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Prisoner-to-Public Communication

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INTRODUCTION

On the forty-seventh anniversary of prison activist George Jackson's death, Heriberto "Sharky" Garcia refused food at Folsom State Prison in California, initiating a national prisoner hunger strike.[1] Since the very possession of a cell phone subjects a prisoner to discipline under the California Department of Corrections and Rehabilitation Operations Manual,[2] Heriberto took great risks when he recorded and posted to social media a scene of himself telling a prison guard, "[b]urritos or not, not eating today . . . I'm hunger striking right now."[3] Having no reason to believe the public would appreciate

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[†] Associate Professor and Director of Diversity & Inclusion, University of Memphis Cecil C. Humphreys School of Law. Much appreciation to the fellows of Brothers Speaking Out for Change, who consistently provide me with points to ponder and motivation to advance the rights of the incarcerated.

[1] Ed Pilkington, *Major Prison Strike Spreads Across US and Canada As Inmates Refuse Food*, GUARDIAN (Aug. 23, 2018, 6:00 AM EDT), https://www.theguardian.com/us-news/2018/aug/23/prison-strike-us-canada-forced-labor-protest-activism [https://perma.cc/UFE9-P92Z]. The demand document's preamble declares that "Men and women incarcerated in prisons across the nation declare a nationwide strike in response to the riot in Lee Correctional Institution, a maximum-security prison in South Carolina." The demand document then sets out a list of ten demands, including the following: (1) "[i]mprovements to the conditions of prisons and prison policies that recognize the humanity of imprisoned men and women"; (2) "[a]n immediate end to prison slavery" and demand that those imprisoned in the United States "be paid the prevailing wage in their state or territory for their labor"; (3) rescind the Prison Litigation Reform Act; (4) rescind the Truth in Sentencing Act and the Sentencing Reform Act; (5) "[a]n immediate end to the racial overcharging, over sentencing, and parole denials of [b]lack and brown humans"; (6) "[a]n immediate end to racist gang enhancement laws targeting Black and brown humans"; (7) access to rehabilitation programs and no denial of access to such programs because of a violent offense; (8) funding for state prisons to offer more rehabilitation services; (9) reinstatement of Pell Grants for prisoners and ex-felons; and (10) restoration of voting rights to all ex-felons and those serving prison time and on parole. *See* Press Release: National Prisoners Strike: August 21–September 9, 2018, https://www.dropbox.com/s/r5cr546jlscgkhj/Prison%20Strike.pdf?dl=0 [https://perma.cc/5LGD-7TYM].

[2] Chapter 4, art. 45, sec. 49020.18.3 notes, "[n]o inmate shall have access to, or possession of, any telecommunication capability, including Internet accessible computers, wireless devices such as pagers or handheld computing devices or cell phones without approval from the Agency Information Security Officer." CAL. DEP'T OF CORR. & REHAB., ADULT INSTITUTIONS, PROGRAMS, AND PAROLE, OPERATIONS MANUAL 319–20, 407–11 (2018).

[3] Pilkington, *supra* note 1.

the significance of the strike's chosen start date, or the stated prisoner demands, Heriberto nevertheless peacefully urged the outside free public to examine why prisoners would resort to refuse food for twenty consecutive days. Heriberto clearly understood that to improve the conditions of his strange home—prison—the public must look beyond transgressions in favor of basic human rights. With few other means of addressing the public about prison woes, Heriberto undoubtedly intended this rare prison scene to go viral.

The prisoner hunger strike occurred amidst the backdrop of over two million people behind bars in United States prisons, jails, and other correctional facilities.[4] Although prison overcrowding often presents major offenses to basic human rights, prisoners have no political power to challenge conditions of the prison system.[5] The disparate burdens of the criminal justice system in communities of color are well documented,[6] as are its historical roots in slavery, racism, and black criminalization.[7] Similarly, criminal justice practices like bail

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[4] Danielle Kaeble & Lauren Glaze, *Correctional Populations in the United States*, *2016*, BUREAU OF JUST. STAT. (Apr. 2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf [https://perma.cc/VHF6-MFQM].

[5] *See infra* notes 177–188, 190–203 and accompanying text (discussing the lack of prisoner right to organize and the lack of prisoner's access to the media, respectively). Additionally, most prisoners are not allowed to vote. CHRISTOPHER UGGEN, ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, 3–4 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ [https://perma.cc/L6J9-J5U8].

[6] Disproportionally high incarceration rates for people of color and the poor create "prison feeder communities" that suffer the severest social consequences such as concentrated economic depression and high rates of crime due to release of hardened individuals back into those communities. *See* ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 56 (2011); ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3–6, 8 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/ZTL3-KTS9]; Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S–89S (2011). In some communities, "one third or more of the young men who live there . . . are either currently incarcerated, recently returned from prison, or on their way back in." CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 11–12 (2006). This movement of people in and out of prison increases neighborhood transiency, making it difficult for residents to get to know and trust one another so that they can organize and build social networks that address neighborhood problems. *See* Jeffrey D. Morenoff, et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517, 518–19 (2001); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 442–43 (1998). Hence, the social fabric of the communities from which most prisoners are drawn is heavily impacted by citizen losses to the justice system and the voice of prisoners from these communities is even more important.

[7] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (discussing the relationship between incarceration and slavery, and the resulting systemic racism embedded within the criminal justice and prison systems); *see also* NAT'L RESEARCH COUNCIL, THE

bond requirements are documented to penalize the politically powerless poor,[8] and other practices have eliminated large segments of communities of color from meaningful political participation through felon disenfranchisement.[9] Especially in light of the grave consequences for socially oppressed groups, the United States corrections system is in desperate need of repair and transparency.[10] Moreover, it simply doesn't work.[11]

To promote prison accountability, transparency, and public safety, this article proposes an unqualified and unfettered right of prisoner-to-public communication.[12] Although prisoners possess an implied right to communicate with members of the free public, all forms of external prisoner communication are subject to prison administration surveillance.[13] Prison administrator review of prisoner external public communication makes it difficult for the public to obtain the unfiltered prisoner viewpoint, with little penological purpose for doing so.

Narratives about prison treatment are important, especially considering that incarcerated people have inside knowledge about prison life and the social circumstances resulting in the loss of freedom. Incarcerated people are also likely the best providers of prison accountability. Yet, the United States Supreme Court has perpetuated the lack of prison accountability by affording high deference to prison regulations that block free press in prisons and limit the First Amendment rights of prisoners.[14] The resulting lack of corrections industry oversight has silenced the voices of prisoners and subverted their existence.

This article proceeds in several parts. Part I provides a brief description of the increased use of prison in the United States, explaining why the impacts of incarceration and overcrowding warrant consideration of the proposed prisoner-to-public communication right. Part II discusses the Supreme Court's

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GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 91–101, (Jeremy Travis, et al., eds., 2014).

[8] Nannette A. Baker, *The End of Money Bail?*, 57 JUDGES' J. 1, 1 (2018) ("Estimates are that some 500,000 people are in jail in this country because they cannot afford to pay the bond set for their release.").

[9] According to the Sentencing Project, approximately 6.1 million Americans cannot vote due to felony conviction. UGGEN, *supra* note 5 at 3.

[10] It is well documented that the homegrown human rights crisis of mass incarceration has socially and economically debilitated many communities of color. *See* Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES SCI. & TECH. 46, 46 (2015).

[11] *See infra* Part I.

[12] As explained in more detail *infra* at Introduction, the prisoner-to-public communication right would encourage communication between prisoners and the free public.

[13] Procunier v. Martinez, 416 U.S. 396, 413, 418 (1974).

