Saint Louis University Law Journal

Volume 67
Number 2 *General Issue (Winter 2023)*

Article 3

2023

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Recommended Citation

Daniel J. Canon, *The Ethics of Assisting Incarcerated People With Collective Action*, 67 St. Louis U. L.J. (2023).
Available at: https://scholarship.law.slu.edu/lj/vol67/iss2/3

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THE ETHICS OF ASSISTING INCARCERATED PEOPLE WITH COLLECTIVE ACTION

DANIEL J. CANON*

ABSTRACT

This article explores ethical issues pertaining to an attorney's role in assisting incarcerated clients with collective action, including striking, within prisons. In all fifty states, most concerted activity by prisoners is prohibited by policy, regulation, or statute. This article makes the case that nonviolent collective action is an effective method to promote changes in conditions of confinement—likely more effective than litigation—and is therefore something that civil rights and criminal defense lawyers should assist incarcerated clients with. In some cases, affirmatively advising incarcerated people to organize in the first place may also be desirable. The central questions explored in this article are: given that the activity in question is almost certainly unlawful, can an attorney give such advice safely and ethically? If so, how? In addition to an examination of the applicable ethical rules, the article provides a list of organizing prohibitions for incarcerated people in all fifty states, an example letter discussing organizing activities, and an overview of proposed changes to existing law that would accommodate lawyers who assist in acts of civil disobedience.

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INTRODUCTION

For nearly a week in April 2021, national news coverage focused on an uprising by people incarcerated at the St. Louis City Justice Center jail ("CJC"). This protest, the fourth of its kind at CJC in a five-month span, had dramatic appeal because it was visible; protesters escaped their cells, blocked corrections officers from common areas, and broke through windows to the outside world. They used toothpaste to write signs saying "HELP US," and hung them from the higher floors of the facility, a rare public demonstration of the desperate conditions many detainees face.[1]

This sort of collective action by incarcerated people, though largely unseen, was not uncommon in the early days of the COVID-19 pandemic, when jails and prisons were reporting hundreds of infections in their general populations[2] and court closures grossly extended pretrial confinement time.[3] According to one source, there were 119 acts of collective resistance in carceral institutions in U.S. and Canada within the first ninety days of the pandemic.[4] But this number is likely an underrepresentation.

We may never know the real number of institutional protests because COVID-19 led to the implementation of a set of austere rules prohibiting communications by incarcerated people nationwide, many of which are still in place as of this writing. In a May 2020 statement to CBS News, the Federal Bureau of Prisons ("BOP") explained that "[d]uring this unprecedented response to a pandemic, we have temporarily suspended access to telephones and e-mails, solely to mitigate the spread of the virus from multiple people touching keyboards and handsets."[5] Such measures, which also involved increased use of

1. Clark Randall & Luce Curtis, *At the St. Louis Jail, Inmates Have Been Pushed to the Brink*, NATION (Apr. 28, 2021), https://www.thenation.com/article/society/st-louis-jail-workhouse/ [https://perma.cc/N39G-XXQK].

2. Yolanda Jones, *Inmates at 201 Poplar Pepper-Sprayed over Move after COVID Quarantine*, DAILY MEMPHIAN (May 19, 2020, 5:51 PM), https://dailymemphian.com/section/metro/article/14169/covid-19-201-poplar-anthony-buckner-shelby-county-sheriffs-office [https://perma.cc/NR5Z-PAN8].

3. The average wait for a preliminary hearing in St. Louis was 146 days. *See* Sarah Fenske, *Long Waits for Preliminary Hearings in St. Louis Draw Public Defender's Ire*, ST. LOUIS PUB. RADIO (Mar. 19, 2021, 1:18 PM), https://news.stlpublicradio.org/show/st-louis-on-the-air/2021-03-19/long-waits-for-preliminary-hearings-in-st-louis-draw-public-defenders-ire [https://perma.cc/3WXH-W4AX].

4. Randall & Curtis, *supra* note 1.

5. Clare Hymes, *No Phone or Email for Nearly 4,000 Inmates at Three Federal Prisons in Effort to Fight Virus*, CBS NEWS (May 1, 2020, 2:48 PM), https://www.cbsnews.com/news/coronavirus-no-phone-email-inmates-federal-prisons-california-lompoc-terminal-island/ [https://perma.cc/NT32-MHFY].

"isolation cells" generally used for disciplinary purposes, were ostensibly designed to prevent the spread of infection.[6]

While limiting the spread of the novel coronavirus was (and is) undoubtedly a legitimate penological goal, one might be forgiven some skepticism as to the veracity of the BOP's stated aims. It seems far more likely that the restrictions were intended to keep incarcerated people from telling the outside world what was happening. And "what was happening" was not good. From the beginning of the pandemic, incarcerated people were infected at a rate at least five times higher than the general population.[7] By June 2021, more than 500,000 people at jails and prisons nationwide (including staff) had tested positive for COVID-19 and nearly 3,000 had died.[8] That is just what we know about.

The few stories that made it outside of prison walls all tended to relate a common idea: Anything even approaching an organized effort to protest a facility's *laissez-faire* attitude toward prisoner safety was met with disciplinary action, including segregation and corporal punishment. One Oregon lawyer reports that during a facility-wide hunger strike to protest COVID-19 restrictions, his client "was threatened with solitary for saying he would go to the media."[9*] How was that a violation of a prison rule? The client believed that "any punishment would be charged as 'unauthorized organization,' which prisons typically use against gangs but is broad enough to encompass almost any concerted effort by more than two people in prison."[10] In Memphis, more than fifty incarcerated people, all of whom had tested positive for COVID-19, were pepper-sprayed when they refused to go back to general population for fear of spreading the virus to other detainees.[11] Again, a rule against unauthorized organization was supposedly violated.

The extreme negligence—and in many cases outright cruelty—shown by prison and jail administrators during the novel coronavirus are not at all novel. By now it is common knowledge that American prisoners face conditions of confinement that are both morally and constitutionally intolerable.[12] New

6. Bureau of Prisons, *Correcting Myths and Misinformation about BOP and COVID-19* (May 6, 2020), https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf [https://perma.cc/HS84-K37L].

7. Brendan Saloner, Kalind Parish & Julie A. Ward, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324(6) JAMA 602, 602–03 (July 8, 2020).

8. Katie Park, Keri Blakinger & Claudia Lauer, *A Half-Million People Got Covid-19 in Prison. Are Officials Ready for the Next Pandemic?*, MARSHALL PROJECT (Nov. 17, 2022, 11:01 AM) https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison -are-officials-ready-for-the-next-pandemic[https://perma.cc/ZD28-85E8].

9. E-mail interview with Alex Meggitt, Attorney (Aug. 3, 2020) (*on file with author).

10. *Id.*

11. Jones, *supra* note 2.

12. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/7V58-L3D7]. As of 2020, the Prison Policy Initiative reports:

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horrors regularly surface: prisoners are denied basic hygiene products and bedding;[13] prisoners are kept in solitary confinement for periods exceeding the most generous definitions of torture set by international law;[14] prisoners starve to death,[15] bake to death,[16] and freeze to death.[17] Yet no one with the power to do anything about it seems to care all that much; American prisons and jails continue to operate with few meaningful challenges to their day-to-day operations, and with little meaningful oversight.

Against this backdrop, even before thousands of incarcerated people began dying of COVID-19, organized action in the carceral context has enjoyed a rich, if underreported, history. Though comprehensive and official accounts remain elusive, a trend of organized protest leading to concrete change (for better or worse) has been loosely documented since at least the 1970s. In 2016, the largest prisoner strike in history took place, affecting as many as 30,000 incarcerated

> The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.

Id.

13. *See, e.g.*, Gentry v. Floyd County, 313 F.R.D. 72, 75 (S.D. Ind. 2016), on reconsideration in part, 2016 WL 4088748 (S.D. Ind. July 25, 2016).

14. *United States: Prolonged Solitary Confinement Amounts to Psychological Torture*, *Says UN Expert*, UNITED NATIONS OFF. OF HUM. RTS. HIGH COMM'R (Feb. 28, 2020), https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture [https://perma.cc/3UWD-N2XU].

15. John Pacenti, *Mentally Ill Man Allowed to Starve to Death in Prison, Lawsuit Says*, PALM BEACH POST (Aug. 3, 2018, 12:01 AM), https://www.palmbeachpost.com/story/news/local/2018/08/03/mentally-ill-man-allowed-to/7003461007/ [perma.cc/F95D-UR3K]; Christopher Zoukis, *Mother of Utah Prisoner Who Starved to Death in County Jail Accepts Settlement*, PRISON LEGAL NEWS (June 21, 2018), https://www.prisonlegalnews.org/news/2018/jun/21/mother-utah-prisoner-who-starved-death-county-jail-accepts-settlement/ [perma.cc/33EH-9CB8]; Associated Press, *Kentucky Inmate Starves Himself to Death*, USA TODAY (Apr. 21, 2014, 7:41 PM), https://www.usatoday.com/story/news/nation/2014/04/21/inmate-starves/7984681/ [perma.cc/232G-6CQV].

16. Associated Press, *Guard Arrested After Rikers Inmates "Bakes to Death" in Hot Cell*, NBC N.Y. (Dec. 8, 2014, 9:31 AM), https://www.nbcnewyork.com/news/local/Guard-Arrested-Death-Rikers-Inmate-in-Hot-Cell-285126091.html [https://perma.cc/WR8C-KNE5].

17. John Kiriakou, *Cruel but Not Unusual, Freezing to Death in Federal Detention*, READER SUPPORTED NEWS (Feb. 14, 2019), https://readersupportednews.org/opinion2/277-75/54988-rsn-cruel-but-not-unusual-freezing-to-death-in-federal-detention [https://perma.cc/24X9-GEFF].

people[18] and corrections officers in twelve states.[19] Another massive multistate strike was organized in 2018.[20]

However, in nearly every jurisdiction in the U.S., organizing by incarcerated people is unlawful. The Supreme Court effectively precluded not only collective bargaining, but any concerted activities by prisoners at all, more than forty years ago in the case of *Jones v. North Carolina Prisoners Labor Union*.[21] Organizing efforts are now prohibited, mostly by regulation, at the federal level and in nearly every state.

Although collective action by incarcerated people tends to be hobbled every step of the way by administrators and largely ignored by the general public,[22] it may hold more promise for meaningful systemic reform than "top-down" solutions like litigation or legislative changes. By and large, judicial solutions to conditions of confinement problems simply do not work very well, even when glaring constitutional violations are present. This is so for a number of reasons, all of which are well-known to practitioners who represent people behind bars: prisoners do not have meaningful access to counsel,[23] the few lawyers who litigate civil rights cases on behalf of the incarcerated can only take cases involving death or serious injury,[24] the Prison Litigation Reform Act[25] poses formidable barriers beyond the already ample roadblocks set by federal courts,

18. Madison Pauly, *Prisoners Are Getting Creative to Pull Off a Massive Strike This Week*, MOTHER JONES (Aug. 20, 2018), https://www.motherjones.com/crime-justice/2018/08/prison-strike-inmate-labor-organizers/ [https://perma.cc/RJD2-YPND]:

> Organizers still don't know how many prisoners joined in the 2016 strike, though they say prisons in about a dozen states locked down 30,000 inmates in response to protests. Unrest inside prisons is always difficult to verify; officials in Alabama, Michigan, and Florida confirmed work stoppages at the time, while others in Texas and South Carolina denied them despite published accounts.

Id.

19. Beth Schwartzapfel, *A Primer on the Nationwide Prisoners' Strike*, MARSHALL PROJECT (Sep. 27, 2016, 10:00 PM), https://www.themarshallproject.org/2016/09/27/a-primer-on-the-nationwide-prisoners-strike [https://perma.cc/FB54-BML9]. As demonstrated by the previous footnote, nearly every media outlet to report on the strike has noted the difficulty in obtaining reliable information about the number of incarcerated people involved, or even where the strikes actually occurred.

20. Ed Pilkington, *US Inmates Stage Nationwide Prison Labor Strike over 'Modern Slavery'*, GUARDIAN (Aug. 21, 2018, 1:00 AM), https://www.theguardian.com/us-news/2018/aug/20/prison-labor-protest-america-jailhouse-lawyers-speak [https://perma.cc/797V-77XL].

21. Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 129 (1977).

22. *See* discussion *infra* of 2016 and 2018 strikes in Section I.D.

23. *See, e.g.*, Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 194 (2015).

24. *See* discussion *infra* Section I.A.

25. Prison Litigation Reform Act, 42 U.S.C. § 1997(e) (2018).

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and an increasingly conservative judiciary has learned that it can be wholly dismissive of prisoners' rights, without consequence, even in the worst cases.[26]

This article will explore ethical issues pertaining to an attorney's role in assisting incarcerated people with collective action from within prisons. In doing so, the article also makes the case that nonviolent collective action is an effective method to promote changes in conditions of confinement—likely more effective than litigation—and is therefore something that civil rights and criminal defense lawyers should be assisting clients with. In some cases, affirmatively advising incarcerated clients to organize in the first place may also be desirable. The central question is: given that the activity in question is almost certainly unlawful, can an attorney give such advice safely and ethically? If so, how? This article endeavors to answer those questions.

