union under the auspices of the Secretary of State of North Carolina, the NCPLU expressly disclaimed any intention to operate as a true labor union as defined by the National Labor Relations Act. N.C. Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 940 n.1 (E.D.N.C. 1977).

176. *Jones*, Brief for Appellee, *supra* note 172, at *8.

177. *Id.* at *8–10.

178. *Id.* at *9.

179. *Id.* at *9–10.

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Finally, prison officials barred paralegals employed by the NCPLU's attorneys from visiting the prisoners.[180]

The NCPLU filed suit in the United States District Court for the Eastern District of North Carolina in early 1975, claiming defendant prison officials violated "its rights and the rights of its members to engage in speech, press, association and assembly activities protected by the First Amendment" by enacting and enforcing the above regulation.[181] In defense of its infringement on the NCPLU's rights, North Carolina prison officials asserted four reasons why its restrictions were lawful.[182] First, prison officials claimed the NCPLU may create "a divisive element" amongst the prisoner population.[183] Second, prison officials speculated that the individual prisoner organizers may become "power figures" among the incarcerated population.[184] Third, prison officials discounted the need for an organization like the NCPLU, reasoning that the Inmate Grievance Commission provides prisoners a forum for "airing their complaints."[185] Finally, prison officials feared "work stoppages and mutinies, riots, and chaos could result" in allowing the NCPLU to continue its operations.[186] The NCPLU responded to these concerns by asserting that the "apprehensions were all of a speculative nature" and that prison officials could point to no "facts derived from the six preceding months of Union activity within the North Carolina correctional system, or to experiences in the prison systems of other jurisdictions, which lent any support to their fears."[187]

On March 26, 1975, the Eastern District of North Carolina certified a three-judge district court panel to determine the constitutionality of the regulation.[188] Almost a year later, on March 16, 1976, the three-judge panel held the regulation unconstitutional and entered a judgment in favor of the NCPLU.[189] The North Carolina prison officials sought review of the district court's judgment in the Supreme Court.[190]

180. *Id.* at *10.
181. *Id.* at *4.
182. *Id.* at *10–11.
183. *Id.* at *10.
184. *Id.*
185. *Id.* at *10–11.
186. *Id.* at *11.
187. *Id.* at *11.
188. *Id.* at *5.
189. *Id.*
190. *Id.* at *2. 28 U.S.C. § 1253 grants the Supreme Court jurisdiction over any appeal "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

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The Supreme Court reversed the district court, upholding the prison officials' ban on solicitation for union meetings and membership.[191] In reaching its conclusion, the Supreme Court stressed that the prisoners' "First Amendment associational rights . . . must give way to the reasonable considerations of penal management."[192] In reaching this conclusion, the Court noted the realities of prison life significantly curtail and necessitate restrictions on prisoners' right to associate.[193] Importantly, however, the Court stressed the need to defer to the discretion of prison officials who determined that "the presence, *perhaps even the objectives*, of a prisoners' labor union would be detrimental to order and security in the prisons."[194] The Court reached this conclusion despite the paucity of evidence supporting the prison officials' conclusions that "work slowdowns or stoppages or other undesirable concerted activity" would result from the NCPLU's existence.[195] By ignoring this clear lack of evidence, the Supreme Court ushered in an era of blind deference to prison officials that allows for frequent and consistent infringement of the First Amendment rights of prisoners.[196] That deference inhibits prisoners' ability to protest in the manner of the suffragists' prisoners because such protest activity will inevitably lead to further punishment.

B. The Flaws of Deference to Prison Officials

The deference accorded the prison officials in *Jones* has proved the rule rather than the exception in the decades since the Supreme Court issued its decision.[197] While the Supreme Court ostensibly promises prisoners that "[p]rison walls do not form a barrier separating"[198] them

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191. Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129, 133 (1977).

192. *Id.* at 132.

193. *Id.*

194. *Id.* (emphasis added). Please recall that the so-called detrimental objectives of the NCPLU included the following:

> secure meaningful rehabilitation programs, to defend human and civil rights of prisoners, to arrange for community based support groups to appear before legislative bodies in the interests of prison reform, to educate the public through the publication of a union newspaper and through news releases, to retain attorneys for the protection of prisoners' legal rights, and for the advancement of prisoners' economic, political, social, and cultural interests.

Jones, Brief for Appellee, *supra* note 172, at *7.

195. *Jones*, 433 U.S. at 123 (quoting N.C. Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 942 (E.D.N.C. 1976)); *see also id.* at 124 (finding "not one scintilla of evidence to suggest that the Union had been utilized to disrupt the operation of the penal institutions").