[14] *See*, *e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 413 (1989); Turner v. Safley, 482 U.S. 78, 89 (1987); Pell v. Procunier, 417 U.S. 817, 827–28 (1974).

"hands-off" approach to prisoner rights and prison administration while examining the role of the prisoner rights movement in prisoner rights gains. This discussion illustrates the need for unqualified and unfettered prisoner-to-public communication, while emphasizing the importance of prisoner voice and public accountability in promoting good prison practices.

Part III proposes an unqualified and unfettered right of prisoner-to-public communication, explaining the necessary features of the proposed right and notable limitations under prevailing Supreme Court prisoner free speech cases. The article closes explaining that the prisoner-to-public communication right would help address the current lack of effective prison oversight that has created serious impediments to addressing prison problems.

I. BACKGROUND

A. Increased Use of Prison[15]

The well-documented rise in incarceration rates beginning in the 1970s has been exponential and rapid and gives the necessary context in which we must evaluate the proposed prisoner-to-public communication right.[16] Since 1972, state prison and jail populations have grown six times in size from about three hundred thousand people to over 2.1 million in prisons and jails in 2012.[17] As the popular statistic goes, the United States represents over 25% of the world's total incarcerated population, though it only comprises 5% of the world's total population.[18] The

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[15] This account is in no way exhaustive of the causes and consequences of mass incarceration and merely highlights issues significant to this discussion on the proposed right of prisoner-to-public communication. However, there is a wealth of literature in this area. *See generally* ALEXANDER, *supra* note 7; CURT R. BLAKELY, PRISONS, PENOLOGY & PENAL REFORM (2007); BAZ DREISINGER, INCARCERATION NATIONS: A JOURNEY TO JUSTICE IN PRISONS AROUND THE WORLD (2016); MARTIN GUEVARA URBINA & SOFIA ESPINOZA ÁLVAREZ, ET AL., ETHNICITY AND CRIMINAL JUSTICE IN THE ERA OF MASS INCARCERATION (2017); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); CHRISTOPHER LORDAN & ROBERT DELLELO, THE FACTORY: A JOURNEY THROUGH THE PRISON INDUSTRIAL COMPLEX (2016); NAT'L RESEARCH COUNCIL, *supra* note 7.

[16] NAT'L RESEARCH COUNCIL, *supra* note 7, at 34–35 (stating that "the [United States] imprisonment rate grew rapidly and continuously from 1972, increasing annually by [six] to [eight] percent through 2000").

[17] *See id.* at 34–36. As a side note, around the same time the United States began increasing its use of prison in 1972, the prisoner's right movement of the 1960s was nearing its end, culminating with the San Quentin riots in New York. *See infra* notes 84–92; *see also* RONALD BERKMAN, OPENING THE GATES: THE RISE OF THE PRISONERS' MOVEMENT, at 62 (1979).

[18] *See Combating Mass Incarceration—The Facts*, AM. CIVIL LIBERTIES UNION (June 17, 2011), http://www.aclu.org/combating-mass-incarceration-facts-0 [https://perma.cc/3FGT-ELKC].

astronomical growth of prison use in the United States is unprecedented in American history and globally unique.[19]

Irregular growth in national incarceration rates is not completely explained by increases in crime rates.[20] Indeed, criminal justice policies and prisons are an elusive system, and, as a number of works note, much of the increased use of prisons is explained by political manipulation of public safety fears.[21] For example, the notorious "War on Drugs" made popular by President Ronald Reagan[22] ushered in exponential increases in criminal convictions and use of longer prison sentences, especially in prosecutions related to drug crimes.[23] As a result, states passed a multitude of laws in the 1980s and 1990s that

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[19] ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 38–39, 42–43 (2011). As Drucker notes, due to its large-scale, rapid growth rate, and self-sustaining properties, some experts consider mass incarceration an issue of public health, sharing characteristics similar to epidemics like cholera and HIV/AIDS. *Id.* at 37–39.

[20] See Bruce Western, et al., *Crime, Punishment and American Inequality*, *in* SOCIAL INEQUALITY 771, 772 (Kathryn M. Neckerman, ed., 2004) https://pdfs.semanticscholar.org/1fed/4fe0f5e826abb2149eeac797aad4263461ad.pdf [https://perma.cc/4ECR-SPRX], stating:

> The crime-imprisonment relationship is less clear cut. Between 1973 and 1995, imprisonment rates rose through small increases and declines in violent crime. From 1995 to 2000, incarceration increased steeply as the violent crime rate plummeted. These simple aggregate trends lend at least superficial plausibility to the idea that inequality, not crime, is behind the prison boom.

[21] *See* MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 125 (2005). Drawing heavily from Barry Goldwater's papers at the University of Arizona, Ronald Reagan's papers at the Hoover Institution, and Richard M. Nixon's at the Nixon Library, Flamm discusses the heightened fears over crime and ties "law and order" prevailing attitudes of the public to political framing and debate surrounding crime in the 1960s and 1970s. *Id.* at 125–41; *see also* VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 151 (2009); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75–78 (2007).

[22] The media did its part by giving significant attention to inner city crack babies, black-on-black crime, welfare mothers, violent "super-predator" youth, and other negative aspects of urban communities intended to illustrate the need for more drastic law enforcement measures. *See supra* note 21.

[23] According to a report by the Sentencing Project, "[d]rug offenders in prisons and jails have increased 1100% since 1980 [and] [n]early a half-million (493,800) persons are in state or federal prison or local jail for a drug offense, compared to an estimated 41,100 in 1980." MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007); *see also* NAT'L RESEARCH COUNCIL, *supra* note 7 at 34–36. This is despite the fact that the war on drugs was ill-conceived and unnecessary. *See* Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25 (1994) ("The Reagan administration's declaration of a war on drugs resembles Argentina's declaration of war against Nazi Germany in 1945. It was late and beside the point. Just as it was clear by 1945 that Germany was in military decline, it was clear in 1987 that drug use was in decline in the United States, and that it had been since the early 1980s." (footnote omitted)).

increased prison terms and the likelihood of imprisonment.[24] These measures were not solely aimed at "big time" drug dealers, however. The new laws' emphases on prosecuting low-level drug dealers and personal use drug crimes led to an exponential increase in prison populations.[25] Additional federal policies, including funding programs incentivizing local criminal prosecution of drug crimes, further solidified America's newfound devotion to incarceration as the primary method of addressing crime.[26] Despite the enormous financial burden to taxpayers and devastating effects on communities and public safety, the public generally supported the harsher laws and penalties.[27]

Increased prison use is also strongly associated with the deinstitutionalization of mental health.[28] Individuals with mental

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[24] *See* RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 5–7 (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/playbook-for-change-states-reconsider-mandatory-sentences/legacy_downloads/mandatory-sentences-policy-report-v3.pdf [https://perma.cc/4KE5-6BF3]. There has been some admission by policymakers that the harsh drug and sentencing policies of the 1980s and 90s went too far. *See* Peter Baker, *Bill Clinton Concedes His Crime Law Jailed Too Many for Too Long*, N.Y. TIMES (July 15, 2015), https://www.nytimes.com/2015/07/16/us/politics/bill-clinton-concedes-his-crime-law-jailed-too-many-for-too-long.html [https://perma.cc/S9AS-2DYC]. Accordingly, justice reforms over the last several years have largely approached reducing prison populations by rolling back minimum penalties associated with drug crimes. For example, since 2000 at least eighteen states increased judicial discretion to judges at sentencing in cases where a mandatory sentence would normally apply including Connecticut, New Jersey, Louisiana, Georgia, and Hawaii. SUBRAMANIAN & DELANEY, *supra* note 24, at 8–10 (2014). "[A]t least 13 states have passed laws adjusting or limiting sentence enhancements, including" Nevada, Louisiana, Kentucky, Colorado, and Indiana. *Id.* at 10–11. "[A]t least 17 states and the federal government have passed laws repealing mandatory minimums or revising them downward for certain offenses," including North Dakota, Rhode Island, South Carolina, Delaware, and Ohio. *Id.* at 11–12. These reforms, while applauded, have scarcely impacted detention facility populations overall and have had a disproportionate impact on communities of color. *See id.* at 12. Moreover, the prisoners' rights movement of the 1960s and early 1970s illustrates that prisons were in need of reform well before contemporary mass incarceration. *See* discussion *infra* notes 118–57.