Part I posits that recent scholarship regarding movement lawyering can provide a useful framework for lawyers looking for new and more impactful ways to represent incarcerated clients, provides an overview of movement lawyering principles, and discusses the need for the application of those principles in the prison/jail context. Part II provides a brief overview of legal prohibitions on prisoner organizations; prohibitions which are left over from an era in which all organized labor was illegal. Part III uses the Model Rules of Professional Conduct as a basis for discussing the ethical implications of assisting incarcerated clients with organizing activities, including striking, which may be unlawful.[27] Part IV discusses solutions to similar ethical dilemmas proposed by scholars over the years that, if implemented, would alleviate the concerns a lawyer might have about assisting in collective action by incarcerated people. The Conclusion provides guidance for practitioners in assessing the risk of advising prisoners under the current rules.

I. THE NEED FOR MOVEMENT LAWYERING IN THE CONTEXT OF REPRESENTING INCARCERATED PEOPLE

A. Litigation is Not Enough

While filing a lawsuit on behalf of an incarcerated person remains the primary course of action for most civil rights practitioners, a legal strategy that relies heavily on litigation has its shortcomings, to put it mildly. First, the ability of the average incarcerated person to contact a lawyer in the first place is severely hampered. This is so even for pretrial detainees seeking access to

26. *See* discussion *infra* Section I.A.

27. The busy practitioner seeking the best way to counsel civil disobedience in prison and avoid discipline, if they find themselves disinterested in the theoretical and historical aspects of the question, may cut to the chase and start at Part III.

criminal defense lawyers,[28] who generally have an easier time than incarcerated people seeking *civil* counsel. The problem is more pronounced for those in rural areas,[29] those who have learning, intellectual, or other disabilities,[30] those in solitary confinement,[31] or those who reside in a facility that has restricted communications (ostensibly) due to COVID-19.[32] For all we really know, lawyers on the outside may never hear the worst stories of prisoner abuse.

Assuming an incarcerated person has the means to shop for civil lawyers at all, there are not nearly enough lawyers who can competently handle lawsuits involving the rights of incarcerated people. A practice grounded in plaintiffs' litigation under 42 U.S.C. § 1983 and similar statutes offers neither the relatively easy money of a standard-issue personal injury practice, nor the relative comfort of a client base that may be billed by the hour. Greg Belzley, a prominent practitioner who represents incarcerated people almost exclusively, describes the realities of his practice:

> Our clients cannot pay us for our time or for the considerable expenses likely to be incurred in inmates' rights litigation for depositions, experts, etc. Many civil rights lawyers have been run out of business because of overhead. That's why we employ no staff, work out of our homes, and endure the paper cuts of opening our own mail. We are also wary of hiring any more experts than we absolutely need, and fight the exorbitant rates charged to us by the defendants' experts when we take their depositions.[33*]

As a result, more than 90% of all civil cases brought by incarcerated people are handled *pro se*—and those are filed only by prisoners with the wherewithal to file them.[34] The few lawyers who litigate against jails and prisons can only afford to take the worst of the worst cases—class cases affecting hundreds of prisoners at once, paralyzing injuries, or deaths—while everyday constitutional violations of every shape and size go unchecked.

28. *See generally* Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 122 (2018) (explaining that only a handful of states have detailed standards governing attorney access to incarcerated clients).

29. *See* Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, AM. BAR ASS'N HUM. RTS. MAG. (July 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/access_justice_rural_america/ [https://perma.cc/4RSP-VFYU].

30. *See* John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 295 (1998).

31. *See* Deborah L. Yalowitz, *Sixth Amendment—Right to Counsel of Prisoners Isolated in Administrative Detention*, 75 J. CRIM. L. & CRIMINOLOGY 779, 781 (1984).

32. *See, e.g.*, Cara Nixon, *Attorneys Can't Reach Oregon Inmates Due to Covid-19 Quarantine*, CORVALLIS ADVOC. (July 6, 2020), https://www.corvallisadvocate.com/2020/attorneys-cant-reach-oregon-inmates-due-to-covid-19-quarantine/ [https://perma.cc/DJ3N-L7ZE].

33. E-mail interview with Gregory A. Belzley, Attorney (Aug. 3, 2020) (*on file with author).

34. Hill, *supra* note 23, at 182.

On the other hand, prisons and municipalities, according to Belzley:

> have no incentive to settle. They are defended by an insurance company, and the insurance industry still has not caught on to the fact that the lawyers they hire milk the file for every cent of fee they can. A defense lawyer doesn't maximize his fee by telling his client they did anything wrong or by urging them to settle.[35]

Plaintiffs' lawyers thus find themselves fighting a war of attrition against an adversary who, despite having meager means to provide for an ever-growing incarcerated population, seems to have infinite capacity to litigate.

Black-letter law itself is notoriously unfriendly. The federal courts have made § 1983 into a minefield of immunities, shifting statutes of limitations, and otherwise insurmountable defenses. The Prison Litigation Reform Act ("PLRA"),[36] which was designed to shortcut *pro se* litigation by people in prison,[37] has done exactly that,[38] and has not done plaintiffs' practitioners any favors in the process.[39] "Like a bad smelling onion, statutory and judicially created immunities, coupled with unreasonable burdens of proof, have created layers upon layers of protection for broken correctional systems," says civil rights attorney Devon M. Jacob, who has litigated some of the nation's highest profile civil rights cases:

> I am presented with clear civil rights violations almost daily that I must turn away simply because there is no path to justice in those cases. The law is now such that justice is no longer about who is factually right or wrong. It's now about whether or not you can navigate a legal minefield intended to prevent justice. Anymore, unless the civil rights violation results in serious injury or death, involves well-recorded evidence, and the facts play like a horror movie, I will not be able to obtain justice for the client, so I don't take the case.[40*]

Al Gerhardstein, a seasoned Cincinnati civil rights lawyer, agrees: "If there is no death or serious bloodletting, the PLRA precludes relief. I feel bad for those voices that have been silenced. And I feel guilty."[41*]

Add to all these complications an austere, dispassionate judiciary, one that is often hostile to the very idea of prisoners' rights, and the prospects for vindicating an incarcerated client in court become very bleak indeed. A 2019 op-ed by Yale law professor Judith Resnik illustrates the courts' impassivity by

35. Belzley, *supra* note 33.

36. 42 U.S.C. § 1997(e) (2018).

37. *See*, *e.g.*, Woodford v. Ngo, 548 U.S. 81, 81 (2006).

38. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 CORR. L. REP. 5, 70 (2017). ("After a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade[.]")

39. *Id*. at 80 (noting that "Plaintiffs are . . . winning and settling less often, and losing outright more often" since the advent of the PLRA").

40. E-mail Interview with Devon M. Jacob, Attorney (Sept. 16, 2021) (*on file with author).

41. E-mail Interview with Al Gerhardstein, Attorney (Sept. 16, 2021) (*on file with author).

describing a lawsuit filed by women incarcerated in Illinois, in which the plaintiffs were forced by corrections officers to "raise their breasts, lift their hair, turn around, bend over, spread their buttocks and vaginas, and cough." Menstruating women were told to throw tampons away and were left bleeding. Male staff could see some of what transpired. The Seventh Circuit's later opinion explained that the women were verbally degraded, too:

> During the searches, correctional officers made demeaning and derogatory insults, calling Plaintiffs "dirty b[——]." One commented: "No man wants to be with you because you smell like death." Plaintiffs declared that they received comments like "Your P[——] stinks," "You all are f[——] disgusting," and "I can't believe women smell like this."[42]

Resnik explains that this heinous treatment "was all just practice, a training exercise;" prison officials did not even attempt to justify officer conduct by hiding behind any safety concern or other institutional contrivance. None of this made an impression on the original panel to decide the case, which "made a sweeping pronouncement: no prisoner has any rights to personal privacy—including if ordered to 'touch her own body' in front of others."[43] Though this case was subject to a rare *en banc* reversal, the exception proves the rule.

Resnik's piece reveals to a broader audience what practitioners have long known: in general, the courts are not much help. Even when they do come to the rescue, it is often years later, when the original harm may have morphed into some new atrocity. In the coming era of Trump judges, this trend is unlikely to change.[44] Intrusive searches like these, and worse, will likely continue unabated

42. Henry v. Hulett, 969 F.3d 769, 775 (7th Cir. 2020) (expletives censored).

43. Judith Resnik, *Degrading Strip Search of 200 Women Prisoners Cries out for Courts to Act*, CNN (Oct. 3, 2019, 8:58 AM), https://www.cnn.com/2019/10/03/opinions/women-prisoners-have-rights-resnik/index.html [https://perma.cc/Q3SP-LBJ2].

44. An in-depth discussion of the gutting of Section 1983 protections overall is beyond the scope of this article, but one illustrative example from the author's home circuit is *Herrera v. Cleveland*, 8 F.4th 493 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1414, 1414 (2022). In that case, Herrera filed a pro se complaint against three John Doe officers employed by the Cook County Jail for Fourteenth Amendment violations. Cook County has the largest single-site jail in the country, and it appears as though neither Herrera nor jail officials knew the identities of the plaintiff's assailants for almost a year after the expiration of the statute of limitations, a situation not uncommon in prison litigation. The appellate court held that an amended complaint could not relate back under Fed. R. Civ. P. 15(c) in a John Doe case because a plaintiff's "lack of knowledge" as to the defendants' identities does not amount to "a mistake in their names." *Id.* at 497 (citing Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993)). Less than ten years ago, the Supreme Court held that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 541 (2010). But the clear admonition to pull focus away from a plaintiff's knowledge did not matter to two Trump-appointed appellate judges. *See Herrera*, 8 F.4th at 498 ("Herrera sued John Doe defendants fully aware that he lacked adequate information to ascertain the correctional officers' identities. Put differently, the plaintiff in *Krupski* did *not* know what she did not know; Herrera *did* know what he did not know."). Not

and mostly unknown, no matter how many lawsuits are filed. As prisoners' rights attorney Ivy Yan puts it, "The large majority of prison litigation is doomed to fail."[45*]

Even in the comparatively rare event that a victory may be had in court, it is not uncommon for facilities to ignore the injunctive orders of courts, if not immediately, then certainly months or years later, when they think no one is looking.[46] Sometimes a facility will simply replace one unconstitutional condition for another, and a years-long litigation process, if it begins at all, must begin anew.[47]

This is not to say that progress cannot be achieved through the courts; of course it can, and it has. The point is that on its own, litigation is not enough. Even seemingly decisive victories often ring hollow in a historical sense. Sarah Guffey, an attorney assisting Indiana's Prison Legal Support Network ("PLSN"), offers this concise explanation:

> I think as attorneys we're often taught that going into courts guns-blazing is the best solution to most problems, but for incarcerated people, especially long-term ones, sometimes even winning a lawsuit isn't all that helpful. Filing a suit could mean facing retaliation at the hands of guards and other staff, and the money they may receive in a judgment can be garnished internally and is difficult to spend.[48*]

That is assuming an incarcerated person ends up with a cognizable sum of money anyway. Class action payments are often modest amounts to everyone

only is this an incorrect reading of the facts in *Krupski* (Krupski most certainly knew the identity of the proper defendant), but it is singularly and unmistakably focused on the plaintiff's knowledge in a Rule 15(c)(1)(C) context, which is exactly what the Supreme Court said not to do. In fact, the *Krupski* court said that disallowing relation back for a prospective defendant who knew "he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity" would be a "windfall" for the defendant, inconsistent with the Rule's purposes. *Id*. at 550. But to the *Herrera* court, this "windfall" apparently does not matter when it comes to John Doe 1983 cases. The result is that now in the Seventh Circuit, a complaint might relate back if it was filed against the wrong defendant, or no individual defendant at all, but *not* if filed against "John Doe" defendants. In the author's view, *Herrera* is utterly and irredeemably inconsistent with the core holding in *Krupski*, but the suspension of unmistakable precedent is unfortunately all too common in prisoners' rights cases.

45. Virtual interview with Ivy Yan, Attorney (Feb. 10, 2022) (*on file with author).

46. *See*, *e.g.*, Essex County Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 445, 447 (D.N.J. 1998) (explaining that a comprehensive consent decree was reached in 1987, but "[t]here does not seem to be any question that the county was in serious contempt in 1993," and that the violation of the consent decree continued for years thereafter).

47. *See* Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & SOC. INQUIRY 1604, 1622–23 (2018) (documenting the initial resistance, and then acceptance, by the courts of long-term solitary confinement over a period of decades).

48. E-mail Interview with Sarah Guffey, Attorney (Jan. 25, 2022) (*on file with author).

but plaintiffs' counsel, and most incarcerated plaintiffs cannot make much use of the few large-dollar settlements obtained.

In the aggregate, one cannot look at the sixty years[49] of hashing out Eighth Amendment issues in the courts and seriously believe that they have translated to systemic change; during that time, the population of incarcerated people has continued to climb, and inhumane treatment of prisoners has not meaningfully abated.[50] There must be a better way.

B. Introduction to Movement Lawyering

For decades, legal scholars have recognized the flaws in, or even the "falsity" of the idea that persists in, bringing wide-eyed optimists to law school: the idea that "our lawyer-based adversary system works well to create change."[51] As Professor Scott L. Cummings wrote:

> Critical scholars have claimed that the legal liberal approach[52] hampered social movements by diverting political challenges into legal channels, emphasizing individual rights over collective action, confusing rule change for social change, and empowering lawyers to make crucial political decisions without accountability to the constituencies they purported to represent.[53]

49. *Monroe v. Pape*, 365 U.S. 167 (1961), marks the beginning of the modern era of private litigation under 42 U.S.C. § 1983. *See* SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK 25 (Carolina Academic Press 3d ed. 2020).