196. *Id.* at 141–43 (Marshall, J., dissenting) (criticizing the *Jones* majority's blind deference to the North Carolina prison officials and failure to account for the credibility assessment conducted by the three-judge panel in the district court).

197. *See* Godfrey, *supra* note 8, at 337–41.

198. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (quoting Turner v. Safley, 482 U.S. 78, 84 (1987)).

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from constitutional protections, First Amendment doctrine now formally incorporates the deference afforded in *Jones* into the test utilized to determine whether a prison regulation violates a prisoner's First Amendment rights.[199] In a companion piece to this Article, I fully catalogue the myriad criticisms lodged against this doctrine of deference, and I need not fully repeat that catalog here.[200] Rather, I pause only to highlight those criticisms particular to my focus on the importance of protecting prisoner rights to association and petition (i.e., those criticisms most relevant to the Supreme Court's analysis in *Jones*).

First, the *Jones* Court accepted the prison officials' argument that the NCPLU's existence and objectives undermined the good order and security of the prison without consideration of any evidence to the contrary.[201] In fact, the *Jones* Court shifted the burden to the prisoners to "conclusively" demonstrate the fallacy in the prison officials' position.[202] But in crediting the prison officials' opinions that the NCPLU's existence and objective *might* undermine prison security, the Supreme Court ignored the fact-finding conclusions of the three-judge panel, which found "not one scintilla of evidence that the [NCPLU] had been utilized to disrupt the operation of the penal institutions."[203] Moreover, the Supreme Court's decision ignored the contemporary acknowledgement by some prison administrators that the recognition and support of prisoner groups actually helps stabilize the prison environment.[204] For example, in the early 1970s, prison officials in Washington allowed prisoners at the Washington State Penitentiary in Walla Walla "to elect a council with authority to

199. *See Turner*, 482 U.S. at 84–85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.") The *Turner* Court expressly emphasized that the four-part test it articulated was driven by its perceived need to defer to the judgment of prison officials. *Id.* at 89–91 (articulating the four factors).

200. *See generally* Godfrey, *supra* note 8, at 342–45.

201. *See Jones*, 433 U.S. at 132.

202. *Id.*; *see also* Clay Calvert & Kara Carnley Murrhee, *Big Censorship in the Big House—A Quarter-Century After* Turner v. Safley*: Muting Movies, Music & Books Behind Bars*, 7 Nw. J.L. & POL'Y 257, 294 (2012) (quoting Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1659 (2007)) (criticizing the burden shifting inherent in the *Turner* doctrine).

203. N.C. Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 944 (E.D.N.C. 1976).

204. *See* Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 64 (1987) (recognizing that while "underground" prisoner groups, like gangs, may increase tension within the prison, the act of granting certain groups legitimacy may, in fact, "contribute to the prison's stability" by giving voice to the voiceless prisoner population).

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recommend new programs to the administration."[205] The move to recognize and grant some power to prisoner-run organizations created an immediate and obvious transformation within the prison.[206] Prisoners used their newfound political clout to both push for revolutionary and personal interests—"[a] single manifesto might demand both Black Power and a new drama class."[207]

Of course, it is unlikely the *Jones* Court had the advantage of record evidence of situations where prison systems successfully recognized prisoner groups like the prisoner council in Walla Walla.[208] Nevertheless, the Court's reflexive deference to the North Carolina prison officials' rationale without due consideration of evidence to the contrary reveals an inherent flaw in the doctrinal deference found in prisoners' First Amendment jurisprudence.

Second, as the *Jones* dissent aptly points out, the *Jones* Court's deference to North Carolina prison officials abdicated the solemn duty of the federal courts to evaluate evidence presented and "reach an independent judgment."[209] In prisoners' rights' cases, the abdication of this duty becomes even more critical because of the authoritarian nature of prison institutions.[210] Leaving prison officials to their own unfettered discretion runs the risk of allowing those officials' proper exercise of state power to convert to "its most brutal form," where that power looks like tyranny.[211] Indeed, certain members of the Supreme Court have recognized that "careless invocations of 'deference'" will often result in a return to the "hands-off" doctrine, wherein the "judicial blind eye" resulted in "barbarism and squalor" in many prisons.[212] By incorporating deference to prison officials into First Amendment doctrine, the Supreme Court has all but eradicated the check on institutional tyranny created by the threat of judicial review.[213]

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205. *Id.* at 65.

206. *Id.*

207. *Id.*

208. *Cf. Jones*, 433 U.S. at 142 (Marshall, J., dissenting) (quoting ABA Joint Committee on the Legal Status of Prisoners, *The Legal Status of Prisoners* (Tent. Draft 1977), *in* 14 AM. CRIM. L. REV. 377, 419 (1977)) (recognizing that "groups feared by the prisons in the 1960s have become stabilizing influences in the 1970s").