[25] *See* RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990S 4 (2005) https://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf [https://perma.cc/Y6J4-MDXC] (noting that "[a]s of 2002, marijuana arrests comprised 45% of all drug arrests, and of these, possession arrests constituted 88% of all marijuana arrests. While marijuana trafficking arrests declined as a proportion of all drug arrests during this period [from 1990 to 2002], the proportion for marijuana possession increased by two-thirds."). Additionally, the study notes that from 1990 to 2002, "[a]rrests for violent crimes dropped 33% and felony drug crimes dropped 39%" but that "misdemeanor drug arrests increased by 143%, driven by growth in marijuana arrests." *Id.* at 15–16.

[26] *See e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 13701 (2012)).

[27] *See* FLAMM, *supra* note 21 at 183–85.

[28] Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1780 (2006) (estimating that deinstitutionalization from 1971 to 1996 accounts "for roughly 28 to 86 percent of prison inmates suffering from mental illness"). *But see* Steven Raphael & Michael A. Stoll,

illness and substance abuse disorders are grossly overrepresented in U.S. jails and prisons with an estimated 14 to 26 percent of individuals in federal and state prisons and jails suffering from a serious mental illness.[29] Federally funded programs and cost-shifting initiatives resulted in states closing a substantial number of mental hospitals, reducing the availability of inpatient care facilities.[30] The availability of new psychotropic drugs also influenced this movement away from state-run mental facilities in the decades prior to increased prison use, as more individuals began treatment with medication in their own communities.[31] Consequently, many individuals that would be treated or housed in mental facilities prior to the deinstitutionalization movement are now living in prisons and jails in every state, where they experience serious mental healthcare access and diagnosis challenges.

Mass incarceration has also been linked to slavery, Jim Crow Laws, and longtime bias associations with blacks and crime.[32] Although the civil rights movement made way for a number of new rights for black Americans, it did little to address the persistent socioeconomic conditions depressing black communities.[33] Scholars have also linked the exponential growth

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Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate, 42 J. LEGAL STUD. 187, 190 (2013) ("[Four to seven] percent of incarceration growth between 1980 and 2000 can be attributed to deinstitutionalization.").

[29] Jennifer Bronson & Marcus Berzofsky, INDICATORS OF MENTAL HEALTH PROBLEMS OF REPORTED BY PRISON AND JAIL INMATES, 2011–2012 (2017) http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5946 [https://perma.cc/ZAD3-3YN4]. The rate of severe mental illness in general populations is only between 3.9 and 5 percent. *Id.*

[30] *See* Harcourt, *supra* note 28, at 1760 n.43.

[31] *See* William Gronfein *Psychotropic Drugs and the Origins of Deinstitutionalization*, 32 SOC. PROBS. 437, 450 (1985).

[32] *See generally* ALEXANDER, *supra* note 7. Since African beginnings in the colonies and specifically with Black Codes enacted following slavery, blackness has largely been defined through criminality. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010).

[33] There are overwhelming economic disparities between blacks and whites in every measurable economic category. *See generally* BRUCE J. SCHULMAN, FROM COTTON BELT TO SUNBELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT, AND THE TRANSFORMATION OF THE SOUTH, 1938–1980 (1991); CHANDLER DAVIDSON & BERNARD GROFMAN, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (1994); LAWRENCE J. HANKS, THE STRUGGLE FOR BLACK POLITICAL EMPOWERMENT IN THREE GEORGIA COUNTIES (1987); MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA; PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY (1983); JULIET E. K. WALKER, THE HISTORY OF BLACK BUSINESS IN AMERICA: CAPITALISM, RACE, ENTREPRENEURSHIP (MacMillan Library Reference USA, 1998).

of incarceration in the United States to deindustrialization[34] and the school-to-prison pipeline.[35]

Regardless of its causes, the increased use of prison as the primary means of addressing crime has not been without great costs to the conditions of prisons and life for prisoners. A number of studies have confirmed that high rates of incarceration have created additional crime in over-incarcerated communities, instead of less.[36] A growing body of literature also suggests that over-incarcerated communities have been costly to taxpayers[37] and incarceration is often unnecessary to promote appropriate goals of criminal justice.[38]

B. Worsened Prison Conditions and Impact on Incarcerated Individuals

The problems of overcrowding are not only unconstitutional in many instances, but are also unsanitary, dangerous, and even deadly.[39] The problem of overcrowding became so great in the state of California that in 2011 the Supreme Court declared California's prisons unconstitutional, mandating that the state reduce its prison population and requiring the release of about thirty thousand convicted felons.[40] As noted by the Supreme Court in *Brown v. Plata*, "overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease."[41] At the time of the litigation, "California's correctional

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[34] *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 90 (2003) ("The deindustrialization processes that resulted in plant shutdowns throughout the country created a huge pool of vulnerable human beings, a pool of people for whom no further jobs were available.").

[35] Zero-tolerance and other harsh polices pervade our education and youth justice system despite social and psychological literature suggesting these policies are more harmful than good and contribute to the likelihood youth will enter prison as an adult. Christopher A. Mallett, *The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents*, 49 EDUC. & URB. SOC'Y 562 (2017).

[36] *See e.g.*, Todd Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33, 55 (2003); Natasha A. Frost & Laura A. Gross, *Coercive Mobility and the Impact of Prison-Cycling on Communities*, 57 CRIME, L. & SOC. CHANGE 459, 459–74 (2012); Crutchfield & Weeks, *supra* note 10, at 46–48.

[37] *See* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUST., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 13 (2012); MICHAEL MCLAUGHLIN ET AL., CONCORDANCE INST. FOR ADVANCING SOC. JUST., THE ECONOMIC BURDEN OF INCARCERATION IN THE U.S. 4 (2016); Harry J. Holzer, et al., *The Economic Costs of Childhood Poverty in the United States*, 149 J. CHILD. & POVERTY 41, 42 (2008).

[38] JAMES AUSTIN ET AL., BRENNAN CTR FOR JUST., HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 46 (2016) https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated.pdf [https://perma.cc/5PTR-CVAH].

[39] Brown v. Plata, 563 U.S. 493, 520 (2011).

[40] *Id.* at 501, 545.

[41] *Id.* at 520.

facilities held some [one hundred fifty-six thousand people]. . . . nearly double the number that California's prisons were designed to hold."[42] The Court essentially concluded that prison overcrowding is a human rights issue.

The rise in prison populations has increased problematic conditions within U.S. prison walls necessitating public access to prisoners' unfettered perspective about prison life.[43] In addition, overcrowding results in "restricted living space" creating additional "losses [to individual] privacy and human dignity."[44] Overcrowded conditions can become so extreme that prison officials sometimes resort to double-celling inmates and insufficient housing assignments[45] such as placing large numbers of prisoners in gymnasiums.[46] Further, overcrowding results in the rapid deterioration of facilities, and restricted access to important living areas such as dining halls and bathrooms.[47]

Crowded prison living conditions are also associated with prisoner idleness and increased prison violence.[48] Crowded correctional facilities are also less safe because the supervisory capacity of staff is impaired, resulting in chaotic prison

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[42] *Id.* at 501.