50. It seems unlikely that readers of this article need convincing on this point, but just in case: the United States incarcerates more people than any other country on earth, and indeed, more than any other country in the history of human civilization, both in terms of raw numbers and percentage of the overall population. *World Population Review*, https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country [https://perma.cc/F9NY-QZ49] (last visited July 31, 2022). Aside from problems with conditions of confinement mentioned throughout this article, the carceral system is fundamentally racist and classist. The reader may pick any source they like as support for this proposition, but it would be difficult to disprove. *See, e.g.*, Martin A. Sabelli, *The Lessons of Chesa Boudin's Defeat*, CRIME REP. (June 10, 2022), https://thecrimereport.org/2022/06/10/the-lesson-of-chesa-boudins-defeat [https://perma.cc/5MBM-WWZ2] (in which Martin Sabelli, the president of the National Association of Criminal Defense Lawyers, explains that "more than 60 percent of the people in prison are people of color. For Black males in their twenties, one in every eight is in prison or jail on any given day. Three-fourths of all persons in prison for drug offenses are people of color."). The point is that after sixty years of litigation under modern 42 U.S.C. § 1983, the problems inherent in the criminal justice system have in many ways become markedly *worse* than they were before *Monroe v. Pape*.

51. Charles R. DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient*, 17 GA. L. REV. 109, 131 (1982).

52. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1650–51 (2017). Cummings uses the term "legal liberalism" as shorthand to refer to the time during and after the Warren Court era in which lawyers relied on impact litigation to effectuate social change.

53. *Id*. (internal footnotes omitted).

This is not a new problem. Community organizer Ron Chisom, in a nearly thirty-year-old interview with Professor William P. Quigley, put it more succinctly: "Most lawyers do not understand about organizing. Lawyers do not understand that the legal piece is only one tactic of organizing. It is not the goal. . . . If lawyers get involved, they create a lot of problems."[54]

Practitioners may finally be steering this Flying Dutchman to port. The scholarly notion that "lawyers may support that change through an approach to representation in which they collaborate with social movements but do not control them"[55] appears to be gathering some popular steam among trench lawyers nationwide. The shorthand term for this mode of practice is "movement lawyering."[56] This new era of multi-disciplinary lawyering is centered on marginalized and oppressed populations with the aim of "coordinating legal and political advocacy in context-specific mobilizations to achieve sustainable social change."[57]

Definitions and principles of movement lawyering vary, but mostly strike the same chord. Betty Hung, the Policy Director at Asian Americans Advancing Justice-Los Angeles, calls movement lawyering a practice that "supports and advances social movements, defined as the building and exercise of collective power, led by the most directly impacted, to achieve systemic institutional and cultural change."[58] Law for Black Lives explains that "[m]ovement lawyering means taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates. It means building the power of the people, not the power of the law."[59] Both of these definitions have been cited favorably by the National Lawyers' Guild, an organization which has engaged in movement-focused, client-led legal work for nearly a century.[60]

As the principles guiding movement lawyering come into sharper focus, the question of how to effectively employ movement lawyering strategies in the context of the American carceral system is becoming more urgent. As discussed above, this shift away from litigation-centered advocacy is more than academic;

54. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 457–58 (1994).

55. Cummings, *supra* note 52, at 1648.

56. It may also be called "community lawyering," "cause lawyering" or "empowerment lawyering." *See* Quigley, *supra* note 54, at 455–56.

57. Cummings, *supra* note 52, at 1652.

58. Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 664 (2017).

59. *What We Can Do: Movement Lawyering in Moments of Crisis*, L. FOR BLACK LIVES, http://www.law4blacklives.org/respond [https://perma.cc/U5DF-7BXX] (last visited Jan. 23, 2023).

60. *NLG Statement on Movement Legal Work, Collective Defense, and the Role of Law*, NAT'L LAWS. GUILD (Aug. 15, 2022), https://www.nlg.org/nlg-statement-on-movement-legal-work-collective-defense-and-the-role-of-law/ [https://perma.cc/R8MW-YAYJ].

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it is both practical and necessary. Perhaps the greatest boon a lawyer can offer to incarcerated people is that of facilitating—and even encouraging—effective organization within prisons. A look at the role of lawyers in the context of the labor movement and other collective actions illustrates why.

C. Movement Lawyering Works for Collective Action

There is a long history of lawyers providing assistance to organized movements in America. As we shall see, this kind of assistance has occasionally cost a lawyer their license—or worse. The most salient examples come from the labor movement of the late nineteenth and early twentieth centuries. In addition to representing workers in criminal cases, lobbying, and developing the framework for legislation that would eventually be used to protect unions, lawyers also used what we would now call "movement lawyering" strategies. They worked behind the scenes to strengthen the labor movement by publicizing worker struggles, teaching workers about their rights, building coalitions between union leaders and other community groups, and whatever else was needed.

A notable success story of lawyers assisting in "a powerful combination of legal and organizing strategies" is contained in Jennifer Gordon's article *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*.[61] Professor Gordon explains that at first, the lawyers assisting Cesar Chavez and the United Farm Workers ("UFW") were so bogged down in the minutiae of labor laws—which did not apply to agricultural workers—that they were of little help.[62] Eventually, the Union had to part ways with lawyers who insisted on cleaving to strategies designed only to produce victories in court.[63] In the late 1960s, UFW's new lawyers began asking a persistent question: "what can law and legal strategies do to build power for this movement at this moment? The UFW's ability to focus exclusively on that inquiry and to experiment—often at high risk—with creative answers was critical to its success."[64] What were those "creative answers?" Gordon explains:

> Chavez worked with [attorney Jerome] Cohen to develop an approach to lawyering that put the achievement of organizing goals above the achievement of legal victories. For example soon after Cohen started work for the UFW a judge took away the Union's right to use bullhorns in an early strike against the Giumarra company. Cohen proudly returned from appellate court with a writ of

61. Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 8 (2005).

62. *Id.* at 14.

63. *Id.* at 14–15 (internal citations omitted).

64. *Id*. at 8–9.

> prohibition blocking the order, but he received a cold response from Chavez, who believed that the best organizing use of the situation would be to use a bullhorn in violation of the judge's order, get thrown in jail, and attract publicity and support for the cause. Through a series of similar encounters, Cohen and Chavez honed their communication. This process was replicated as Cohen brought new attorneys onto the Union's legal staff, each of whom brought his or her own strengths but who also had to be immersed in the culture of UFW legal and organizing strategy before beginning to work effectively as an integral part of it.[65]

This decentralizing of court-based strategies—an early rejection of the "legal liberal" approach described by Professor Cummings decades later—was critical to the success of the UFW. "In each situation, the question was never only 'what are our rights here?,' but 'how can we best turn this legal situation to the Union's organizing advantage?'"[66] Sometimes, as demonstrated by the above anecdote, the best organizing strategy was to *lose* in court.

The "high risk" described by Professor Gordon was not just risk to the organizers, but to the attorneys, too:

> Attorney Sandy Nathan was jailed in 1975 when he demanded access to a group of workers just arrested by the INS from a Salinas ranch where their votes were crucial in winning an upcoming election. The INS refused, and called the police when he persisted. Two years later, the police arrested Nathan again for insisting on access to twenty-five tomato pickers and a UFW organizer being held in a jail cell. As the door to the cell opened so that an officer could shove him in with the others, the organizer smiled and said to the workers, "See, I told you our lawyer would be here!" On the police report for Nathan's arrest, under the box marked "Weapon," the officer scrawled a single word: "Mouth."[67]

After decades of hard-fought battles, the UFW won the right to organize and strike, and as a result, succeeded in dramatically improving the lives of farmworkers in California and elsewhere. The tactics of movement lawyers like Cohen and Nathan can be employed to support organizers in a carceral context, as discussed below.

D. Movement Lawyering Works for Incarcerated People

If we can bring ourselves to think beyond litigation, lawyers can play significant roles outside the courtroom, on the periphery of larger movements working toward humane (or at least minimally torturous) conditions for American prisoners. Attorneys can provide incarcerated people with advice on how to best navigate the complex tangle of bureaucratic rules that it takes to improve conditions from within a facility, to the extent that such a thing is

65. *Id.* at 16–17.
66. *Id.* at 17.
67. *Id.* at 19.

possible using the existing rules of an institution. Attorneys can serve as watchdogs, reminding institutional bad actors that someone with a corner office and a professional degree is taking notes on their behaviors, lest those bad actors think they will never be called to account for misconduct. And attorneys can provide resources for self-study in the many institutions that suppress mail, books, and access to law libraries.

Perhaps most importantly, attorneys are the easiest portal to the outside world: a world which some prisoners would have no contact with were it not for counsel. Even as more conditions of confinement cases were filed, the ensuing decades of federal jurisprudence have given jails, prisons, and individual state actors more permission to conduct operations in secret, suppress prisoner speech, and generally act with impunity if it can purport to serve any "legitimate penological interest"[68] one might invent, thus lessening an earnest advocate's ability to harness the judiciary. To be a point of contact thus means far more than just relaying messages for family and friends of an incarcerated person; it means that a prisoner has an outlet to tell their story. Such stories—be they stories of routine violence,[69] forced labor under dangerous conditions,[70] extreme administrative apathy,[71] serial rape,[72] or something else—can often be quite shocking to those fortunate enough to have had no real contact with the criminal justice system. It is these stories that can move the public, lawmakers, and even courts to action.

Such stories can have a real-world impact. Just as with the labor movement, lawyers in communication with incarcerated clients have been the driving force behind the recognition of egregious and serial violations of human rights law in America. For example, a 2014 report by Amnesty International entitled

68. This is the standard used by courts to justify nearly any indignity an incarcerated person might suffer. *See, e.g.*, *In re* Application for Forfeiture of Unauth. Items Confiscated from Inmates Pursuant to AR 5120-9-55, 811 N.E.2d 589, 592–93 (Ohio App. 12th Dist. 2004) (holding that a prisoner's personal belongings, including legal materials, may be taken without a hearing so long as the taking "bears a rational relation to a legitimate penological interest").

69. *See, e.g.*, Jones v. Goord, 190 F.R.D. 103, 108 (S.D.N.Y. 1999):

> Although no court approves of physical violence in the correctional system, the fact is that maximum security prisons house violent offenders, and confrontations between inmates are, to some extent, inevitable despite the best efforts of correction officers and prison officials to prevent them. Such incidents, standing alone, do not necessarily rise to the level of cruel and unusual punishment. Nor will 'fear of assault' by other inmates support a constitutional claim.

70. *See, e.g.*, Morgan v. Morgensen, 465 F.3d 1041, 1041 (9th Cir. 2006), opinion amended on reh'g, 04-35608, 2006 WL 3437344 (9th Cir. Nov. 30, 2006) (prisoner forced to continue working at a defective printing press).

71. *See, e.g.*, Sours v. Big Sandy Regl. Jail Auth., 593 Fed. Appx. 478, 479 (6th Cir. 2014) (unpublished) (prisoner dies of diabetic ketoacidosis after medical staff refuses to administer insulin for two days).

72. *See, e.g.*, Riascos-Hurtado v. Raines, 422 F. Supp. 3d 595 (E.D.N.Y. 2019) (women prisoners sexually assaulted multiple times by "correctional counselor").

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"Entombed: Isolation in the US Federal Prison System" relies extensively on the accounts of American lawyers who have provided direct representation to incarcerated people.[73] The reports of these lawyers contribute to Amnesty's determination that federal prisoners in solitary confinement are subjected to "cruel, inhuman or degrading treatment" under international standards.[74] These prisoners, cut off from virtually all human contact, would not have been able to tell their stories to anyone—in some cases for *years* at a time—were it not for their lawyers.

The comparatively few organizations and lawyers that engage in power building from within prisons are focused not on individual-centered litigation, but on group-centered support. The Indiana Prison Legal Support Network ("PLSN") summarizes its two-pronged approach as "Building Inside/Outside Networks and Cultivating Working Relationships."[75] Their website explains:

> Inside/outside networks not only help us gain some autonomy from our dependence on outside lawyers and public defenders, but empower us to take some responsibility for ourselves. They also allow us to cultivate principled working relationships with outside legal professionals and attack the problem from both sides, while alleviating some of the workload of those legal professionals by us doing our own legal research, filing briefs, establishing our own legal law libraries, and developing and organizing our own Re-Entry Programs for those being released and who want to continue or join the work.[76]

Attorney Ivy Yan explains her approach to utilizing movement lawyering principles in her work on behalf of incarcerated people:

> The jailhouse lawyers and organizers on the inside that we work with are the experts in their own experience and the experts in understanding what is needed in terms of structural and defensive interventions. I seek to be led by the legal strategy committee [composed of incarcerated people] . . . because I have no idea what they need, I have no idea what will be effective. Most of the time the strategy comes from [incarcerated people] and they'll have questions like, "will this work?" that you can then chase down and do research on, but it's mostly directed by them.[77]

In other words, the lawyer is not the focus—the client does not develop the expectation that their liberation is on the attorney's shoulders, but rather retains control of it themselves. In many cases, the primary concern may not be an

73. *USA: Entombed: Isolation in the U.S. Federal Prison System*, AMNESTY INT'L 36 (July 16, 2014), https://www.amnesty.org/en/documents/AMR51/040/2014/en/ [https://perma.cc/MMD5-F3LP].