209. *Id.* at 142 (Marshall, J., dissenting).

210. *See* Erwin Chemerinksy, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999) (noting that prisons, by their very nature, are the "places where serious abuses of power and violations of rights are likely to occur"); Willens, *supra* note 204, at 69 (noting that the "authoritarian prison has historical roots in the slave plantation").

211. Willens, *supra* note 204, at 71.

212. Block v. Rutherford, 468 U.S. 576, 594 (1984) (Blackmun, J., concurring).

213. Willens, *supra* note 204, at 98–99.

When prisoners are defined as brutal, hardened criminal, attacks on their humanity are easily ignored. When prison is defined as inherently dangerous and violent, attempts to

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Finally, the *Jones* Court's deference fails to appreciate the democratic value inherent in allowing prisoners to voice their collective concerns.[214] While the federal courts have expressly recognized that the integrity of our criminal justice system is a matter of public concern,[215] the Supreme Court has declined to ensure that the voices of those most impacted by the criminal justice system—the 2.2 million men and women incarcerated within that system—are heard. By allowing prison officials to curtail prisoner associational and petition rights with little to no oversight, the Supreme Court has almost completely eradicated the few democratic processes available to the disenfranchised. Those democratic processes include the ability to petition those in power to correct unchecked abuse[216] and the ability to seek redress in the courts.[217] By weakening prisoners' associational rights, the Supreme Court not only limited the ability of prisoners to successfully litigate First Amendment claims but also limited their ability to attract the attention of lawyers whose "presence and relentless demand for information" might increase accountability of prison systems.[218]

Judicial deference to prison officials on issues involving the curtailment of prisoners' associational and petition rights undoubtedly contributes to the lack of transparency and accountability inherent to the modern American prison system.[219] But the example of the protests staged

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> maintain institutional security which are *themselves* dangerous and violent are easily justified. Both of these definitions have been essential to the legitimation of the new legal prison. The new prison in turn legitimates attacks on the prisoner, attacks on his space, his property, his body, and his pride. This prison is the paradigm of an irrational society: driven by fear and violence under the rhetoric of law and order, built for custody and domination in the name of freedom and democracy. The irrational society legitimates itself by rationalizing insane facts. The legitimation works, until finally it becomes irrational to say the obvious: something must be wrong when society asks its citizens to bend over and spread their legs so that society may inspect.

Id. at 133–34.

214. *See, e.g.*, Mark, *supra* note 164, at 2155–56 (recognizing the centrality of the Petition Clause to "the relationship between the governed and the government"); *see also* Borough of Duryea v. Guarnieri, 564 U.S. 379, 396–97 (2011) (observing the importance of petitioning for "groups excluded from the franchise").

215. *See* Miller v. Clinton County, 544 F.3d 542, 549 (3d Cir. 2008).

216. *See* Mark, *supra* note 164, at 2182 (noting that "[p]etitioning provided not just a method whereby individuals within [disenfranchised] groups might seek reversal of harsh treatments by public authority, judicial or otherwise, but also a method whereby such individuals could seek the employment of public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit. . . . That such power might reside in the hands of those with little, or no, other formal political power greatly heightens the constitutional significance of the right").

217. *See* Willens, *supra* note 204, at 67 n.140 (recognizing the role litigation plays in "increas[ing] the visibility of prisons and the dialogue about them").

218. *Id.* at 66–67 (noting that the existence of prisoners' groups allowed those groups to garner the attention of outside community leaders, which "brought reformers into the prisons").

219. *See* Gibbons & deBelleville Katzenbach, *supra* note 21, at 408–10.

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by the suffragist prisoners demonstrates why protecting these rights for prisoners is important, not only to ensure appropriate accountability in the criminal justice system but also to honor the importance of these rights, even for the incarcerated. However, under current doctrine, prison officials are free to act with impunity in punishing prisoners for attempting to expose unlawful or inhumane prison conditions. As such, current doctrine disserves the values embodied by the First Amendment.

III. IMPORTANCE OF PROTECTING PRISONER ASSOCIATIONAL AND PETITION RIGHTS

As the suffragists' in-prison protests demonstrate, allowing prisoners to organize peacefully and to inform the public and those in power of injustices occurring inside prison walls can have a profound impact on public opinion and may ultimately lead to necessary social change. But most modern American prison systems have enacted rules that outright forbid any protest activity meant to draw attention to unjust prison conditions.[220] At minimum, these rules certainly discourage prisoner participation in protest activity because of the harsh punishments associated with rules violations.[221] Unfortunately, prison systems remain emboldened to promulgate, maintain, and enforce these rules because of the lack of serious judicial oversight under current First Amendment doctrine.[222]

By limiting prisoners' ability to engage in collective protest, prison systems maintain the veil of secrecy that surrounds the American prison.[223] While some prisoners may be lucky enough to catch the attention of a lawyer for assistance in redressing constitutional violations, lawyers may be reluctant to advise or allow their clients to engage in the type of civil disobedience practiced by the suffragists.[224] But practices of peaceful

220. *See infra* Section III.A.