[43] *See generally* HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION 5 (2011), https://www.hrw.org/sites/default/files/related_material/2014_US_Nation_Behind_Bars_0.pdf [https://perma.cc/HU56-PMMX] (explaining that "[m]any of the harsh laws adopted decades ago remain on the books, supplemented by newer ones, because 'tough-on-crime' has remained a default approach for all too many politicians").

[44] HANS JÖRG ALBRECHT, PRISON OVERCROWDING, FINDING EFFECTIVE SOLUTIONS, STRATEGIES AND BEST PRACTICES AGAINST OVERCROWDING IN CORRECTIONAL FACILITIES 33, (United Nations Asia & Far E. Inst. for the Prevention of Crime and Treatment of Offenders (UNAFEI) ed., 2011); *see also* Susanna Y. Chung, Note, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2351–52 (2000).

[45] ALBRECHT, *supra* note 44, at 8, 33. According to the Correctional Association of New York, "double celling" refers to "forcing two people to share a small cell that was designed for one inhabitant, for months, or sometimes even years" while "'[d]ouble-bunking' is a practice where bunk beds are used in a dormitory setting generally found in medium-security facilities." *What We Know: on Double-Ceiling*, *Double-Bunking*, *and Prison Downsizing*, CORR. ASS'N. OF N.Y. (Aug. 1, 2013), http://www.correctionalassociation.org/news/what-we-know-on-double-celling-double-bunking-and-prison-downsizing [https://perma.cc/ZX9D-P8J9]. However, the Supreme Court has ruled that "double celling" is not unconstitutional cruel and unusual punishment under the Eighth Amendment. *See* Rhodes v. Chapman, 452 U.S. 337, 339, 352 (1981).

[46] Laura Sullivan, *San Quentin's Prison Becomes One Massive Cell*, NPR (July 7, 2008, 11:43 AM ET), https://www.npr.org/templates/story/story.php?storyId=92296114 [https://perma.cc/HZ75-L2WL].

[47] Caitlin Curley, *When Prison Overcrowding Becomes Cruel & Unusual Punishment*, GENFKD (Feb. 9, 2016, 4:49 PM EST), http://www.genfkd.org/prison-overcrowding-cruel-unusual-punishment [http://perma.cc/6N5R-MWTZ].

[48] Increased prison violence is at least in part due to high staff turnover in overcrowded facilities. Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 275–76 (2006); Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1161–62 (2013) (stating "extensive inmate idleness" leads to prison violence).

environments and less opportunities for prisoners to remain in contact with the outside world.[49] As a result, crowded facilities "diminish the corrections system's ability to reduce recidivism," presenting serious threats to public safety.[50]

The problematic conditions created by overcrowding inevitably impact the physical and mental health of all prisoners, as well as their access to mental healthcare and ability to rehabilitate while serving time.[51] Mental and physical health issues are nearly impossible to address in overcrowded and chaotic prison environments where symptoms can remain unaddressed, undiagnosed, and worsen.[52] For example, "[t]he prison environment may exacerbate health conditions such as asthma because of poor ventilation, overcrowding, and stress."[53] Moreover, the number of aging prisoners and prisoners who suffer from mental illness has increased markedly along with prison growth.[54] Appropriate services for the full range of mental illness seen by prisons and accommodations for prisons' aging population are also scarce.[55]

Generally, educational and rehabilitative programs become less available in overcrowded facilities because of a prison's inability to accommodate large numbers of prisoners.[56] When the incarcerated are not given the opportunity to rehabilitate or acquire skills helpful to life on the outside, they

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[49] Salins & Simpson, *supra* note 48, at 1161–62; ALBRECHT, *supra* note 44, at 33–34 (noting that one way prisons have managed overcrowding is by "transfer[ing inmates] from overcrowded facilities to less crowded but far away prisons" that would limit prisoner access to family members). Additionally, some prison facilities have resorted to reducing prisoners' visitation time purportedly due to shortcomings in managing the influx of visitors due to staff shortages. *See* Gaby Galvin, *Underfunded, Overcrowded State Prisons Struggle with Reform*, U.S. NEWS & WORLD REP. (July 26, 2017, 1:30 PM), https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership [https://perma.cc/9JYZ-AETY] (noting, "[r]ecreation, family visits and training programs are often the first to go when staffing levels dip"). Note that adequate visitation practices have long been a right sought by prisoners and was one of the modest demands made by prisoners in the Folsom Manifesto during the 1970 Folsom strike originating at San Quentin prison in California.

[50] Salins & Simpson, *supra* note 48, at 1162.

[51] NAT'L RESEARCH COUNCIL, *supra* note 7, at 222–23 (noting that overcrowding is "particularly associated with a serious degeneration of mental health" and "raise[s] concerns about transmission of airborne infections").

[52] NAT'L RESEARCH COUNCIL, *supra* note 7, at 221–24; *see also* Zulficar Gregory Restum, *Public Implications of Substandard Health Care*, 95 AM J PUB. HEALTH 1689–91 (Oct. 2005) (noting, that prisoners bring with them "infectious diseases from impoverished home environments that are breeding grounds for HIV/AIDS, hepatitis C, and tuberculosis, the three most prevalent communicable diseases in America's prisons today").

[53] NAT'L RESEARCH COUNCIL, *supra* note 7 at 223.

[54] *Id.* at 205, 211.

[55] *See id* at 211–12.

[56] *Id.* at 330.

are more likely to recidivate following release.[57] Since most prisoners will one day rejoin society, the availability of rehabilitative programming and transition management services is vital to success on release.[58] Yet, a number of legal and social realities make the task of reentering society extremely difficult, with few systems in place to assist prisoners,[59] leaving many with few tools to reintegrate into society upon release.[60]

Even without overcrowding, the impacts of imprisonment are debilitating. Incarcerated individuals are vulnerable to abuses of power by prison authorities, warranting the prisoner-to-public communication right.[61] As the mid-1970s saw a rise in prison populations, and led to prison overcrowding, the dominant thought of the rehabilitative model for prisons shifted to one of punishment.[62] As a result, daily life for prisoners became harsher with public acquiescence to the "penal harm" movement.[63] Penal harm movement policies, which largely remain in prisons today, involve a combination of physical, mental, and social punishments, intended to make the daily life of incarcerated people miserable.[64] A report by the Human Rights Watch reminds how extreme a form of punishment imprisonment really is:

> Prisoners lose their liberty, autonomy, and the freedom to exercise fully most rights. They are cut off from families, friends, and communities. Children lose their parents to prison, and parents lose their children. In prison, a person's ability to work, express themselves, and engage in activities that promote what human rights law calls the "free and full development of the personality," is severely restricted. In many prisons, the health and safety of prisoners, as well as their dignity and privacy,

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[57] *See* KAMALA MALLIK-KANE & CHRISTY A. VISHNER, HEALTH AND PRISONER REENTRY: HOW PHYSICAL, MENTAL, AND SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION 1–5 (Urb. Inst. Just. Pol'y Ctr. 2008); *see also* COUNCIL OF STATE GOV'TS JUSTICE CTR., REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEMS (2015).

[58] *See* MALLIK-KANE & VISHNER, *supra* note 57, at 61.

[59] *See id.* at 14–19; *see also* Adam P. Hellegers, Comment, *Reforming HUD's "One-Strike" Public Housing Evictions Through Tenant Participation*, 90 J. CRIM. L. & CRIMINOLOGY 323, 324 (1999).