74. *Id.*

75. *A Call to Action and Appeal to the Legally Inclined: Help Organize the Prison Legal Support Network!*, INDIANA DEP'T OF CORR. WATCH, https://www.idocwatch.org/prison-legal [https://per ma.cc/TP8E-EZW2] (last visited Nov. 7, 2022).

76. *Id.*

77. Yan, *supra* note 45.

individual client at all, but rather the needs of the movement itself. And while litigation is contemplated as a component of the overall strategy, the emphasis is not on winning court cases, it is on power-building and organizing from within the prison.

Formal data on how well these strategies work is practically nonexistent, but there is plenty of anecdotal evidence to suggest that advocates working with incarcerated people confirm that movement lawyering principles succeed where litigation-focused strategies fail. PLSN's Sarah Guffey explains:

> I've . . . heard from a few of my previous incarcerated clients that they don't feel like their central issues are being addressed. At this point, I really want incarcerated people to be at the forefront of how they want to be receiving assistance and not attorneys, legal professionals and advocates. Hearing their first-hand perspective has really changed my view on how I can make a difference in incarcerated people's lives.
>
> Recently, I've been working with PLSN on creating better prison libraries so incarcerated people can better navigate their own lawsuits, and I've talked with women about reunification [with their children] when they get out and the legal process around [child neglect] cases. I've also talked with some of my former incarcerated clients about how to navigate discussions with prison wardens, preventative measures for safety in dangerous prison conditions, and ways to remedy issues before a lawsuit is involved. [M]ost of the incarcerated people I've spoken to echo the same sentiments that courts are terrible and the legal process is often fruitless. Even just trying to decide what the other options are available for a problem, talking about your dreams to one day have full custody of your kids, or discussing a future business plan and how to draft the documents with an attorney who's willing, in my experience, has been much more meaningful to my clients than chugging through my one federal pro-bono case a year.[78]

As Guffey suggests, beyond these concrete examples there is an immense, unquantifiable value when an "institutional" figure like an attorney acts in solidarity with an incarcerated person. Ivy Yan explains: "One of the ways that prison dehumanizes people is the isolation, and not being able to trust anyone on the inside, and not knowing if anyone is out there still hoping that you will emerge well, or hoping that you will be okay."[79]

In addition to all the support identified above, movement lawyers can assist incarcerated people in forming organizations for the purpose of bargaining with jails and prisons for better wages, better conditions of confinement, and changes to disciplinary policies, as well as providing assistance for organized strikes.

78. Guffey, *supra* note 48.

79. Yan, *supra* note 45.

Such organizing, it would seem, could accomplish the goals of movement lawyering better than litigation alone, as discussed in the section below.[80]

E. Collective Action Works for Incarcerated People

Finally, it is important to understand that collective action by and for incarcerated people, though risky, can bring about sustainable change if done correctly. Labor strikes by an incarcerated workforce, for example, have a long history in the United States, though such events were, then as now, practically kept secret from the public. Even in the nineteenth century, before the massive surge of the criminal law in the Prohibition Era, "riots and insurrections morphed into well-disciplined and peaceful labor strikes engulfing entire prisons" throughout the Northeast and the South.[81] Such labor strikes continued into the twentieth century and finally began to make national headlines after World War II.[82] For a time, the publicity generated by these strikes brought not only labor conditions, but conditions of confinement in American prisons overall, to the fore.[83]

Whatever public sympathy may have been generated by the publicity of the postwar period was damaged by reports of "full-blown revolts in prisons across the United States" as the War on Drugs filled prisons in the 1960s and 70s,[84] including the notorious Attica State Correctional Facility uprising in 1971.[85] More than 1,200 prisoners participated in the Attica protest, which lasted five days.[86] Prisoners, hostages, and prison employees alike appealed to Governor Rockefeller to continue negotiations, but state officials decided to take the prison

80. Forms of collective action by justice-involved people have existed for some time, but the idea of "criminal justice organizing," (as compared with, say, labor organizing) is still somewhat new. This is not the fault of criminal justice organizers; the dissolution of solidarity among people labeled "criminals" has been a potent and effective strategy employed by power structures of all kinds for as long as the criminal law has existed. *See* Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 702–03 (2006) (discussing the use of criminal syndicalism laws to separate radical labor movement figures from everyone else). Even the term "solidarity" has belonged almost solely to a labor movement existing wholly outside of prison walls until fairly recently. Effective movement lawyers, who are used to managing different (and often difficult) personality types in a variety of settings, can ultimately prove more valuable in effectuating real, observable change by assisting organizing efforts within carceral structures than by seeking relief in the courts.

81. Note, *Striking the Right Balance: Toward A Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1495–96 (2019).

82. *Id.* at 1498.

83. *Id.* at 1496.

84. Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & SOC. INQUIRY 1604, 1623 (2018).

85. Heather Ann Thompson, *How Attica's Ugly Past is Still Protected*, TIME (May 26, 2015, 4:18 PM), https://time.com/3896825/attica-1971-meyer-report-release/ [https://perma.cc/DN5U-9LCX].

86. *Id.*

by force, with disastrous results.[87] Forty-three people died, including eleven prison employees.[88] Victims' families have struggled to obtain the details of the deaths at Attica for nearly fifty years now, with some marginal success in the courts but little genuine satisfaction.[89] By nearly all eyewitness accounts, unspeakable violence, including the murders of prison employees, was primarily perpetrated at Attica by hundreds of New York law enforcement officers—not by prisoners.[90] But at that time, prison officials had total control of the narrative the public heard about how and why it happened. New York officials exploited this advantage to the fullest, creating a resonant story about violent prisoners which reverberates even today, and was a direct cause of the prohibitions on anything approximating collective action by incarcerated people, as discussed thoroughly in the next section.

Strikes and other collective actions have persisted behind prison walls, though. Because of a mix of ingenuity and technology, organizing by incarcerated people has become more sophisticated, independent from the efforts of the judiciary.[91] In the twenty-first century, prisoners are building their own complex networks using social media and other contemporary tools and discovering that these networks can be effective in organizing nonviolent protests.[92] Just within the last decade, a series of hunger strikes attended by thousands of people incarcerated in California prompted changes in the state's solitary confinement policies.[93] By the middle of the 2010s, the Free Alabama Movement had organized and mobilized tens of thousands of incarcerated people across twelve states to participate in work stoppages on specified dates.[94] And in 2021 alone, the website perilouschronicle.com documented 39 instances categorized as "hunger strike," "uprising," and "protest" from prisons and jails around the country, many of which were organized, collective efforts involving dozens—if not hundreds—of incarcerated people.[95] This scale of organizing would not have been possible even twenty years ago.

These massive protests are even possible within maximum security facilities. In September of 2021, Russell Jones of the Direct Action for Rights

87. *Id.*

88. *Judge Awards $550,000 to Attica Hostage Widow*, TOLEDO BLADE 4 (Sept. 4, 1982), https://news.google.com/newspapers?nid=1350&dat=19820904&id=h3gUAAAAIBAJ&sjid=rgIEAAAAIBAJ&pg=5642,759944&hl=en [https://perma.cc/78XA-3RU2].

89. Thompson, *supra* note 85.

90. *Id.*

91. Emma Grey Ellis, *How to Organize the Largest US Prison Strike Ever . . . From Inside Prison*, WIRED (Sept. 9, 2016), https://www.wired.com/2016/09/endprisonslavery/ [https://perma.cc/6AM7-PXT5].

92. *Id.*

93. *Striking the Right Balance*, *supra* note 81, at 1500.

94. *Id*.

95. *A Chronicle of Prisoner Unrest Across the US and* Canada, PERILOUS CHRONICLE, https://perilouschronicle.com/ [https://perma.cc/RH6C-PK4C] (last visited Jan. 13, 2022).

and Equality ("DARE") Behind the Walls Committee reported that more than 300 men in Rhode Island's Adult Correctional Institutions penitentiary went on hunger strike for being treated like "animals on display in a zoo."[96] Incredibly, a convoy of more than two-dozen car protesters joined in, ultimately forcing the corrections officers' union to cancel the "Family Night" event planned for invitees of prison employees.[97] The corrections union denied that there was any strike at all.[98]

Perhaps the most remarkable displays of organizing prowess from behind bars can be seen in the multi-facility strikes of 2016 and 2018. On September 9, 2016, a coordinated action spearheaded by prisoner-led organizations the Incarcerated Workers Organizing Committee ("IWOC") and the Free Alabama Movement led to confirmed work stoppages in at least three states—there were stoppages reported in two other states, but prison officials denied that any collective action took place.[99] Incarcerated people used contraband cellphones and outside organizers to coordinate an action that spanned forty to fifty total facilities.[100] According to the organizers, tens of thousands of incarcerated people participated and were joined by corrections officers.[101] Though it was considered "the largest prison strike in U.S. history" it received little media coverage.[102] The strikers had no unified list of demands, and the action lasted a few days at most.[103]

On August 21, 2018, activists with prisoner-led organizations Jailhouse Lawyers Speak, with the support of outside activist groups, declared a nationwide strike in response to the killing of seven incarcerated people in South Carolina's Lee Correctional Institution.[104] According to Jailhouse Lawyers

96. Steve Ahlquist, *Protesters Object to Prison Tours that Treat the Incarcerated as Zoo Animals*, UPRISE RI (Sept. 24, 2021), https://upriseri.com/dare-v-aci/ [https://perma.cc/S7EA-NGUQ].

97. Letter from Steven Brown, Exec. Dir., ACLU R.I., & Natalia Friedlander, Staff Att'y, R.I. Ctr. for Just., to Patricia Coyne-Fague, Dir., R.I. DOC (Sept. 10, 2021), https://riaclu.org/sites/default/files/field_documents/acluri_letter_ribco_officers_week.pdf [https://perma.cc/T8JA-NG5C].

98. Ahlquist, *supra* note 96.

99. Beth Schwartzapfel, *Why America's Incarcerated Have Launched the Largest Prison Strike in Recent History*, ALTERNET (Sept. 28, 2016), https://web.archive.org/web/20170224052514/http://www.alternet.org/human-rights/why-americas-incarcerated-have-launched-largest-prison-strike-recent-history [https://perma.cc/829U-8XTG].

100. Alice Speri, *Largest Prison Strike in U.S. History Enters its Second Week*, INTERCEPT (Sept. 16, 2016, 9:19 AM), https://theintercept.com/2016/09/16/the-largest-prison-strike-in-u-s-history-enters-its-second-week/ [https://perma.cc/8JFF-RJZ4].

101. Schwartzapfel, *supra* note 99.

102. Speri, *supra* note 100.

103. *Id.*

104. *Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., https://incarceratedworkers.org/campaigns/prison-strike-2018 [https://perma.cc/KSR5-YXBV] (last visited Nov. 20, 2022).

Speak's press release, the strike was to include labor stoppages, sit-ins, a halt to all commissary spending, and hunger strikes.[105]

Details are murky about exactly how many incarcerated people participated in these strikes, but the action appears to have been much bigger than the 2016 strikes, at least in geographic scope. Reports confirm that the 2018 strikes reached at least six states and parts of Canada.[106] It can be safely estimated that thousands of prisoners participated.[107] At least one member of Congress, Ro Khanna of California, expressed support for the strike in a tweet that said: "American prisoners are going on strike in seventeen states. I support them. Instead of focusing on rehabilitation, inmates are exploited for cheap labor. In California, prisoners are fighting massive wildfires for a dollar an hour. That is simply inexcusable."[108] The strikes officially ended on September 9, 2018—the forty-seventh anniversary of the Attica uprising.[109]

Whether these strikes led to any real, lasting reforms is an open question, but at the very least, the strikes of the twentieth century "led to slight increases in pay and triggered noteworthy reform efforts within prisons, including the establishment of inmate-run grievance committees and advisory boards."[110] Professor Eric M. Fink has remarked: "The lesson of this history is that, with or without legal support, incarcerated workers, like workers on the outside, have persisted in organizing and acting through unions as a means of improving the conditions under which they labor and live."[111] These successes, while perhaps modest, can be improved upon with competent, diligent support from outside individuals and organizations. Formal prisoner-led organizations such as IWOC are still in their infancies, relatively speaking, and will undoubtedly need increased outside support as prisoner organizing continues its rise as a reform

105. @JailLawSpeak, TWITTER (Apr. 24, 2018, 9:28 AM), https://twitter.com/JailLawSpeak/status/988771668670799872/photo/3 [https://perma.cc/E9BD-DVWP].

106. Brooke Fryer, *US Inmates Sent to Solitary Confinement over 'Prison Slavery' Strike*, NITV (Sep. 5, 2018, 5:59 PM), https://www.sbs.com.au/nitv/nitv-news/article/2018/09/05/us-inmates-sent-solitary-confinement-over-prison-slavery-strike [https://perma.cc/VXL2-43ZR]; Julia Conley, *With US Prison Strike on Third Day, Reports of Hunger Strikes and Work Stoppages Nationwide*, COMMON DREAMS (Aug. 23, 2018), https://www.commondreams.org/news/2018/08/23/us-prison-strike-third-day-reports-hunger-strikes-and-work-stoppages-nationwide [https://perma.cc/HSC6-8QYS].

107. *See id.*

108. @RepRoKhanna, TWITTER (Aug. 22, 2018, 11:43 AM), https://twitter.com/RepRoKhanna/status/1032292279866802177 [https://perma.cc/6LVN-XCC7].

109. 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/N7A9-SV3D].

110. *Striking the Right Balance*, *supra* note 81, at n.71 (citing Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LABOR 15, 28–29 (2011)).

111. Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 973 (2016).

tactic, as evidenced by the lack of formal media coverage of the 2016 and 2018 strikes. Assuming they get this support, organized actions could very well boast a success rate outpacing that of federal litigation.

Professor Fink is undoubtedly correct that incarcerated people will organize "with or without" support from lawyers, but one can safely assume that they would be better off "with." That is, so long as the people seeking to organize can find lawyers willing to do something other than simply whack problems with a litigation hammer. A lawsuit likely could not have prevented the tragedy at Attica, for example, but entrenched movement lawyers might have, if they had been there to counsel protesters and act as media liaisons before and throughout the entire five-day ordeal.[112] Contrast Attica with the outside-organization-supported 2016 and 2018 strikes, in which there were certainly instances of retaliation,[113] but apparently little bloodshed, and no death.[114] The situation faced by farmworkers in the 1960s is perhaps a better comparison to that of incarcerated people now *vis a vis* the role of lawyers; UFW members operated without the protections of the National Labor Relations Act, and the Agricultural Labor Relations Act had not yet been passed, so the powers-that-were could (and did) legally stop them from picketing, boycotting, or organizing at all.[115] Lawyers like Jerome Cohen and Sandy Nathan were able to assist workers in violating injunctions and other acts of civil disobedience, knowing that they could turn technical losses into public relations victories.[116] As Cohen later noted: "The beauty of working with a movement is that whether you win or lose is sometimes entirely irrelevant, because there's not a defeat you can't turn into some kind of victory."[117] Such victories are exceedingly difficult to achieve for prison-led organizations without the help from people who can exist simultaneously within and outside prison walls, i.e., licensed attorneys.

Unfortunately, at this point in history there is little to speak of when it comes to lawyers assisting incarcerated people in organizing efforts. This is true for two major reasons, the first and most salient of which is discussed throughout

112. Legal professionals stepped in during the uprising to serve as mediators, but too little, too late. *See War at Attica: Was There No Other Way?*, TIME (Sept. 27, 1971), https://time.com/vault/issue/1971-09-27/page/30/ [https://perma.cc/U2QT-6HAN].

113. *See* Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, GUARDIAN (Aug. 31, 2018), https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation [https://perma.cc/N8Y5-VV3L].

114. The author does not mean to lay the Attica tragedy at the feet of the protesting prisoners, whose uprising was relatively peaceful considering the horrendous conditions they faced. By virtually all accounts, state police and Governor Nelson Rockefeller were to blame for the breakdown of negotiations and for charging blindly into a volatile situation, creating what the Second Circuit later referred to as an "orgy of brutality." *See* Joe Heath, *What Actually Took Place and Why So Much Is Still Unknown*, 102 N.Y. HIST. 21, 21–34 (2021).

115. Gordon, *supra* note 61, at 17–18.

116. *Id.* at 19.

117. *Id.* at 27–28.

the rest of this article. The second reason is that there was no recognized "movement lawyering" to speak of in the pre-Attica days; not because those principles were not already in use (they were obviously at work in the example of the United Farm Workers), but because lawyers were scarcely in prisons at all.[118] Aside from the occasional visit by an appellate or postconviction counsel, there was no financial reason for an attorney to forge relationships with incarcerated people until the Supreme Court's 1961 decision in *Monroe v. Pape*, which recognized private § 1983 actions.[119] Ten years after Attica, civil lawyers were just finding their way into the prisons; the total number of § 1983 cases was only a little over 15,000, and only a fraction of those were brought on behalf of incarcerated people. But the prison population continued to increase, and the cottage industry of prisoners' rights litigation rose along with it. By 2018, the number of civil rights cases filed in federal courts hit nearly 70,000.[120] As a result of all that contact with those on the "inside," the bar had—and has—a better sense of what the problems are, and how they might—or might not—be solved.

In sum, this is the right moment in history for more attorneys to adopt movement lawyering principles in providing organizing support to incarcerated people. There is a hitch, though: advising or assisting prisoners in union-style organizing can be the equivalent of advising or assisting them in breaking the law. This unfortunate fact, and its accompanying ethical and practical implications, are discussed below.

II. THE PROHIBITION OF COLLECTIVE ACTION IN THE CARCERAL CONTEXT

For much of America's early history, worker organization was a violation of one criminal law or another, punishable by steep fines and prison time. In 1806, a Philadelphia court's opinion in *Commonwealth v. Pullis*, the first reported prosecution of a labor union, said that "[a] combination of workmen to raise their wages may be considered in a twofold point of view; one is to benefit

118. *Id.* at 7.

119. *See* Monroe v. Pape, 365 U.S. 167, 171–72 (1961).

120. *See* SARAH E. RICKS & EVELYN TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK 25 (Carolina Academic Press 3d ed. 2020):

> Yet §1983 was not a frequently litigated statute before 1961. In its first fifty years, the statute generated only 21 cases. *See Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). By 1981, however, there were 15,639 §1983 suits filed, representing "over 8.6% of the total federal district court civil docket." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 534 (1982) (Powell, J., dissenting). "By 1985 not counting prisoner petitions, the number was over 17,000, and by 1992 the number was over 20,000." While not limited to §1983 cases, recent federal judicial business statistics reflect that 41,741 "civil rights" cases were filed in the twelve month period ending September 30, 2018, and that an additional 18,842 prisoners' civil rights cases and 9,708 prison condition cases were filed during that same year.

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themselves . . . the other is to injure those who do not join their society. The rule of law condemns both."[121]

But by the middle of the nineteenth century, the outsized influence of the working classes made continued prosecution of organized labor impossible. As historian Sean Wilentz puts it, "The political dilemmas of the late 1820s and 1830s . . . hastened the development of openly class-conscious groups of employers and wage earners."[122] In other words, the lower layers of society were becoming aware of their stations in life as compared to the wealthy land and business owners they worked for, and they did not particularly like being prosecuted for working toward better pay and more time off.[123] In 1842, Massachusetts Chief Justice Lemuel Shaw held in *Commonwealth v. Hunt* that workers who formed organizations—or "combinations" as they were called in those days—in order to improve wages and working conditions were not, as a matter of law, engaging in criminal conspiracy.[124] The ruling classes recognized that they simply did not have the police power to beat back the tide of labor entirely.[125]

From the 1840s on, most labor unions were legitimized and brought within the purview of the courts, instead of being left wholly outside of the law.[126] While "respectable" labor unions were brought into the proverbial fold in the late nineteenth and early twentieth centuries, more radical, anticapitalistic labor unions—particularly the Industrial Workers of the World ("IWW"), which later begat IWOC, discussed *supra*—were effectively stamped out with "criminal syndicalism" statutes.[127] These statutes were broad enough to disenfranchise and often imprison anyone who so much as voiced support for strikes.[128] In fact, membership in IWW was itself enough to earn a criminal prosecution.[129]

Lawyers, too, have been subject to discipline, including disbarment, for their work in the early labor movement and other collective actions. One notable

121. *Commonwealth v. Pullis*, 3 Doc. Hist. 59, *reprinted in* JOHN R. COMMONS & EUGENE A. GILMORE, LABOR CONSPIRACY CASES, 1806-1842, VOLUME 1, at 233 (John R. Commons et. al eds., 1910); *see also Philadelphia Cordwainers' Case*, UMASS AMHERST LAB. L. ULA (2008), https://blogs.umass.edu/ulaprog/files/2008/06/commonwealth-v-pullis.pdf [https://perma.cc/72HQ-RKAH] (last visited Nov. 20, 2022) (summarizing *Commonwealth v. Pullis*).

122. Sean Wilentz, *Artisan Republican Festivals and the Rise of Class Conflict in New York City, 1788–1837*, *in* WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY 37, 44 (Michael H. Frisch & Daniel J. Walkowitz eds., 1983).

123. *See id.*

124. Commonwealth v. Hunt, 45 Mass. 111, 112, 136 (1842).

125. *See* DAN CANON, PLEADING OUT: HOW PLEA BARGAINING CREATES A PERMANENT CRIMINAL CLASS 30–32 (Basic Books, 2022).

126. White, *supra* note 79, at 667.

127. *See id.* at 752.

128. *Id.* at 667.

129. *Id.* at 715 n.350 (citing People v. Casdorf, 212 P. 237, 238 (Cal. Ct. App. 1922); People v. Johansen, 226 P. 634, 634 (Cal. Ct. App. 1924)).

example is IWW counsel Elmer Smith, who was disbarred in Washington in 1925 for "advocat[ing] a general strike, a strike that 'will paralyze all the industries of the state,' as a means of coercing their liberation."[130] The Washington Supreme Court held, "On his admission to practice as an attorney, the defendant took an oath to uphold the laws of the land, and, in our opinion, his conduct in this particular is a violation of that oath."[131]

Over time, labor movements managed to finagle a few formal safeguards. Ten years after Elmer Smith was disbarred, Congress passed the National Labor Relations Act to provide protections for organized laborers.[132] In 1975, the same year that Sandy Nathan was arrested with UFW strikers, the California legislature passed the California Agricultural Labor Relations Act to provide similar protections for farmworkers—similar legislation failed at the federal level.[133] But to date, no equivalent statute has been seriously proposed to protect incarcerated people who wish to organize, whether for labor purposes or for any other reason. To the contrary, the Thirteenth Amendment provides safe harbor for correctional facilities that wish to exploit prisoner labor.[134] Legal prohibitions on prison unions, and prison organizing in general, are thus a relic of America's shameful history of not only slavery, but also criminalizing organized labor—and of cracking down on collective action generally.

Prohibitions on prisoner organizing were put to the test in the 1977 Supreme Court case of *Jones v. North Carolina Prisoners' Labor Union, Inc.*[135] In that case, the justices considered a First Amendment challenge brought by a prisoners' union which sought "'through collective bargaining . . . to improve . . . working . . . conditions . . . .' It also proposed to work toward the alteration or elimination of practices and policies of the Department of Correction which it did not approve of, and to serve as a vehicle for the presentation and resolution of inmate grievances."[136]

The union had become increasingly popular. In a year, "the Union had attracted some 2,000 inmate 'members' in 40 different prison units throughout

130. *In re* Smith, 233 P. 288, 289 (Wash. 1925).

131. *Id.*

132. *1935 Passage of the Wagner Act*, N.L.R.B., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/7AMK-ERUD] (last visited Nov. 20, 2022).

133. CAL. LAB. CODE § 1140.2 (2021); H.R. 5521, 94th Cong. (1975).

134. The Thirteenth Amendment to the United States Constitution bans "involuntary servitude" in addition to slavery, "except as a punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII. *See also New Global Human Rights Clinic Report Finds Coercion and Exploitation at the Center of Prison Labor Programs Nationwide*, UNIV. CHI. L. SCH. NEWS (June 15, 2022), https://www.law.uchicago.edu/news/new-global-human-rights-clinic-report-finds-coercion-and-exploitation-center-prison-labor [https://perma.cc/SR5V-FEF8].

135. 433 U.S. 119 (1977).

136. *Id.* at 122.

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North Carolina."[137] But in an opinion authored by Justice Rehnquist, the Court held that the "fact of confinement and the needs of the penal system impose limitations on constitutional rights, including those derived from the First Amendment," and therefore upheld regulations put into place as a direct response to the union by the North Carolina Department of Corrections which, in essence, prohibited all organizing activity.[138]

It is important to note that in *Jones*, just as in early conspiracy prosecutions, the concern by prison officials was not about riots, uprisings, or violence of any kind.[139] Only later, when a wave of §1983 litigation resulted in a spate of court opinions obsessed with vague notions of "institutional security" and "officer safety," did anti-organizing provisions suddenly find their roots in "keeping the peace."

In any event, all fifty states and the federal government took full advantage of the *Jones* ruling by enacting similar regulations in the 1970s and 1980s.[140] Appendix A presents a nearly complete list of the black-letter prohibitions on prison organizing in each state. The qualifier "nearly" must be applied to this "nearly complete" list because finding prohibitions, even when one is certain they exist, can be practically impossible. Some states have devolved rulemaking authority to individual facilities, making the rules at least esoteric, if not totally opaque. Take the example of Minnesota: handbooks and rules given to incarcerated people in that state are apparently online and password protected, making it difficult even for experienced legal researchers to access.[141] Some facilities are tight-lipped about their internal policies out of some vague notion of confidentiality. One might wonder how incarcerated people themselves are supposed to know the rules that govern their conduct if law students and professors, with the resources provided by public universities, cannot discern them. The overall takeaway, however, is clear: Incarcerated people are restrained from organizing, at least in some aspect, *everywhere* in the United States.

Most of these regulations are startlingly broad, and violations are punished severely.[142] The current regulations promulgated by the Federal Bureau of Prisons prohibit "[e]ngaging in or encouraging a group demonstration," and "[e]ncouraging others to refuse to work, or to participate in a work stoppage."[143] These offenses are considered "High Severity Level Prohibited Acts" and are

137. *Id.*

138. *Id.* at 119. There are some exceptions to this, but not enough to really be meaningful. *See* Fink, *supra* note 111, at 953–54 (discussing loopholes for private sector labor in prison industries).

139. *See Jones*, 433 U.S. at 119.

140. *See infra* Appendix A.

141. *JPay Frequently Asked Questions*, MINN. DEP'T OF CORR., https://mn.gov/doc/family-visitor/send/jpay-faq/ [https://perma.cc/UHW7-D5N8] (last visited Nov. 20, 2022).