221. *Id.*

222. *See* Evan Bianchi & David Shapiro, *Locked up, Shut up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1, 8 (2018).

> Prison officials appear to have received the message that they enjoy "practical immunity" from First Amendment lawsuits by prisoners due to a combination of *Turner* deference, other legal obstacles that stand in the way of successful prisoner action (such as administrative exhaustion under the Prison Litigation Reform Act), and non-legal impediments (such as limited education, poverty, and the difficulty of obtaining counsel). The prison censors carry on with impunity. As one of us has argued previously and at greater length, "anything goes" seems to be the attitude of prison officials who have been liberated from serious judicial oversight.

Id.

223. *See* Dewan, *supra* note 15.

224. *Cf.* Charles R. DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient*, 17 GA. L. REV. 109, 110 (1982) (encouraging the legal profession to "recognize the importance of civil disobedience in creating changes in law and public policy"); *see*

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disruption may be the best way for prisoners to educate the public on what is happening inside the public institutions that comprise the American prison system.[225] And a strong public response to unfair or illegal prison policies is almost always enormously useful in getting those polices rescinded or amended.[226] This is particularly true in situations where the policies are more the result of implicit (or explicit) biases on the part of prison officials rather than actual issues of prison safety.[227] Some examples of these types of policies are discussed in the next section.

A. "Inciting a Riot"

A nationwide review of prison policies reveals that almost every state prison system has a disciplinary rule prohibiting the type of non-violent protest engaged in by the suffragists at Occoquan and in the D.C. jail. Many prison systems name these prison disciplinary charges "inciting a riot" or some variation thereof.[228] While some of these charges seem to be

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also id. at 132 (noting the lack of equal access to lawyers and the legal system for some groups and reiterating that "social change does not occur solely with the aid of lawyers, courts, and judges").

225. JAMES TAGER, LITERATURE LOCKED UP: HOW PRISON BOOK RESTRICTION POLICIES CONSTITUTE THE NATION'S LARGEST BOOK BAN 10 (2019), https://pen.org/wp-content/uploads/2019/09/literature-locked-up-report-9.24.19.pdf [https://perma.cc/XL5R-8PM6] (acknowledging that "it may take months or even years for the general public to even learn about" certain prison policies because of the secrecy surrounding prison policy promulgation).

226. *Id.* ("Prisons and jails get away with a lot of what they do just because people aren't watching. These are closed institutions, and they house politically powerless and unpopular people. So when you can get public attention, the prison system is often exposed as a paper tiger. Not every time, but often enough." (quoting David Fathi, who leads the American Civil Liberties' Union's National Prison Project)).

227. *See, e.g., id.* at 5 (describing "bans on literature that discusses civil rights, historical abuses within America's prisons, or criticism of the prison system itself, often on the grounds that such titles advocate disruption of the prisoner's social order").

228. *See, e.g.*, CAL. CODE REGS. tit. 15, § 3005(d)(2) (2008) (prohibiting prisoners from participating in or urging others from participating in "a riot, rout, or unlawful assembly"); COLO. DEP'T OF CORR., ADMIN. REG. 150-01, CODE OF PENAL DISCIPLINE, at § IV.E.14 ("Advocating or Creating a Facility Disruption"); DEL. DEP'T OF CORR., HOWARD R. YOUNG CORR. INST., INMATE HANDBOOK 8 ("Inciting a Riot"); FLA. ADMIN. CODE ANN. r. 33-601.314(2-2) (2014) ("Inciting or attempting to incite riots, strikes, mutinous acts, or disturbances"); GA. COMP. R. & REGS. 125-3-21.C-2A (2009) (prohibiting "planning, conspiring or encouraging others to participate in any group demonstration, disturbance, riot, strike, refusal to work, work stoppage, or work slowdown"); HAW. DEP'T OF PUB. SAFETY, CORR. ADMIN., POLICY AND PROCEDURES MANUAL, POLICY NO. COR. 13.03, ADJUSTMENT PROCEDURES GOVERNING SERIOUS MISCONDUCT VIOLATIONS AND THE ADJUSTMENT OF MINOR MISCONDUCT VIOLATIONS, at 5.0.2.a.6(11),(12); IDAHO DEP'T OF CORR., STANDARD OPERATING PROCEDURE, DUAL DIVISION, OFFENDER MANAGEMENT, CONTROL NO. 318.02.01.001, DISCIPLINARY PROCEDURES: OFFENDER, at Appendix A.2 (defining "group disobedience" as "[p]articipation in a work stoppage, demonstration, or group disobedience that does not result in property damage or injury where participation is forced or coerced by other inmates"); ILL. ADMIN. CODE tit. 20, § 504.App.A.205 (2017) (forbidding participation in "unauthorized organizational activities," including meetings); IND. DEP'T OF CORR., ADULT DISCIPLINARY PROCESS, APPENDIX I: OFFENSES 208 (forbidding participation in "unauthorized organizational activities," including meetings); IOWA DEP'T OF CORR., OFFENDER RULEBOOK, at E.27 (making any "obstructive" or