[60] *See* DAVIS, *supra* at note 34, at 53–59 (discussing the "disestablishment of . . . prison educational programs"); *see also* ALEXANDER, *supra* note 7, at 140–77.

[61] *See* NAT'L RESEARCH COUNCIL, *supra* note 7, at 157–201.

[62] *See* NAT'L RESEARCH COUNCIL, *supra* note 7, at 163–69; *see also* Francis T. Cullen, *Assessing the Penal Harm Movement*, 31 J. RES. CRIME & DELINQ., 338, 34258 (1995).

[63] NAT'L RESEARCH COUNCIL, *supra* note 7, at 163–69.; Cullen, *supra* note 62, at 341–43.

[64] The overuse of solitary confinement in American prisons illustrates the results of the penal harm movement well. For example, according to the Equal Justice Initiative, "[a]bout 75,000 people in the United States are held in solitary confinement, spending [twenty-three] or more hours a day in small cells, allowed out only for showers, brief exercise, or medical visits, without telephone calls or visits from family members." *Mass Incarceration: Prison Conditions*, EQUAL JUSTICE INITIATIVE, https://eji.org/mass-incarceration/prison-conditions [https://perma.cc/A77Z-57MP].

> are threatened by overcrowding, harsh measures such as solitary confinement, and poor physical conditions and sanitation, not to mention rape and other forms of violence.[65]

The wide range of problems resulting from prison life generally and especially overcrowded systems illustrate why the ability of prisoners to communicate with the public without prison interference is so important. Notwithstanding the risk of serious human rights violations resulting from overcrowding, the Supreme Court has left the regulation of prison conditions to prison administrators unchecked.

II. PRISONER RIGHTS AND THE SUPREME COURT

A. The Supreme Court's Hands-Off Approach

Understanding the rise of mass incarceration and its impacts might be challenging without the appreciation that people convicted of crimes have always been treated inhumanely alongside the silent acquiescence of courts. Following emancipation, only those indebted to society due to commission of a crime were supposedly subjected to the immoral elements of legal slavery. In fact, while the Thirteenth Amendment of the United States Constitution abolished slavery, it expanded state authority over convicted criminals.[66] Indeed, the Thirteenth Amendment adopted in 1865 aptly describes nineteenth century prevailing thought of the legal rights and personage status of prisoners that influences prison practices today:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.[67]

During the early development of modern prisons, incarcerated people were not only slaves of the state,[68] but also "civilly dead," the legal equivalent of physically dead.[69] While the personage status of "slave of the state," meant literal slavery at the hands

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[65] HUMAN RIGHTS WATCH, *supra* note 43, at 8 (footnote omitted).

[66] *See generally* DENNIS CHILDS, SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY (2015); *see also* U.S. CONST. amend. XIII, § 1.

[67] U.S. CONST. amend. XIII, § 1.

[68] *See* Ruffin v. Virginia, 62 Va. (21 Gratt.) 790, 796 (Va. 1871); *see also* Pervear v. Massachusetts, 72 U.S (5 Wall.) 475, 479–80 (1866) (where the Supreme Court initially decided that prisoners had no constitutional right to be free from cruel and unusual punishment at the hands of the state under the Eighth Amendment).

[69] In 1799, New York became the first state to adopt a civil death statute for convicted felons. Thereafter, other states followed suit, passing similar statutes or imposing specific disabilities on felons. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1798–1803 (2012).

of the state,[70] "civil death" meant that the prisoner permanently lost all civil rights once convicted and imprisoned.[71] The concept of criminals as *civiliter mortuus* or civil decedents was plainly described in the 1871 state of Virginia decision *Ruffin v. Commonwealth*, which reiterated the Thirteenth Amendment's demand that a convicted man is a slave of the state during the term of imprisonment and added that "his estate, if he has any, is administered like that of a dead man."[72]

Despite this harsh notion, state civil death statutes existed in at least eighteen states and were perceived by lawmakers and the public as more humane than the near and certain death criminal penalties previous generations witnessed.[73] The California Penal Code, for example, directed that "[a] sentence for imprisonment in a [s]tate [p]rison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment" and that "[a] person sentenced to imprisonment in the State Prison for life is thereafter deemed civilly dead."[74] Under such civil death statutes, conviction of crime meant no legal identity for the individual while in prison and severe limitations on rights even after release from prison and supposed restoration of liberty.[75]

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[70] The convict lease system is the clearest example of state early treatment of prisoners as slaves. For more on the convict lease system *see* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996).

[71] *See Ruffin*, 62 Va. (21 Gratt.) at 796 ("He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.").

[72] *Id.*

[73] *See* Chin, *supra* note 69, at 1796. For example, states began moving away from "civil death" statutes in favor of legal disabilities such as felon disenfranchisement imposed on those convicted of felonies. *Id.* at 1799–1803. States also began to move away from perpetual retribution, in favor of parole and probation systems. *Id.* at 1804–05. Moreover, to place the public view of this legal status of prisoners in context in the late 1800s, note that early prisons were adopted as a more humane replacement to public degradation as the penalty for minor offenses, and physical mutilation or capital punishment (death) as the penalty for all felony offenses. *Id.* Notwithstanding the deeply embedded connections with slavery, civil death statutes, and disproportionate prison sentences were accepted well beyond abolition. *Id.* at 1798; *see also* DAVIS, *supra* note 34, at 27 ("In many ways, the penitentiary was a vast improvement over the many forms of capital and corporal punishment inherited from the English." (emphasis omitted)). Additionally, although civil death statutes were not pervasive, and use began to decline by the 1980s, a "system of collateral consequences applicable to people convicted of crimes" began to quickly emerge in the regulatory state. *See* Chin, *supra* note 69, at 1799.

[74] CAL. PENAL CODE §§ 673–74 (1871) (repealed and superseded 1975).

[75] ERIC CUMMINS, THE RISE & FALL OF CALIFORNIA'S RADICAL PRISON 24–25 (Stan. Univ. Press, 1994) (explaining that much like state limitations on prisoner right restorations today, convicted felons in California had no right to vote, hold office, make contracts, or own property).

Because of the concept of prisoner "civil death," courts did not readily interfere with the administration of correctional institutions in the early years of prisons.[76] With the exception of scrutiny under the Eighth Amendment for cruel and unusual punishment, conviction of a crime constructively meant complete forfeiture of constitutional rights for prisoners and courts exercised extreme judicial restraint in shaping how prisons operated.[77] This cruel dichotomy created a class of individuals that essentially had no rights and no protections—a class of slaves behind bars. Even at the turn of the nineteenth century during the Progressive Era, the Supreme Court maintained its hands-off approach toward prison administration.[78]

By the end of World War II, urban populations grew, and so did poverty, crime, and prison populations. Because of the enormous expense of building prisons in a post-war era, however, most states simply added new prisoners to existing facilities, eventually leading to overcrowding and poorer conditions.[79] The "hands-off" approach traditionally taken by courts proved detrimental and prisons entered a crisis in terms of conditions and treatment of prisoners in the 1970s.[80] In the period following, prisoners began connecting their everyday life in prisons to the pursuit of social and racial justice.[81]

B. The Prisoner Rights Movement

Following the civil rights era and worsening conditions of prisons as a result of the hands-off approach by courts, prisoners began to realize the power of their voice alongside the Black Power movement in the 1960s and 70s.[82] On the inside, racism was just

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[76] *See* Christopher E. Smith, *Black Muslims and the Development of Prisoners' Rights*, 24 J, BLACK STUD. 131, 131 (1993) (noting that "[u]ntil the 1960's, the judiciary had taken a hands-off approach to issues related to the constitutional rights of prisoners" and that "[j]udges avoided deciding cases . . . or . . . deferr[ed] to correctional officials because of their supposed expertise in treating offenders").