142. 28 C.F.R. § 541.3 (2021).

143. *Id.*

in the same category as bribery, theft, extortion, and escape.[144] Georgia's regulations make a similarly sweeping prohibition:

> (c) Violations pertaining to the Security and the Orderly Operation of the Institution.
>
> C-1: Participation in any meeting or gathering which is not of a type which has been authorized by the institutional staff or an individual staff member.
>
> C- 2 Participation in any group demonstration, disturbance, riot, strike, refusal to work, work stoppage or work slow down which would disrupt the ordinary routine of the institution.
>
> C-2A: Planning, conspiring, or encouraging others to participate in any group demonstration, disturbance, riot, strike, refusal to work, work stoppage, or work slowdown which would disrupt the ordinary routine of the institution.[145]

Though these regulations do not have the force of criminal statutes, there can be no doubt that punishment for violating them can be just as severe, often earning a prisoner months in solitary confinement.[146] Indeed, that is exactly what happened in the prisoner uprisings of 2018.[147] IWOC posted a list of sixteen prisoners who were subjected to penalties for participating in strikes that summer, and that likely only represents a fraction of the total number of prisoners who were retaliated against.[148]

III. ETHICAL ISSUES IN ADVISING INCARCERATED CLIENTS TO TAKE COLLECTIVE ACTION

Advising or assisting incarcerated clients in organizing therefore presents a classic problem: How can an attorney ethically give advice to a client who is engaging in what is essentially an act of civil disobedience?[149] The rules of ethics

144. *Id.*

145. GA. COMP. R. & REGS. 125-3-2-.04 (2022).

146. *See, e.g.*, Bruce v. Woodford, 1:07-CV-00269-BAM PC, 2016 WL 8673059, at *7 (E.D. Cal. July 22, 2016).

147. *2018 Prison Strike Solidarity Letters*, INCARCERATED WORKERS ORG. COMM., https://incarceratedworkers.org/prison-strike-letters [https://perma.cc/5ANF-QNUY] (last visited Nov. 20, 2022).

148. *Id.*

149. There is significant need for further scholarship on, and further popular discussion of, this topic. This need is underscored by the recent flood of ALEC-sponsored bills designed to suppress peaceful protest, many of which have been passed by state legislatures. *See* Chloe Marie, *Update on State Critical Infrastructure Protection Statutes: North Dakota, Oklahoma, and South Dakota*, PENN STATE L. CTR. FOR AGRIC. & SHALE L. (May 22, 2019), https://aglaw.psu.edu/shale-law-in-the-spotlight/update-on-state-critical-infrastructure-protection-statutes-north-dakota-oklahoma-and-south-dakota/ [https://perma.cc/PU6C-Y7KA] (explaining Oklahoma House Bills 1123 and 2128, which impose penalties including a fine of up to $1,000,000.00 for tampering with "critical infrastructure," *i.e.*, property of the oil and gas industry, and imposing liability on anyone *inciting* trespass onto such property).

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do not contemplate the idea of breaking the law—even a patently unjust law—to serve a higher purpose. As Professor Charles DiSalvo wrote more than forty years ago: "The Model Code has a lawyer-centric perspective on change, for it bestows its blessing on only one kind of change—lawyer-induced change."[150] Thus, he wonders, "had Rosa Parks sought the advice of a counselor, would not her lawyer have been duty bound to turn her away, and, if he spoke to her, to urge her not to take her historic bus ride?"[151]

There are two main provisions of the Model Rules of Professional Conduct ("MRPC") that are implicated in assisting incarcerated people with unlawful organizing activities, *i.e.*, MRPC 1.2(d) and 8.4(d). Both of these will be discussed in the sections below.

A. Implications of MRPC 1.2(d)

Rule 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[152]

The current rule represents a significant departure from the rule of the 1981 Model Code of Professional Responsibility, in that the word "criminal" has been substituted for the former term, which was the much broader "illegal."[153] Indeed, upon the adoption of the MRPC in 1983, some scholars made the argument that the broader term should be retained, a recommendation that the American Bar Association ("ABA") openly resisted and ultimately rejected.[154]

As such, simply assisting a prisoner with organizing, even if the prisoner is violating a regulation, does not seem to be assisting in a "crime" in any jurisdiction, and is probably ethically permissible so long as the attorney advises the prisoner of the probable consequences of their organizing efforts—which, again, can be quite severe.[155] Professor Paul Tremblay opines quite plainly that

150. Charles R. DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient*, 17 GA. L. REV. 109, 129 (1982).

151. *Id.*

152. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N, Scope of Representation and Allocation of Authority Between Client and Lawyer 2020).

153. MODEL CODE OF PRO. RESP. at DR 7-102(A)(7) (AM. BAR ASS'N 1981).

154. Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 257–58, n.21 (2018).

155. *Id.* at 266 (noting that it is "not terribly controversial and is reasonably well accepted" that "a lawyer may counsel a client about the meaning of a legal authority, its reach, its enforcement, and the consequences of its breach, even if that authority encompasses criminal or fraudulent activity"). Tremblay distinguishes this sort of counseling from actively *assisting* a client in unlawful activity, but concludes that both may be permissible, as discussed below.

Rule 1.2(d) and its comments do "not prohibit counseling about or assisting with client conduct that is unlawful but not criminal or fraudulent," though he notes that "case law on the question is effectively nonexistent."[156]

Scholarly sources are less reticent than courts on the topic, but almost universally agree with Professor Tremblay. The Restatement (Third) of the Law Governing Lawyers, for example, opines that a lawyer may assist a client in a breach of contract without violating Rule 1.2(d), so long as the client has already elected to breach that contract of their own volition.[157] This sort of activity is perhaps uncomfortable to an ethical purist. But, according to Tremblay, "lawyers may only take advantage of the discretion the ABA and the states provide in settings where doing so would advance justice or morality. No other understanding seems plausible."[158] As this article argues above, prisoner organization—done correctly—can certainly advance both justice and morality.

A separate, slightly thornier question is whether assisting a client in organizing activities could be considered "fraudulent." Rule 1.0(d), comment [5] provides: "the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[159] One might argue that organization in general, and certainly striking/work stoppages, are acts of open opposition to management—or in this case, to the facility's administration—and therefore cannot be "fraudulent" within the meaning of the rule. But this ignores the steps an incarcerated person must take to meaningfully organize in the first place; steps which, practically speaking, *must* be concealed in many facilities if the organizing effort is to have any success. Former incarcerated worker Cole Dorsey, in an interview with Pacific Standard magazine, recounted his "secretive organizing" efforts in the early 2000s:

> As prisoners are permitted to congregate for religious services, he and his fellow inmates met under the auspices of the Nation of Islam. "We spent time talking about revolutionary politics, how prisons were a vital component of the carceral state, and how we needed to start relying on one another and building cultures of solidarity," Dorsey says. . . . Dorsey points to the importance of "kites": handwritten notes surreptitiously passed between prisoners—or even via guards, if the price is right. Smuggled cell phones have also played a large role, allowing inmates to speak with outside advocates, journalists, and others without being subjected to the prying of prison administrators.[160]

156. *Id.* at 267–68, 271–72.

157. *Id.* at 272.

158. *Id.* at 258.

159. MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 5 (AM. BAR ASS'N 2011).

160. Arvind Dilawar, *How to Organize a Prison Strike*, PAC. STANDARD (May 7, 2018), https://psmag.com/social-justice/how-to-organize-a-prison-strike [https://perma.cc/HGD2-G538]. The piece notes that the efforts of Dorsey and other prisoners in Michigan were at least somewhat successful.

Some of this conduct must be considered fraudulent activity under the Rule; an attorney obviously cannot knowingly assist clients with bringing contraband phones into a facility.[161] But an example of "fraud," defined broadly, need not be so stark. Intuitively, it seems as though opportunities for sneaky, dishonest, or at least secretive behavior abound in the carceral context.

On the other hand, the legal definition of "fraud" in an organizing context or in the context of civil disobedience may not always track with the average lawyer's expectations. "Fraud typically consists of a false representation, whether oral, written or based in conduct that creates an untrue or misleading impression in the mind of another with the intent that the person would rely upon the false representation." As such, falsifying one's citizenship status for purposes of entering the country, for example, would be considered fraudulent—a lawyer cannot assist in that endeavor, even if it seems just.[162] But on the other hand, the practice of "salting" has been considered—and approved—by the United States Supreme Court in the context of an action brought under the National Labor Relations Act ("NLRA"). "Salting refers to a union organizer applying for employment with a nonunion entity for the sole purpose of engaging in campaign activity on behalf of the union *i.e.*, while concealing the intent to organize or communicate with the employees about a pending representative election or recruiting membership, *etc*."[163] It is hard to imagine that this sort of activity is not considered fraudulent, but the Court concluded that this sort of concealment did not exclude the "salters" from the definition of "employees" under the NLRA.[164]

This might reasonably lead one to believe that concealment of initial organizing activities does *not* fall under the definition of fraud set forth by the Model Rules. Furthermore, Comment 9 to the annotated Model Rules explains: "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed *with impunity*."[165] If "getting away with it" is part of the fraud equation, then this lends further credence to the notion that organizing, even in secret, is not fraudulent activity. Again, organizing conduct is, by definition, going to be found out, and incarcerated organizers are very likely to be punished for it.

161. An interesting question is whether an attorney may continue assisting a client once they know of the use of a smuggled cellphone in the organizing activities. If immigration crimes are considered analogous, the answer is probably yes. *See supra* note 159.

162. Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 367–68 (2008).

163. Nathaniel D. Johnson, *Salting: An Organizing and Recruitment Tool*, 77 MICH. B.J. 1069, 1069 (Oct. 1998) (discussing N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85, 96 (1995)).

164. N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85, 96 (1995).

165. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2022) (emphasis added).

The careful advocate should therefore counsel an incarcerated person that organizing efforts should be done without taking deliberate steps to conceal those efforts, if at all possible—impractical as this may seem—or at least not offer an opinion one way or another as to whether those efforts should be kept secret.

Additionally, the affirmative advice to organize in the first place—"counseling to engage," in the parlance of the Rule—is a trickier subject and should be analyzed separately. The advice to organize, when an incarcerated person is not already contemplating concerted activity and belongs to no existing network of incarcerated people, is tantamount to advising a client to deliberately violate a provision of the law in most jurisdictions—an administrative regulation, but the law nonetheless. This advice is therefore qualitatively different from simply "assisting" a prisoner with organizing activities. Professor Tremblay notes that "no lawyer has been disciplined under the Model Rules version of Rule 1.2(d) for misconduct that did not involve a crime or a fraud."[166] Still, discipline under the rule has not been restricted exclusively to direct violations of criminal *statutes* where an attorney has given the affirmative advice to break the law. In at least one post-MRPC case, an attorney was disciplined for advising his client to violate a court order in a custody case, which then led to criminal contempt charges against his client.[167]

B. Implications of MRPC 8.4(d)

Avoiding a violation of Rule 8.4(d), however, may prove more difficult. The Rule, which has been called a "catch-all,"[168] prohibits lawyers from "engag[ing] in conduct that is prejudicial to the administration of justice[.]"[169] Noncriminal conduct can violate this rule.[170] Again, no lawyer appears to have been disciplined under this rule for providing assistance to incarcerated people, but the rule has been construed broadly enough in other contexts to conceivably reach an attorney's conduct if they openly and affirmatively advise violations of institutional regulations at a state or federal prison.

A common interpretation of the rule is that an attorney's misconduct must be connected to a "judicial proceeding" to fall under this rule.[171] And indeed, most of the disciplinary actions under the Rule are connected to obstruction of an existing court case in some way.[172] So at first blush, it would seem as though

166. Tremblay, *supra* note 154, at 273.

167. *In the Matter of* Kevin Scionti, 630 N.E.2d 1358, 1360 (Ind. 1994).

168. § 59:14. Catch-all provision on misconduct, 6 MS PRAC. ENCYC. MS L. § 59:14 (2d ed.).

169. MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR. ASS'N 2019).

170. Atty. Grievance Comm'n. of Maryland v. Sheinbein, 812 A.2d 981, 996 (Md. 2002).

171. *See, e.g.*, Rogers v. Mississippi B., 731 So. 2d 1158, 1170 (Miss. 1999).

172. The annotated Rule collects the following case examples: People v. Roose, 69 P.3d 43 (Colo. 2003) (leaving courtroom midtrial in defiance of judge's order); *In re* Kline, 311 P.3d 321, 346 (Kan. 2013) (attorney general directed staff to attach sealed documents to brief in violation of

an attorney advising clients to organize around anything other than an active case may be insulated from discipline under this rule. But the term has been construed in an *ad hoc* fashion, and in a way that suggests that if a regulating authority really wants to discipline an attorney, that is what they will do. For example, one Florida case holds that the rule covers "conduct that prejudices our system of justice as a whole,"[173] and found it violated by an attorney's "conduct not connected with proceedings before a tribunal."[174] Indiana seems to be in line with this interpretation,[175] but Alaska has held that mishandling of client funds does not violate the Rule (though it violates others).[176] Some courts apply the Rule "even if a legal proceeding has ended and even if the lawyer stops somewhere short of spreading outright lies."[177] In fact, courts have used the Rule to reach conduct by attorneys that occurred before they were licensed.[178]

Of particular import here are the cases that find violations of the rule simply because some aspect of law enforcement is involved, however peripherally. One Delaware case, for example, held attorney discipline proper under the rule where he falsely reported a hostage situation to 911.[179] The court reasoned that "filing of charges with the police is often a starting place for charges in the criminal justice system."[180] Of course, there are many such "starting places." One might imagine that any movement lawyers working within the criminal justice system could be subject to discipline under this Rule.

court order); *In re* Johnson, 877 N.E.2d 249, 251 (Mass. 2007) (posting on website information court had impounded in child molestation case; lawyer not free to ignore court orders and challenge them for first time in disciplinary proceeding); *In re* Estrada, 143 P.3d 731, 735 (N.M. 2006) (failure to respond properly to discovery requests); Disciplinary Counsel v. Rohrer, 919 N.E.2d 180, 182–83 (Ohio 2009) (leaking information to local newspaper in violation of court order); *In re* Nelson, 750 S.E.2d 85 (S.C. 2013) (assistant prosecutor exchanged more than thirty phone calls and text messages with cousin serving as juror in criminal trial handled by other prosecutors).