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more explicitly tied to violence,[229] the elements of others can clearly be met by merely engaging in any type of organized disobedience, regardless of whether such disobedience involves violence.[230] At least one state has even criminalized "organized disobedience" within a correctional

"disruptive" conduct a disciplinary offense, including "participating in unauthorized meetings, gatherings, or petitioning" and "encouraging others to refuse to work or participate in work stoppage"); KAN. ADMIN. REGS. § 44-12-319 (2007) (prohibiting "disruptive behavior"); KY. CORR., POLICIES & PROCEDURES, POLICY NO. 15.2, RULE VIOLATIONS AND PENALTIES 9 ("inciting to riot or rioting"); LA. DEP'T OF PUB. SAFETY & CORR., DISCIPLINARY RULES AND PROCEDURES FOR ADULT OFFENDERS, at VIII.29 (prohibiting "disturbances"); 03-201-10 ME. CODE R. § 20.1(VI) (PROCEDURE E) (LexisNexis 2013) (including "demonstration," which prohibits group demonstrations); MICH. DEP'T OF CORR., POLICY DIRECTIVE NO. 03.03.105, PRISONER DISCIPLINE, at Attachment A (Code 022 violation includes "joining others in an unauthorized work stoppage"); MONT. STATE PRISON, OPERATIONAL PROCEDURE, PROCEDURE 3.4.1, INSTITUTIONAL DISCIPLINE, at Major Rule Infractions 4013 ("rioting or encouraging others to riot"); NEV. DEP'T OF CORR., ADMIN. REG. 707, INMATE DISCIPLINARY PROCESS, at 707.02.5.MJ27 & 28 (prohibiting rioting and "[o]rganizing, encouraging or participating in a work stoppage or other disruptive demonstration or practice"); N.H. DEP'T OF CORR., POLICY AND PROCEDURE DIRECTIVE, ENFORCEMENT OPERATIONS, STATEMENT NO. 5.25, PROCESSING SPOT, DISCIPLINARY, INCIDENT & INTELLIGENCE REPORTS, at Disciplinary Rule Infractions 21.A (prohibiting participation in any group demonstration, strike, or work stoppage or slowdown); N.M. CORR. DEP'T, CD-090100, INMATE DISCIPLINE, at Category "A" Offenses A(9) & A(10) (prohibiting inciting a riot); R.I. DEP'T OF CORR., POLICY AND PROCEDURE, POLICY NO. 11.01-5 DOC, CODE OF INMATE DISCIPLINE, at Discipline Severity Scale P13 (inciting others to riot); S.D. DEP'T OF CORR., INMATE LIVING GUIDE 16 (prohibiting engaging in a group demonstration or group food or hunger strike), 18 (prohibiting "circulating or signing a petition"); TENN. DEP'T OF CORR., INMATE RULES AND REGULATIONS 41 (prohibiting participation in or encouragement of an "institutional disturbance"); TEX. DEP'T OF CRIM. JUST., CORR. INST. DIV., DISCIPLINARY RULES AND PROCEDURES FOR OFFENDERS, at Attachment A (prohibiting participation in a riot); VT. AGENCY OF HUMAN SERV., DEP'T OF CORR., SECURITY AND SUPERVISION #410.01, FACILITY RULES AND INMATE DISCIPLINE, at Attachment 1 (Major "A" Violations) (2012) (prohibiting work strikes and hunger strikes); VA. DEP'T OF CORR., OPERATING PROCEDURE NO. 861.1, OFFENDER DISCIPLINE, INSTITUTIONS, at V.A.103 (inciting a riot).

229. *See, e.g.*, CAL. CODE REGS. tit. 15, § 3005(d)(2) (2008) (limiting violation to instances where the circumstances "produce a clear and present and immediate danger of acts of force or violence"); KAN. ADMIN. REGS. § 44-12-319 (2007) (limiting a "riot" to those situations where a "use of force or violence occurs"); LA. DEP'T OF PUB. SAFETY & CORR., DISCIPLINARY RULES AND PROCEDURES FOR ADULT OFFENDERS, at VIII.29 (2008) (defining "disturbances" as those instances "involving acts of force or violence"); MO. DEP'T OF CORR., OFFENDER RULEBOOK 6 (prohibiting participating in "violent behavior that interferes with normal operations of the facility").