[77] *See id.*; *see also* Pervear v. Massachusetts, 72 U.S (5 Wall.) 475, 480 (1866).

[78] *See* Smith, *supra* note 76, at 131.

[79] DAVIS, *supra* note 34, at 12–13.

[80] *See* Smith, *supra* note 76, at 131; Haney, *supra* note 48, at 269–73.

[81] *See*, *e.g.*, Dan Berger, *Captive Nation: Black Prison Organizing in the Civil Rights Era*, 7 (North Carolina Press, 2014) (noting that "the period between 1955 and 1980 was remarkable not only for the expanded criminalization and state punishment of black radicalism . . . . [m]ore notable was the way in which black activists turned prisons into . . . schools of liberation: training grounds and battlegrounds in larger struggles against racism in the form of state violence").

[82] Zoe Colley, *War Without Terms: George Jackson*, *Black Power and the American Radical Prison Rights Movement*, *1941–1971*, J. HIST. ASS'N 266, 268–69, 275 (2016) (noting that "it is evident that the political activity of [George] Jackson, Nolen and their supporters was intricately bound up with the rise of the black power movement across America in the post-1966 years"); CUMMINS, *supra* note 75, at 61–65. Additionally,

as much a part of the environment as it was on the outside.[83] Because prisoners lacked access to other means of sociopolitical participation, they began pushing the courts and public to recognize the human constitutional protections of prisoners. During the years following the civil rights movement, many prisoners became activists while incarcerated, organizing for better treatment and more rights.[84] Organizations, like the Nation of Islam, began prison ministries on the inside that had strong connections to Black Nationalists with giant voices like Malcolm X, who was now on the outside.[85] As marginalized groups were extended constitutional protections on the outside, "[p]risoners began to assert newfound identity as rights-bearing persons."[86]

Despite the Supreme Court's history of resistance to interfering with prison administration,[87] the Warren Court ushered in modest gains for prisoners during the prisoner rights movement.[88] For example, the Supreme Court considered *Jones v. Cunningham* and decided that state inmates have the right to file a writ of habeas corpus in federal court challenging the legality of sentencing and conditions of imprisonment.[89] A year

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Caryl Chessman who arrived at San Quentin prison in 1941, is credited with turning the attention of California Bay Area political activists toward prison. Chessman, a death row prisoner, provided fellow inmates "a model of how a convict could gain power through writing and education and ten use it to seek his freedom." CUMMINS, *supra* note 75, at 61–65. Following Chessman's legacy, and in the midst of the civil rights movement, Black Nation of Islam members became the movement's in-prison political arm and by 1960 Black Muslim membership "was estimated at 65,000 to 100,00 nationwide, a good portion inside prisons." *Id.*; *see also* DAVIS, *supra* note 34, at 55–56.

[83] Berger, *supra* at note 81, at 12–13, 99–100 (noting that when George Jackson entered prison in 1960, he "inhabited a world even more sharply polarized by race than the neighborhoods he had once called home" and "[m]any prison officials not only nurtured racism but demanded absolute obedience to their authority, no matter how capricious their demands").

[84] Smith, *supra* note 76, at 131–32.

[85] *Id.* at 133; *see also* Colley, *supra* note 82, at 270, 275. The emergence of Muslim leaders in prison also promoted unity amongst black prisoners, which was needed in the black prison movement as blacks in prisons were previously fragmented and disorganized. BERKMAN, *supra* note 17, at 55.

[86] HANEY, *supra* note 6, at 59.

[87] Smith, *supra* note 76, at 131.

[88] *See* Haines v. Kerner 404 U.S. 519, 520–21 (1972) (ruling courts should generously construe the work of pro se plaintiffs); Cruz v. Beto, 405 U.S. 319, 322 (1972) (holding prisoners should enjoy the right to practice their religion); Johnson v. Avery, 393 U.S. 483, 490 (1969) (holding state regulations that would absolutely bar inmate assistance with court papers and filings unconstitutional); *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (ruling prisoners have the right to protection under the Civil Rights Act of 1871); Jones v. Cunningham, 371 U.S. 236, 240–44 (1963) (deciding state inmates have the right to file a court order of habeas corpus and challenge both the legality of their sentencing and the conditions of their imprisonment); Robinson v. California, 370 U.S. 660, 666–67 (1962) (ruling that the Eighth Amendment prohibition against cruel and unusual punishment applied to states and state prisons); Monroe v. Pape, 365 U.S. 167, 187 (1961) (allowing individual government actors to be sued for unconstitutional acts).

[89] *Cunningham*, 371 U.S. at 244.

later, the Court decided that prisoners have some First Amendment religious freedoms under the Civil Rights Act of 1871 in *Cooper v. Pate*.[90] Following *Cooper*, prisoners began using the court system more aggressively to air grievances about prison conditions, and federal courts began addressing prisoner petitions on the merits for the first time.

In all likelihood, "prisoners anticipated the overcrowding of mass incarceration and tried to curb its growth" in the quest for prisoner rights.[91] By the 1970s, prisoners were getting attention across the United States due not only to prisoner lawsuits, but also to a series of prison demonstrations including a four-day prison riot that erupted at Attica Prison in New York.[92] The Attica riots are significant because for the first time, the public became nationally aware of the United States' appalling prison policies.[93]

The Supreme Court even purportedly abandoned its hands-off approach in *Procunier v. Martinez*, recognizing that prisoners do not completely shed constitutional rights due to conviction.[94] Although the Court was characteristically hesitant to recognize any specific right on behalf of prisoners,[95] it did recognize a right on behalf of free citizens to access prisoner speech, stating:

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[90] *See Pate*, 378 U.S. at 546.

[91] Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of the Carceral States Through the Lens of the Prisoners' Rights Movement*, 102 *J. AM. HIST.* 73, 75–77 (2015) (discussing the increase in prisoners' rights suits post-*Cooper v. Pate*).

[92] In September 1971, inmates seized control of the prison in protest of living conditions, including chronic overcrowding, mail censorship, and prison restrictions that limited Attica prisoners to one shower per week and one roll of toilet paper each month. Berger, *supra* note 81, at 2–3. The catalyst for the Attica riots is said to be the death of prison revolutionary George Jackson who was shot in the back by prison guards at San Quentin prison in August 1971, while allegedly trying to escape. *Id.* at 133–38. Although New York Correction Commissioner Russell Oswald agreed to honor the Attica prisoners' demand for better living conditions, negotiations failed after prisoners demanded amnesty. Following Governor Rockefeller's order that the prison be taken back by force by National Guardsmen, prison guards and police, thirty-nine men were killed at the facility, including ten hostages. *See* Chase, *supra* note 91, at 74. Due to an Attica governmental cover-up of ten hostages shot by prison guards, the public began to grow more skeptical of prison administration. *See id.* at 74–75; *see also* NAT'L RESEARCH COUNCIL, *supra* note 7, at 115.

[93] *See* Chase, *supra* note 91, at 75; *see also* NAT'L RESEARCH COUNCIL, *supra* note 7, at 115 n.12. The Attica prisoner demands included requests related to prisoner First Amendment rights, including the right to political participation, outside visitation, and union organizing. However, in the months following the Attica riot, prison officials raided a number of prisons around the country taking preventative action to destroy organizing efforts among prisoners. *See Attica Prison Liberation Faction*, *Manifesto of Demands 1971*, LIBCOM.ORG:BLOG (Jan. 6, 2012, 7:09 PM) https://libcom.org/blog/attica-prison-liberation-faction-manifesto-demands-1971-06012012 [https://perma.cc/ND93-QNHL].