173. Fla. Bar v. Frederick, 756 So. 2d 79, 87 (Fla. 2000).

174. ANN. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 1981) (discussing Fla. Bar v. Frederick, 756 So. 2d 79, 87 (Fla. 2000)).

175. *In re* Mears, 723 N.E.2d 873, 875 (Ind. 2000).

176. *In re* Friedman, 23 P.3d 620, 629 (Alaska 2001).

177. *In re* Pyle, 156 P.3d 1231, 1247 (Kan. 2007).

178. *See, e.g.*, the cases cited in ANN. MOD. RULES OF PROF. COND. § 8.4. Misconduct: Att'y Grievance Comm'n v. Hunt, 76 A.3d 1214, 1217 (Md. 2013) (criminal conduct involving unauthorized disclosure of taxpayer information while serving as IRS revenue officer before bar admission and failure to inform admissions authorities); *In re* Mikus, 131 P.3d 653, 654–55 (N.M. 2006) (suspension based on pre-admission assault resulting in felony conviction, and failure to supplement bar application after indictment); *In re* Wong, 710 N.Y.S.2d 57, 57 (App. Div. 2000) (pre-admission criminal sexual misconduct with minor); Off. of Disciplinary Couns. v. Clark, 531 N.E.2d 671, 672 (Ohio 1988) (felony convictions for pre-admission drug smuggling, tax evasion); State *ex rel.* Okla. Bar Ass'n v. Flanery, 863 P.2d 1146, 1147 (Okla. 1993) (embezzling $71,000 from relatives who hired lawyer as manager/bookkeeper before bar admission); *In re* Brown, 605 S.E.2d 509, 517 (S.C. 2004).

179. *In re* Schaeffer, 45 A.3d 149 (Del. 2012).

180. *Id.*

The common thread throughout the majority of Rule 8.4(d) cases, however, is that the lawyers themselves must be "engaging" in the prohibited conduct or at least encouraging it; merely "assisting" a client in navigating conduct they have already decided to engage in does not seem to suffice.[181] So the outlook for advising incarcerated people who might wish to organize is roughly the same under 8.4(d) as it is under 1.2(d): merely assisting is probably permissible, but directly advising the initiation of organizing tactics is risky.

IV. ENSURING ETHICAL COMPLIANCE AND PROPOSED CHANGES

All told, the possibility of attorney discipline, even for merely assisting incarcerated people, is not insignificant. This section collects suggested changes to existing law, including the Model Rules, that would better protect movement lawyers who seek to assist those caught in the gears of the criminal justice system—and civil disobedience of all kinds.

A. Legal Challenges to Existing Prohibitions

At the outset, it should be acknowledged that there is some room for advocates who proceed from the good-faith position that an anti-organizing regulation is itself unconstitutional or otherwise unlawful, and can therefore be disregarded. The federal bench has become collectively starry-eyed about the First Amendment as of late, and the current Supreme Court in particular seems willing to stretch the boundaries of free speech to the outer boundaries of what reasonable people might call "sane."[182] This mode of thought is, at times, even applied to incarcerated people.[183]

However, a direct challenge to *Jones v. North Carolina* is probably a dead end. Even with the influx of First Amendment hawks on the federal bench over the last two decades, *Jones* has never been disapproved by any noteworthy court.[184] Nearly all subsequent, relevant jurisprudence reflects the Supreme Court's attitude that "harsh conditions and rough disciplinary treatment are part of the price that convicted individuals must pay for their offenses against society."[185] This includes the tepid reaffirmation of *Jones* itself in the no-holds-barred-for-the-First-Amendment case of *Citizens United*.[186] And to date, no

181. *See* ANN. MOD. RULES OF PROF. COND. § 8.4. Misconduct (referencing the cases cited under "Assisting in Violation, or Violating Rules Through Acts of Another"); *Supra* note 178.

182. *See, e.g.*, Shurtleff v. Boston, 142 S. Ct. 1583, 1593 (2022).

183. *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 356 (2015).

184. Note that this hawkishness *does* apply to organized labor, but not in a way that favors workers. *See, e.g.*, Janus v. Am. Fed'n of St., Cnty. & Mun. Emps., 138 S. Ct. 2448, 2448 (2018).

185. Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1200 n.56 (2013) (quoting *Substantive Rights Retained by Prisoners*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 943, 959 (2008)).

186. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 420 n.42 (2010) (quoting Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 129 (1977)) ("In a prison context, an inmate

lower federal court or state court has invalidated any carceral institution's regulations on organizing under any constitutional provision. The cautious advocate should therefore assume that a frontal assault will fail.

B. 'Choice of Evils' Arguments

If an attorney is faced with a conditions of confinement scenario that is unconstitutional, then they could argue a conflict between the Constitution and the administrative regulation, assuming the regulation poses a barrier to enforcement of that constitutional provision. In other words, if the unconstitutional condition is unlikely to be remedied unless an incarcerated person violates an administrative regulation, it may be ethically permissible to advise them to violate that regulation.

This is not unlike the scenario posed by Professor Ellen Yaroshefsky in the context of military lawyers who knew—and know—about the treatment of prisoners at Guantanamo Bay, treatment which Yaroshefsky describes as "criticized throughout the world as violative of fundamental principles of international law."[187] "These military lawyers are often unable to communicate with clients or to share evidence with them, and are subject to a panoply of other restrictions on access that would be unthinkable in a typical case or courtroom in the United States."[188] Attorneys assigned to represent detainees were threatened not just with disciplinary action, but with criminal prosecution, for disclosing what was tantamount to outright torture of their clients.[189]

The fourth prong alone would exclude this test's application in a conditions-of-confinement setting, as any court or tribunal could readily determine there were "legal alternatives"—*i.e.*, a civil rights lawsuit, practicalities be damned. Similarly problematic is the "imminent harm" prong; collective action is not necessarily designed to prevent what lawyers would call *imminent* harm, but rather quotidian humiliation and torture. A necessity defense is therefore not readily adaptable to the attorney disciplinary actions contemplated here.

Yaroshefsky proposes a "safe harbor" framework as a modification to the federal necessity test that would insulate some military lawyers. Her modified test would require the lawyer to demonstrate a good faith belief that:

> 1. [The lawyer's] actions were the lesser evil in the balance between violating a law or regulation and the harm that could reasonably be avoided by failing to act to uphold fundamental norms of international law.

does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.") (internal quotation marks omitted).

187. Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563, 563 (2007).

188. *Id.* at 564.

189. *Id.* at 572–79.

> 2. The harm would be inevitable (but not necessarily imminent or immediate).
>
> 3. There is a causal nexus between [their] action and the harm sought to be avoided.
>
> 4. There are no reasonable legal alternatives or it is futile to exhaust other remedies.
>
> 5. [The lawyer] acted openly or, if not, why reasonably [they] did not do so.[190]

This defense could be adapted to apply to attorney discipline for violations of model rules 1.2 or 8.4. By removing the requirement that harm be immediate, a lawyer may act against normalized human rights violations such as those that occur every day in U.S. prisons.[191] And a consideration of the futility of legal remedies would allow a lawyer to account for the abject failure of the courts to end even the most horrific conditions of confinement.

In any event, a variation on Yaroshefsky's test would likely settle any formal ethical problems inherent in advising incarcerated people to organize, at least in situations where nonviolent resistance would be less harmful than an unconstitutional condition of confinement. The test has not been adopted by any court or bar association as of this writing.

C. Professor DiSalvo's Proposed Change to MRPC 1.2(d)

Finally, Professor Charles DiSalvo's proposed amendment to 1.2(d) would cut the Gordian knot on this issue. His change would read:

> A lawyer shall not . . . counsel or assist [their] client in conduct that the lawyer knows to be [criminal or fraudulent], except that a lawyer may counsel [their] client in acts of civil disobedience. An act of civil disobedience, for the purpose of this rule, is an act of deliberate and open violation of the law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in society.[192]

In the author's view, DiSalvo's solution offers the best path forward. Under the current rules, it must be conceded that counseling a client to violate the law—including concealing the violation—is not technically a violation of a subjective, unclear rule, but it still *feels* dishonest.[193] DiSalvo's rule resolves this tension.

190. *Id.* at 595–97.

191. A version meant for domestic use by movement lawyers would likely remove the clause "to uphold fundamental norms of international law" from paragraph 1. It bears mention, however, that mistreatment of incarcerated people stateside commonly rivals that of those subject to all manner of terrible things at Guantanamo Bay, and undoubtedly violates norms of international law. *See, e.g.*, Law School Communications, *New Global Human Rights Clinic Report Finds Coercion and Exploitation at the Center of Prison Labor Programs Nationwide*, UNIV. OF CHI. L. SCH. (June 15, 2022), https://www.law.uchicago.edu/news/new-global-human-rights-clinic-report-finds-coercion-and-exploitation-center-prison-labor [https://perma.cc/5SF8-PU7G].

192. DiSalvo, *supra* note 150, at 141–42.

193. *Id.*

The anti-organizing regulations themselves are unlikely to change anytime soon, but until they do, an amended ethical rule would allow lawyers some flexibility in dealing with an objectively unjust, inhumane system.

CONCLUSION

While impact litigation will likely retain vitality in some jurisdictions, lawyer-assisted collective action promises better outcomes for prisoners in nearly every conceivable aspect. Collective action gets public attention in a way that individual cases cannot, especially when it comes to ordinary—though awful—conditions of confinement. The public appears to have little time to mourn the run-of-the mill prison death; after all, they happen every day, and are rarely newsworthy to any more than a select few grieving friends and family members. The sustainability of a good outcome, too, can be more readily ensured by a critical mass of incarcerated people within a facility than by an order issued by courts and lawyers that may be hundreds of miles away from that facility. The lack of resources available to litigate prison cases also becomes less of an obstacle if a lawyer steps out of the spotlight and into the role of would-be-prison-union advisor. Consider the entire world of criminal lawyers who do not have the time, the ability, or the inclination to pursue civil rights litigation on behalf of incarcerated clients. These lawyers still regularly hear valid concerns regarding conditions of confinement from their clients; concerns which, even if met with empathy, are often pitched into a black hole. Imagine the difference if those lawyers advised their clients on the practicalities of organizing within an institution to improve conditions, or connected them with existing networks of incarcerated people, or at the very least informed them as to the existence of other criminal justice organizers.

To sum up the ethical implications of the rules discussed above: an attorney's advice to an incarcerated person may be conceptualized as a spectrum. On the least safe end of that spectrum is an attorney affirmatively advising an incarcerated client to take part in an organized act of civil disobedience, in violation of jail regulations and/or state law. On the safest end, a lawyer simply waits for a prisoner-client to suggest an action, and then advises the client of the possible consequences without suggesting that the action might result in any greater good.[194] Between those two extremes lies a range of possible actions for a movement lawyer, none of which are without risk. All in all, based on relevant precedent, it seems unlikely that serious disciplinary action will befall even those

194. Appendix B, a sample letter of rejection to an incarcerated potential client, presents a solution that sits somewhere in the middle of this spectrum. The letter advises the potential client as to the existence of larger organizing efforts but does not provide affirmative advice as to what to do with those resources. To the author's way of thinking, a letter such as this is ethically beyond reproach, but "the old rule, caveat emptor, doth hold[.]" John B. Waite, *Caveat Emptor and the Judicial Process*, COLUM. L. REV. 25, no. 2 (1925): 129-51, n.25 (citing 2 Coke Inst. (6th ed. 1681).

lawyers who go so far as to directly advise an incarcerated client to enlist other prisoners in a work stoppage or other nonviolent act. But the author does not wish to inspire too much confidence; a bar association or other regulatory body certainly has the ability to punish an attorney for rendering such advice.

As a final cautionary note, the author reiterates: the conscientious practitioner must keep in mind that ethics aside, there is a gravely serious practical dimension to advising clients on acts of civil disobedience. The danger to the client, in this context at least, far outweighs any danger to the lawyer. Sarah Guffey with PLSN explains:

> Since organizing or advocating on a larger scale seems to really affect my clients' release dates, that often seems like a huge risk unless you're a lifer. I would love if there were more incarcerated people in these organizations, but after seeing lots of clients get placed in solitary confinement over much less, I'm generally very reluctant to ever advocate for that.
>
> I've been corresponding with my incarcerated family member for the last 6 years and she's really familiar with my work with PLSN, but she almost never wants to get involved because she constantly worries that if she loses favor with the guards she could lose the small privileges she has now that give her life meaning. When she previously set boundaries with a guard, she subsequently had her property 'searched' and lost some of her most precious possessions and family photos that are now impossible to get into the prison. Prisoners have so little bargaining power, and I feel like pushing that can mean losing everything for people who are already extremely marginalized.[195]

Clients who are considering whether and how to organize must be advised of these potential outcomes as early and as often as possible. The author has mostly taken this practical aspect for granted here, choosing to focus on the second order of business, *i.e.*, keeping oneself out of trouble with the bar.