230. *See, e.g.*, COLO. DEP'T OF CORR., ADMINISTRATIVE REGULATION 150-01, CODE OF PENAL DISCIPLINE, at § IV.E.14 ("Advocating or Creating a Facility Disruption"); DEL., DEP'T OF CORR., HOWARD R. YOUNG CORR. INST., INMATE HANDBOOK 8 ("Inciting a Riot"); FLA. ADMIN. CODE ANN. r. 33-601.314(2-2) (2014) ("Inciting or attempting to incite riots, strikes, mutinous acts, or disturbances"); GA. COMP. R. & REGS. 125-3-21.C-2A (2009) (prohibiting the "planning, conspiring or encouraging others to participate in any group demonstration, disturbance, riot, strike, refusal to work, work stoppage, or work slowdown"); IDAHO DEP'T OF CORR., STANDARD OPERATING PROCEDURE, DUAL DIVISIONS, OFFENDER MANAGEMENT, CONTROL NO. 318.02.01.001, DISCIPLINARY PROCEDURES: OFFENDER, at Appendix A.2 (defining "group disobedience" as "[p]articipation in a work stoppage, demonstration, or group disobedience that does not result in property damage or injury where participation is forced or coerced by other inmates").

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institution,[231] and another has a disciplinary violation for taking part in a "minor disturbance."[232]

While the behavior prohibited by these laws and regulations is not always immediately clear, many expressly prohibit the type of non-violent collective actions I am concerned with here. In particular, the types of protest I am interested in protecting are "a range of nonviolent collective actions by prisoners—namely work stoppages, sit-ins, spending boycotts, hunger strikes, and other forms of protest,"[233] including petitions, that will allow prisoners to draw public attention to abuses and injustices occurring within prison walls. Importantly, these types of protest may "challenge the rule or order" of the prison system or "disrupt business as usual"—i.e., "*peaceful* forms of resistance" that "do not involve the threat or the use of force against persons or property."[234]

In urging broader protections for this type of protest, I am cognizant of the very real risk prison officials must address in that some of these protests can lead to actual riots—i.e., disturbances wherein violence against both prisoners and prison guards and damage to property results.[235] For that reason, I am not calling for the wholesale rescission or eradication of these disciplinary rules. Rather, I am calling for the judiciary to take seriously its role in ensuring that valid, non-violent prisoner protest activities meant to draw the attention of both the public and those in power are given proper constitutional protections. In particular, the judiciary must ensure the voices of those most impacted by modern criminal justice policies are heard in the current "national debates on mass incarceration, forced labor, and other injustices of our carceral state,"[236] just as the suffragist prisoners' voices were heard in the years leading up to the passage of the Nineteenth Amendment. To conclude this Article, I turn to

231. *See, e.g.*, CONN. GEN. STAT. § 53-179c (2013) (criminalizing taking "part in any meeting" of prisoners at a prison where the purpose of such meeting is to "strike" or create "other organized disobedience to the rules").

232. FLA. ADMIN. CODE ANN. r. 33-601.314(2-3) (2014) (prohibiting "[c]reating, participating in or inciting a minor disturbance").

233. Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1491 (2019) [hereinafter Harvard Note].

234. *Id.* at 1491–92.

235. *See, e.g.*, *id.* at 1490 (discussing a deadly riot at the Lee Correctional Institution in South Carolina in April 2018). In including damage to property in the categories of harms for which prison officials have a legitimate interest, I do not mean to suggest that we should equate bodily harm and personal rights violations to persons to harm to property. *Cf.* Jaz Buckley, *Police Violence in the Time of COVID-19*, JURIST (June 3, 2020) (criticizing societal concern for the protection of businesses and property at the expense of Black lives). Rather, I merely mean to concede that prisons have an interest in maintaining some semblance of order, and the forms of protest I am discussing in this article are forms of protest that disrupt that order through peaceful means.

236. Harvard Note, *supra* note 233 at 1500–01.

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two examples of modern prisoner protest that have sparked or contributed to current conversations on criminal justice issues.