[94] Procunier v. Martinez, 416 U.S. 396, 422–23 (1974) (Marshall, J., concurring), *rev'd on other grounds*, Thornburgh v. Abbott, 490 U.S. 401 (1989).

[95] *Id.* at 408 ("[W]e have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand.").

> [A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.[96]

Additional notable gains during the prisoner rights movement included *Estelle v. Gamble*, where the Supreme Court held that deliberate indifference to an inmate's serious medical needs amounted to cruel and unusual punishment.[97] Then in the *Bounds v. Smith* opinion authored by Justice Marshall, the Court declared that states are required to provide meaningful assistance to prisoners preparing legal papers.[98] In 1980, a federal court ruled against the state of Texas's use of abusive convict guards to control prison populations with rape and other forms of physical abuse.[99] In addition to guaranteeing important rights of prisoners, these cases illustrate some of the obstacles prisoners have had to historically overcome to bring light to the "hidden world of prison society."[100]

Unfortunately, many of the rights granted to prisoners during the prisoner rights movement were significantly limited or narrowed under the more conservative Burger and Rehnquist Courts.

C. Retreat to the Hands-Off Doctrine: Turner v. Safley

Supposed increases in crime on the heels of the prisoner rights movement along with "law and order" political rhetoric, discussed *infra*, heightened public fears about crime, prompting rapid retreat by courts to a constructive hands-off deference to prison officials.[101] The tide seemed to change permanently for prisoner rights with *Bell v. Wolfish*, where the Supreme Court overturned a lower court ruling that found practices in a New York City jail unconstitutional and held that even pretrial detainees could be subjected to intrusive body searches.[102]

Despite the previous favorable prisoner free speech ruling in *Martinez*, in 1987 the Court decided *Turner v. Safley*,

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[96] *Id.* at 405–06. The same term, however, the Court declined to recognize media access rights to face-to-face interviews with prisoners in Pell v. Procunier, 417 U.S. 817, 827–28 (1974).

[97] Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[98] Bounds v. Smith, 430 U.S. 817, 828 (1977).

[99] *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1299–1307 (S.D. Tex. 1980), *aff'd in part*, *rev'd in part*, 679 F.2d 1115 (5th Cir. 1982).

[100] *See* Chase, *supra* note 91, at 77–79.

[101] *See supra* notes 16–28 and accompanying text.

[102] Bell v. Wolfish, 441 U.S. 520, 524, 558–60 (1979).

holding that prisoners have no right to communicate with prisoners at other facilities.[103] *Turner* involved a class action by prisoners challenging the constitutionality of mail and marriage regulations in Missouri prisons.[104] Justice O'Connor, writing for the Court, posited, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[105] *Turner* also developed a four-factor test heavily favoring prison administrator regulations.[106]

In the years following, *Turner*'s low scrutiny rational basis test has been used to assess the constitutionality of prison regulations in a number of contexts, severely limiting the rights of prisoners.[107] The wide-ranged deference afforded to prison administrators under *Turner* means that courts will rarely, if ever, look past the allegedly "expert decisions" of prison administrators to assess the impact of facility policies on

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[103] Turner v. Safley, 482 U.S. 78, 91–93 (1987). The challenged mail regulation permitted correspondence "with immediate family members who are inmates in other correctional institutions," and also permitted "correspondence between inmates concerning legal matters." *Id.* at 81 (citations omitted). However, the regulation did not permit correspondence between other inmates unless "the classification/treatment team of each inmate deemed it in the best interest of the parties involved." *Id.* at 82 (citations omitted). Applying the substantial state interest standard from *Martinez*, the district court and Eighth Circuit, under strict scrutiny analysis, held the regulations violated the class action prisoners' constitutional rights. *Id.* at 83.

[104] *Id.* at 81.

[105] *Id.* at 89.

[106] *See infra* text accompanying notes 121–127.

[107] *See* Overton v. Bazzetta, 539 U.S. 126, 132, 135–37 (2003) (applying *Turner* standard to uphold prison regulations which restrict the visitation rights of inmates with substance abuse violations while incarcerated); Shaw v. Murphy, 532 U.S. 223, 229, 231–32 (2001) (remanding the question of whether inmates have a special First Amendment right to provide legal assistance to fellow inmates, to be answered via application of the *Turner* standard); Washington v. Harper, 494 U.S. 210, 223, 226–27 (1990) (applying the *Turner* standard to determine that when requiring a mentally ill inmate to take antipsychotic medications, due process does not require a judicial hearing, and thus a physician's recommendation that he be on those medications suffices); Thornburgh v. Abbott, 490 U.S. 401, 414, 418–19 (1989) (applying the *Turner* standard to regulations allowing prison wardens to reject certain outside publications from being received by prisoners); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–52 (1987) (applying *Turner* standard to determine the government's legitimate penological interest permit regulations barring Muslim prisoners from attending weekly Jumu'ah services). Additionally, lower federal courts have extended the *Turner* standard of review to a number of contexts, including cruel and unusual punishment and equal protection. *See* Klinger v. Dep't of Corr., 31 F.3d 727, 733–34 (8th Cir. 1994) (applying the *Turner* standard to equal protection claims by inmates at Nebraska's only women's prison regarding the facility's conditions); Salaam v. Collins, 830 F. Supp. 853, 861–64 (D. Md. 1993) (applying the *Turner* standard to equal protection claims to uphold regulations preventing Muslim inmates from practicing dietary restrictions, performing congregate daily prayer services, and celebrating religious events with outsiders); White v. Morris, 832 F. Supp. 1129, 1136 (S.D. Ohio 1993) (applying the *Turner* standard to constitutionality of racial segregation within prison population).

prisoners.[108] Further, *Turner*-era increases in prison populations led to an inundation of prisoner lawsuits in federal courts, giving courts plenty opportunity to severely limit the rights of prisoners.[109] In more recent years, federal courts have seldom found that a prison regulation offends the high prison deference standard requiring examination of the prisoner to public communication right.[110]

III. THE PROPOSED RIGHT OF PRISONER-TO-PUBLIC COMMUNICATION

An unfettered and unqualified prisoner-to-public communication right should be recognized in light of the rise of mass incarceration, resulting conditions, and the hands-off approach the Supreme Court has taken toward prison administration.[111] The inhumane conditions resulting from overcrowding—and the highly disproportionate impacts of over-incarceration on communities of color—suggest the need to fully reconsider the nature of prisoner basic human rights. In the age of mass incarceration, prison industry accountability to the public and rehabilitation of the incarcerated should be at the center of this contemporary evaluation of prisoner rights.

One of the most fundamental rights of all citizens, including prisoners, is First Amendment freedom of speech. Without freedom of speech, other fundamental human rights are at risk. As the Supreme Court has repeatedly announced, however, the free speech of prisoners is necessarily restricted due to the nature of the prison environment.[112] Nevertheless, the proposed right of

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[108] *See* Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."). It is important to note that the court essentially created a presumption of prison administrator expertise with no explanation as to why this is so, and no directives that lower courts demand any requirements to ensure the expertise of prison administrators.

[109] *See supra* note 106; *see also* James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y.C. L. REV. 97, 102 (2006) ("The facts of the record mattered little, because a majority of the justices accepted at face value the defendant's security concerns and accorded them greater weight than the liberty interests of persons presumed innocent."). Additionally, Congress responded to the influx of prisoner lawsuits by enacting the Prisoner Litigation Reform Act 1996, severely limiting prisoner access to litigation in federal courts. *See* discussion *infra* notes 254–260.

[110] *See supra* note 120 and accompanying text.