All that said, civil disobedience has always come with consequences, even for the lawyers. Echoes of Elmer Smith's disbarment and Sandy Nathan's arrest can be seen today, in arrests like that of North Carolina abolitionist and defense attorney Habekah Cannon, charged with "trespassing" on jail property in protests following the death of George Floyd.[196] And even these sacrifices pale in comparison with the countless martyrs of the early American labor movement. The risk of arrest, ostracism, injury, and even death is often part of movement work. But a critical mass of informed and educated activists who accept those risks, working in concert, can be a major catalyst for lasting change.

195. Guffey, *supra* note 48.

196. WBTV Web Staff, *Protesters March in Charlotte on Second Night after Jail Support Station Taken Down by Deputies*, WBTV (Sep. 12, 2020, 10:47 PM), https://www.wbtv.com/2020/09/12/protesters-march-charlotte-second-night-after-jail-support-station-taken-down-by-deputies/ [https://perma.cc/5LAE-N9FV]; *Attorney Arrested for Trespassing after Protest*, WBTV (Sept. 12, 2020, 5:56 PM), https://www.wbtv.com/video/2020/09/12/attorney-arrested-trespassing-after-protest/ [https://perma.cc/SN33-T9H7].

APPENDIX A: RESTRICTIONS ON COLLECTIVE ACTION BY INCARCERATED PEOPLE IN ALL 50 STATES

* Handbook or Manual
**Policy or Directive Order

Alabama**
State of Ala. Dep't of Corr., Procedures for Inmate Rule Violations, No. 403, Annex A (Aug. 20, 2020), http://www.doc.state.al.us/docs/AdminRegs/ar403.pdf [https://perma.cc/ST95-G3JA].

Alaska
22 Alaska Admin. Code 05.400(c)(10), (c)(15), (c)(21).

Arizona**
Arizona Dep't of Corr., DO 803 Inmate Disciplinary Procedure, Attachment A, No. 35B (June 7, 2014), https://corrections.az.gov/sites/default/files/0803.pdf [https://perma.cc/4AKD-687T].

Arkansas*
Ark. Dep't of Corr., Inmate Handbook 19 (Nov. 2022), https://doc.arkansas.gov/correction/inmates/inmate-handbook/ [https://perma.cc/2G3Y-M298].

California
15 CCR 3005(d)(3); 15 CCR § 3378.4(4)(b), (4)(f); 15 CCR § 302.

Colorado**
Colo. Dep't of Corr., Disciplinary Guide Code of Penal Discipline, No. 150-01 (Nov. 1, 2019), https://drive.google.com/file/d/10CYpnSs7DDuZwP7BSTt9QmKd5xw7liuN/view [https://perma.cc/R7VX-LHLC].

Connecticut**
State of Conn. Dep't of Corr., Code of Penal Discipline, Administrative Directive 9.5 (Oct. 1, 2019), https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0905pdf.pdf?la=en [https://perma.cc/2TL4-XMS9].

Delaware*
Del. Dep't. of Corr.; Delores J. Baylor Women's Correctional Institution Inmate Handbook, https://www.law.umich.edu/special/policyclearinghouse/Documents/DE%20-%20BWCI%20Inmate%20Handbook%20-%20Revised% 2002-07-2014.pdf [https://perma.cc/VHP8-MGEQ].

Florida
Fla. Admin. Code 33-601.314.

Georgia
Ga. Comp. R. & Regs. r. 125-3-2-.04.

Hawai'i**
Dep't of Pub. Safety, Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations, No. COR 13.03 (Nov. 13, 2017), https://dps.hawaii.gov/wp-content/uploads/2012/10/COR.13.03.pdf [https://perma.cc/Z7UT-4WHY].

Idaho*
Idaho Dep't of Corr., Disciplinary Offenses 318.02.01.001 (Aug. 7, 2017), https://forms.idoc.idaho.gov/WebLink/0/edoc/273087/Disciplinary%20Offenses.pdf [https://perma.cc/ZLS4-8H5T].

Illinois:
20 Ill. Admin. Code § 504. Appx A (105).

Indiana**
Ind. Dep't of Corr., Adult Disciplinary Process Appendix 1: Offenses 1, 7, 8 (Mar. 1, 2020), https://www.in.gov/idoc/files/ADP-Attachment-I-Offenses-3-1-2020.pdf [https://perma.cc/DG4Y-P2UW].

Iowa*
Iowa Dep't of Corr., Offender Rulebook, IO-RD-03, https://doc.iowa.gov/sites/default/files/offender_rulebook.pdf [https://perma.cc/Q7W8-N7PL].

Kansas
K.A.R. § 44-12-325(c); K.A.R. § 44-12-318(a).

Kentucky**
Ky. Corrs., Rule Violations and Penalties, No. 15.2 (Aug. 12, 2016), https://corrections.ky.gov/About/cpp/Documents/15/CPP%2015.2.pdf [https://perma.cc/U4JA-2DPJ].

Louisiana
LAC 22:1.341(I)(29), (I)(30)(P).

Maine
CMR 03-201-010 § 20.1(V) (Procedure F).

Maryland
COMAR 12.03.01.04(c)(1); COMAR 12.03.01.02(B)(14).

Massachusetts
103 CMR § 430.24 (1-13), (2-10), (3-13).

Michigan**
Mich. Dep't of Corr., Discipline—Prisoner Discipline, No. 03.03.105 Attachment A (Apr. 9, 2012), https://www.michigan.gov/documents/corrections/0303105_382060_7.pdf [https://perma.cc/KH76-HED2].

Minnesota*
Bureau of Prisons, FCI Sandstone Admissions and Orientation Handbook 61 (Jan. 2016), https://www.bop.gov/locations/institutions/sst/SST_aohandbook.pdf [https://perma.cc/6ZB2-WEYS].

Mississippi*
Miss. Dep't of Corr., Inmate Handbook 21 (June 2016), https://www.mdoc.ms.gov/Inmate-Info/Documents/CHAPTER_XI.pdf [https://perma.cc/2U2M-Z8BM]; CMSR § 29-101-01.

Missouri*
Mo. Dep't of Corr., Offender Rulebook 12, https://doc.mo.gov/sites/doc/files/2018-01/offender-rulebook-9-12-14.pdf [https://perma.cc/3X6D-6ZWR].

Montana*
Dep't of Corr. Mont. State Prison, Operational Procedure, MSP 3.4.2 (May 5 2015), https://cor.mt.gov/Policy [https://perma.cc/LWF7-FLL6].

Nebraska
68 Neb. Admin. Code § 5-005(i)(F), (iii)(K).

Nevada**
Nevada Dep't of Corr., Administrative Regulation 707 Inmate Disciplinary Process 8 (May 16, 2017), https://doc.nv.gov/About/Administrative_Regulations/Administrative_Regulations__700_Series/ [https://perma.cc/S3FR-5MU7].

New Hampshire*
N.H. Dep't of Corr., Manual for the Guidance of Inmates 45, App. A (2011), https://www.nh.gov/nhdoc/divisions/publicinformation/documents/manual.pdf [https://perma.cc/YB2Y-ANXF].

New Jersey:
N.J.A.C. § 10A:4-4.1(a)(2)(xix), (a)(2)(xxiv), (a)(3)(x).

New Mexico**
N.M. Corrections Dep't, CD-090100 Inmate Discipline, Attachment CD-090101.A, (May 28, 2019), https://www.cd.nm.gov/wp-content/uploads/2022/05/CD-090100.pdf [https://perma.cc/S76U-2UCS].

New York
7 NYCRR § 270.2(B)(5)(iii), (B)(6)(i), (B)(6)(v).

North Carolina**
N.C. Dep't of Pub. Safety, Inmate Discipline (July 17, 2017), https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility%20Handbook.pdf [https://perma.cc/X6EH-Z8XQ].

North Dakota*
N.D. Dep't of Corr. & Rehab., Facility Handbook (Aug. 2021), https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility%20Handbook.pdf [https://perma.cc/3L2P-Y42B].

Ohio
OAC Ann. § 5120-9-37 (B)(4); OAC Ann. § 5120-9-06(C)(16), (C)(17).

Oklahoma*
Okla. Cty Detention Center, Inmate Handbook 41 (Mar. 22, 2019), https://sheriff.oklahomacounty.org/DocumentCenter/View/866/Inmate-Handbook-English-3-22-2019/ [https://perma.cc/3N2F-XTW3].

Oregon
OAR § 291-105-0015(4)(e), (4)(r)(B).

Pennsylvania**
Commonwealth of Pa. Dep't of Corr., Inmate Discipline, No. DC-ADM 801, Attachment 1-A (July 1, 2019), https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/801%20Inmate%20Discipline.pdf [https://perma.cc/FB84-KPGT].

Rhode Island**
R.I. Dep't of Corr., Rules and Discipline: Code of Inmate Discipline, No. 11.01 DOC Attachment 1 (Feb. 26, 2018), https://doc.ri.gov/news-info/inmate-life.php [https://perma.cc/YP7W-NY7H].

South Carolina**
S.C. Dep't of Corr., SCDC Policy Inmate Disciplinary System, OP-22.13 (Feb. 2, 2015), http://www.doc.sc.gov/policy/OP-22-14.htm.pdf#APPENDIX%20A [https://perma.cc/S668-7VW6].

South Dakota*
S.D. Dep't of Corr., Inmate Living Guide 17, 19 (Sept. 2019), https://doc.sd.gov/documents/Inmate%20Living%20Guide4232021.pdf [https://perma.cc/95D8-DU6R].

Tennessee*
Tenn. Dep't of Corr., Inmate Rules and Regulations 12 (Aug. 2018), https://www.tn.gov/content/dam/tn/correction/documents/502-04OffenderHandbook.pdf [https://perma.cc/5KAR-GU8V].

Texas*
Tex. Dep't of Crim. Just., Offender Orientation Handbook 118 (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf [https://perma.cc/4R3G-JFDV].

Utah*
Utah Dep't of Corr., Inmate Orientation Handbook 10 (July 2022), https://corrections.utah.gov/wp-content/uploads/2022/09/ Inmate-Orientation-Handbook-Master.docx.pdf [https://perma.cc/U74D-DY2Z].

Vermont**
Vt. Agency of Hum. Aff. Dep't of Corr., Facility Rules and Inmate Discipline, No. 410.01 Attachment 1 (May 1, 2012), https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/410.01-facility-rules-and-inmate-discipline.pdf [https://perma.cc/K5YE-KG3Z].

Virginia**
Va. Dep't of Corr., Operating Procedure: Offender Discipline, Institutions, No. 861.1 (Apr. 2016), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-861-1.pdf [https://perma.cc/32KY-SCYK].

Washington
WAC § 137-25-030(652), (708).

West Virginia**
W. Va. Div. of Corr., Discipline of Inmates, No. 325.00 (Feb. 1, 2012), https://www.law.umich.edu/special/policyclearinghouse/Documents/West%20Virginia%20-%20Discipline%20of%20Inmates.pdf [https://perma.cc/8LFB-NR9V].

Wisconsin
Wis. Admin. Code DOC 303.24.

Wyoming**
Wyo. Dep't of Corr., Code of Inmate Discipline, No. 3.101 (Oct. 1, 2019), https://corrections.wyo.gov/about-us/department-policies-procedures-and-forms#h.4d1dlf7d64sc [https://perma.cc/S7SC-THJC].

APPENDIX B: LETTER TO POTENTIAL CLIENT

Dear [Potential Client]:

I am in receipt of your inquiry dated [September 9, 2022]. I regret that I am unable to directly assist you in this matter. Nonetheless, I do not doubt that the conditions of your confinement are horrific, and possibly unconstitutional. If you are able to access the internet, materials on filing a federal lawsuit on your own may be found at https://www.jailhouselaw.org/ and at https://www.prisonlegalnews.org/. [Insert jurisdiction-specific resources for *pro se* lawsuits here if applicable].

I would also like to advise you of the existence of the following organizations, all of which are composed of incarcerated people and networks of activists on the outside.

- Incarcerated Workers Organizing Committee (incarceratedworkers.org; email: iwoc@iww.org)
- Jailhouse Lawyers Speak (iamweubuntu.com/about-jailhouse-lawyers-speak.html; email: jailhouselawyersspeak@protonmail.com)
- The People's Consortium (thepeoplesconsortium.org; email: communications@thepeoplesconsortium.org)
- National Lawyers Guild (nlg.org/about/contact-us)
- [State/regional resources with contact information, such as IDOC Watch; The Free Alabama Movement, etc.]

These groups may be able to assist with organizing efforts both inside and outside the facility in which you are housed, and have enjoyed some success in organizing acts of nonviolent resistance within prisons and jails in the past.

I am not your lawyer and I cannot advise you to engage in any organizing efforts within your facility; all I can do is point out that organized acts of nonviolence frequently occur within prisons and jails. However, please be advised that organizing activity of any kind, including labor or hunger strikes, can – and almost certainly will – subject you to additional discipline by prison officials, including loss of privileges, solitary confinement, and/or additional criminal charges.