B. Modern Prisoner Protests

For the past several years, criminal justice reform has been the topic of much political debate.[237] The reasons for this newfound interest in criminal justice reform are complex, but evolving public opinion on the cause and consequences of mass incarceration played a significant part.[238] Prison systems have seen reforms related to the use of solitary confinement and moves toward "normalization" of life inside the walls.[239] Prisoners, cognizant of the growing conversation on prison reform, have engaged in various peaceful protest activities in order to draw attention to particular harmful prison conditions.[240] I provide two examples of these protest activities, but for every example of a successful (or semi-successful) prison protest, there are many others where prisoners' protest activities were thwarted by prison rules, retaliation, and internal prison punishment.[241]

An example of a prison protest that led to meaningful reforms of prison conditions comes out of the California prison system. In 2011 and 2013, thousands of prisoners confined in Special Housing Units (SHUs) in California's prisons engaged in a series of hunger strikes to protest the

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237. *See, e.g.*, Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why*, N.Y. TIMES (Aug. 20, 2019) https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html [https://perma.cc/5X4G-2VX3].

238. *Id.*

239. *See, e.g.*, Stephen Hart, *Epidemic Underlines Need to Halt Solitary Confinement*, BUFFALO NEWS (Mar. 18, 2020), https://buffalonews.com/2020/03/18/epidemic-underlines-need-to-halt-solitary-confinement/ [https://perma.cc/4MD5-3MNF]; Shannon Halligan, *Bill Could Limit Use of Solitary Confinement in Illinois*, WGN9 (Mar. 10, 2020), https://wgntv.com/news/bill-could-limit-use-of-solitary-confinement-in-illinois/ [https://perma.cc/MRS9-BXA4]; Michael J. McCarthy, *Colorado's First Justice Systems Forum Breaks Out of the Box*, WESTWORD (Mar. 6, 2020), https://www.westword.com/news/colorado-justice-systems-forum-looks-at-possible-prison-reforms-11658492 [https://perma.cc/3D3L-KMBK]; TCR Staff, *Europe Offers Lessons for Overhauling U.S. Prison 'Culture,' Conference Told*, CRIME REPORT (Feb. 21, 2020), https://thecrimereport.org/2020/02/21/democracy-needed-to-turn-tide-in-criminal-justice-reform/ [https://perma.cc/XYS2-AF2U].

240. *See, e.g.*, Aviva Stahl, *Force-Feeding Is Cruel, Painful, and Degrading—and American Prisons Won't Stop*, NATION (June 4, 2019), https://www.thenation.com/article/force-feeding-prison-supermax-torture/ [https://perma.cc/HYL4-3QNS]; German Lopez, *America's Prisoners are Going on Strike in at Least 17 States*, VOX (Aug. 22, 2018), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018 [https://perma.cc/8XFU-YG97]; Josh Harkinson & Maggie Caldwell, *50 Days Without Food: The California Prison Hunger Strike Explained*, MOTHER JONES (Aug. 27, 2013), https://www.motherjones.com/politics/2013/08/50-days-california-prisons-hunger-strike-explainer [https://perma.cc/2KLH-3PQF]. *See generally* Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 226, 228 (2016).

241. *See* WOODFOX, *supra* note 23; Egan, *supra* note 23; O'Sullivan, *supra* note 23.

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brutal SHU conditions.[242] The prisoners' protest caught the attention of both advocates and attorneys, and in 2012, lawyers working with the Center for Constitutional Rights filed a class action lawsuit on behalf of the prisoners challenging the constitutionality of the conditions in California's SHUs.[243] In 2015, the case reached a landmark settlement ending indeterminate solitary confinement in California.[244] In January 2019, at the request of the prisoners through their attorneys, the United States District Court for the Northern District of California determined that the constitutional violations giving rise to the suit continued in certain prisons and ordered an additional year of monitoring of the settlement agreement.[245] Thus, while the fight for humane SHU conditions continues in California, the prisoners' protest activities prompted meaningful change and judicial oversight.

A second example of modern prisoner protest occurred from August 21, 2018 until September 9, 2018, when incarcerated individuals across the country "orchestrated a daring and seemingly improbable coordinated protest" by engaging in work stoppages, hunger strikes, sit-ins, and commissary boycotts.[246] Organized through a nationwide prisoner organization called Jailhouse Lawyers Speak, the prisoners "sought to draw public attention to longstanding grievances over inhumane treatment within prisons across the country and to call for significant criminal justice reforms."[247] While public officials met none of the prisoners' ten demands,[248]

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242. *See* Harkinson & Caldwell, *supra* note 240. Prisoners in the Pelican Bay SHU are confined to eleven-by-seven feet windowless, concrete cells. *See* Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons*, MOTHER JONES (Nov./Dec. 2012), https://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer/ [https://perma.cc/B8TH-S9CP]; Plaintiffs' Second Amended Complaint at ¶ 3, Ashker v. Governor of Cal., 2014 WL 2465191 (N.D. Cal. May 31, 2012) (No. 4:09-cv-05796-CW). At the time of the prisoners' protests, the California Department of Corrections and Rehabilitation (CDCR) did not allow the prisoners telephone calls, contact visits, or any programming. *Id.* Confined to single occupancy cells, most of the men in the SHU could not have normal human conversations with the people around them. *Id.* at ¶ 40. CDCR forbade prisoners from putting any pictures, photographs, or other decorations on their walls, save a single calendar. *Id.* at ¶ 58. CDCR had confined the men in the SHU for decades, some as long as twenty-two years, by the time the men started hunger striking in protest of these conditions. *Id.* at ¶ 14–23, 33.

243. *See* Order Granting in Part Motion for Class Certification; Denying Motion to Intervene, Ashker v. Governor of Cal., No. 4:09-cv-05796-CW, 2014 WL 2465191 (N.D. Cal. June 2, 2014).

244. *See* Order, Ashker v. Newsom, No. 4:09-cv-05796-CW, 2019 WL 330461 (N.D. Cal. Jan 25, 2019).

245. *Id.* Lawyers for CDCR filed and won an appeal overturning this order. *See* Ashker v. Newsom, 968 F.3d 939, 942 (9th Cir. 2020). The prisoners' attorneys have moved for rehearing to the *en banc* Ninth Circuit. *See* Plaintiffs-Appellees' Petition for Rehearing *En Banc*, Ashker v. Newsom (9th Cir. Aug. 31, 2020) (No. 18-16427).

246. Harvard Note, *supra* note 233, at 1490.

247. *Id.*

248. The ten demands outlined by the protesters included:

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> the 2018 nationwide prison strike was still a remarkable event in its scope and coordination, as well as its ability to generate public support and attention. An estimated 150 different organizations endorsed the strike; citizens held numerous demonstrations outside of prisons in solidarity; and a range of national media publications provided detailed coverage of the protest's motivations, objectives, tactics, and status as potentially the 'largest prison strike in U.S. history.'[249]

Joining the ranks of the prison strikes that occurred in conjunction with the civil rights movement in the 1960s and 1970s, the 2018 prison strike created critical public awareness of prison conditions.[250] The sheer enormity of the strike and the press coverage it generated demonstrate the effectiveness of allowing prisoners to collectively make their voices heard in political debates on criminal justice reform.[251] This result—allowing the disenfranchised to be heard through protest activities protected by petition and associational rights—is consistent with the meaning and purpose of the First Amendment.

CONCLUSION

By broadening the protections afforded prisoners exercising their petition and associational rights, federal courts entertaining the First Amendment claims of prisoner-plaintiffs will be providing a necessary

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

Jailhouse Lawyers Speak (@JailLawSpeak), TWITTER (April 24, 2018, 6:28 AM), https://twitter.com/jaillawspeak/status/988771668670799872?s=21 [https://perma.cc/6EHU-UQVQ].

249. Harvard Note, *supra* note 233, at 1491.

250. *Id.* at 1499–1500.

251. *Id.* at 1500–01.

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check on the operation of executive power in the prison systems.[252] Like the suffragists, the modern American prisoner is often disenfranchised and lacks any political power. The First Amendment exists to ensure that the voice and ideas of the powerless can be asserted against the powerful.[253] In particular, the Petition Clause is meant "to codify a broad right to seek redress from the whole of government,"[254] including redress for prisoners.[255] Because prison systems can and do promulgate policies meant to entrench biases,[256] and prison systems rarely have the capacity to self-regulate,[257] it is incumbent upon the federal courts to protect prisoners' right to criticize the prison system and bring to light unlawful and inhumane conditions.[258] This is especially true because prisoners, like the disenfranchised women who became the Silent Sentinels, are a politically marginalized community who must be able "to articulate alternative viewpoints and play active roles in public life."[259] By providing a platform for such diverse viewpoints, we are able to "keep[ ] the state honest" and protect our democratic values and constitutional form of government.[260]

252. *See* Dodd, *supra* note 3, at 342.

253. *See* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 844 (2002) (noting that "the First Amendment serves a crucial purpose related to self-government: it ensures the necessary preconditions to keep the political process open, accessible and accountable").

254. *Id.* at 847.

255. *See* Mark, *supra* note 164, at 2182.

256. *See* Tager, *supra* note 225, at 5.

257. *See* Gibbons & deBelleville Katzenbach, *supra* note 21, at 408-12; *see also* James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 614 (2009) (noting that a study of prisoners using the internal grievance process in New York revealed "a level of actual retaliation" that "is unacceptably high") (internal citations omitted).

258. *See* Tsai, *supra* note 253, at 850 (suggesting that "the First Amendment should be read to protect criticism of government in whatever lawful form that challenge takes").

259. *See id.* at 851.

260. *Id.* at 865.

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