[111] *See supra* Part II.

[112] *See Thornburgh*, 490 U.S. at 415–19 (allowing prison wardens to restrict inmate's access to various publications); Turner v. Safley, 482 U.S. 78, 93 (1987) (restricting the communication between inmates at different Missouri prisons); Pell v. Procunier, 417 U.S. 817, 826–27 (1974) (restricting the right for press to conduct face-to-

prisoner-to-public communication would be a strong start to providing the public with prison accountability and transparency.

A. Features of the Proposed Right of Prisoner-to-Public Communication

1. Prison Regulations Involving Prisoner-to-Public Communication Should Be Subject to the *Procunier v. Martinez* Standard of Review

The Supreme Court impliedly established the standard of review for all outgoing prisoner communication to the public when it decided *Procunier v. Martinez*.[113] *Procunier v. Martinez* was a prisoner class action lawsuit challenging prison mail censorship rules in California state prisons in the midst of the prisoner right's movement.[114] The Court's primary task was resolving the question of the appropriate standard of review for prison regulations limiting prisoner communication with the public.[115] The Court held that a prison's regulations or practices restricting free citizen's access to prisoner speech must (1) "further an important or substantial governmental interest unrelated to the suppression of expression;" and (2) "must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[116]

Martinez established a right on behalf of free citizens to access prisoner speech, impliedly granting prisoners a right to communicate with the public.[117] In doing so, the Court

face interviews with inmates, instead saying inmates and press members may conduct correspondence in writing).

[113] Procunier v. Martinez, 416 U.S. 396, 413–14 (1974). Note that the Supreme Court later limited the holding in *Martinez* finding the standard of review unsuitable for regulations that involve speech directed inside the prison. *See Thornburgh*, 490 U.S. at 409–14. This limit to the *Martinez* holding by *Thornburgh* is entirely consistent with this analysis because the prisoner-to-public communication right proposal only seeks application of the *Martinez* standard for outgoing prisoner communication, consistent with the holding in *Thornburgh*.

[114] *Martinez*, 416 U.S. at 396, 398. The prison regulations challenged in *Martinez* authorized officials to open and read all incoming and outgoing mail, and to censor any mail considered to "unduly complain" or "magnify grievances" by prisoners. *Id.* at 399–400. Additionally, prisoner mail could be withheld if it expressed "inflammatory political, racial, [or] religious" views or was "lewd, obscene or defamatory." *Id.* at 399–400.

[115] *Id.* at 406.

[116] *Id.* at 413. Applying the fairly rigorous *Martinez* two-step standard of review, the Court first found that the prison regulations at issue were unnecessarily broad and that the state failed to show a substantial government interest that the regulations were necessary to preserve order in the facility or rehabilitate inmates. *Id.* at 415–16. As to the second part, the court found the regulations were "not narrowly drawn to reach only material that might be thought to encourage violence nor is its application limited to incoming letters." *Id.* at 416.

[117] *Id.* at 418.

recognized the tension between prison administration and the need to protect prisoner-public communication, finding the Court's traditional hands-off approach inappropriate.[118] The Court held that the restrictions unconstitutionally interfered with the rights of *free citizens*, who sought to maintain contact with people housed at the correctional facility.[119] Under the *Martinez* standard's second factor, the Court held that the California regulation which might exclude material that would "unduly complain" or "magnify grievances" was overbroad.[120]

Although the Court did not state it explicitly, the bilateral nature of the *Martinez* Court's recognized that any regulation interfering with prisoner-to-public communication right must be examined under the *Martinez* standard.[121] By acknowledging the free citizen right to prisoner communication, the Court impliedly recognized a right on behalf of prisoners to reach the public with its communication.[122] That is, the public's right to prisoner communication cannot exist, or is meaningless, unless prisoners also have the right to provide speech to the public.[123] As noted by the Court:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.[124]

Application of the *Martinez* standard for prisoner-to-public communication makes sense given the Court's repeated distinction between external and internal communication in its prisoner free speech cases.[125] Intra-prisoner speech is highly

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[118] *Id.* at 404–06.

[119] *Id.* at 408–09 ("[C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.").

[120] *Id.* at 415 (Moreover the court explained that the regulation was overbroad because it "invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship," and were not "necessary to the furtherance of a governmental interest, unrelated to the suppression of expression.").

[121] *Id.* at 408.

[122] *Id.* at 408–09.

[123] *Id.* at 408–09.

[124] *Id.* at 408. As noted by the Court for example, "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* at 409.

[125] *See* Thornburgh v. Abbott, 490 U.S. 401, 412–13 (1989) (concluding that prisons officials are afforded broad discretion when regulations relate to incoming publications, and noting, "[o]nce in the prison, material . . . may be expected to circulate

restricted, and prisoners have few rights associated with free speech within prison walls.[126] The Supreme Court naturally assumes that intra-prison speech is more likely to threaten the penological interest of correctional facilities than speech aimed outside the prison walls.[127]

Consequently, when involving intra-prison speech, the Supreme Court has applied the more prison-deferential standard of review articulated in *Turner v. Safley*.[128] Finding the more rigorous *Martinez* standard inappropriate for regulations aimed at intra-prisoner speech,[129] the Court held that prison regulation impinging on inmates' constitutional rights is valid if it is "reasonably related to a legitimate penological interest."[130]

In doing so, the *Turner* Court announced four factors in determining whether a reasonable relationship exists between the prison limitation on free speech and penological interests.[131] The first factor involves whether there is a "valid, rational connection between the prison regulation" and the penological interest promoted by the government.[132] The Court noted that "the governmental objective must be a legitimate and neutral one," that operates "in a neutral fashion, without regard to the content of the expression."[133] The second factor requires that the court examine "whether there are alternative means of exercising the right that remain open to prison inmates."[134] The third factor requires the court to consider how accommodating prisoners' asserted constitutional right will impact "guards and other inmates" and "allocation of prison resources generally."[135]

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among prisoners, with the concomitant potential for coordinated disruptive conduct"); Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 131–32 n.8 (1977) (limiting prisoners' right to unionize, including right to receive bulk mailings due to potential internal security threats); Pell v. Procunier, 417 U.S. 817, 826 (1974) (holding that when the question of media rights involve people entering the prison for face-to-face communication, "legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations").

[126] *Jones*, 433 U.S. at 137 ("Prisons, by definition, are closed societies . . . . Of necessity, rules far different from those imposed on society at large must prevail within prison walls." (Burger, C.J., concurring)).

[127] *See id.*

[128] *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

[129] According to the *Turner* Court, the more demanding strict scrutiny analysis "would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89.

[130] *Id.* at 89. This is known as the "reasonable relationship" test. *Id.* at 91, 97. Under the "reasonable relationship test," a prison practice arguably restricting the free speech rights of prisoners is valid if it is "reasonably related to legitimate penological interests." *Id.* at 89.

[131] *Id.* at 89–91.

[132] *Id.* at 89–90.

[133] *Id.* at 90.

[134] *Id.*

[135] *Id.*

Finally, the fourth factor considers whether there are alternative methods that would accommodate prisoners' rights at minimal cost to valid penological interests.[136] In examining these four factors, the *Turner* Court decided the Missouri regulation at issue, which barred inmate-to-inmate correspondence, was reasonably related to the legitimate security interest of the facility.[137]

As demonstrated in subsequent cases applying the four-factor *Turner* standard,[138] it is very difficult to overcome the deference afforded to prison authorities after virtually any penological interest is proffered by the state.[139] Restrictions aimed at prisoner speech intended for free citizens have fewer such risks and very little, if any, rational relation to any legitimate non-speculative penological interest.[140] Hence, any restrictions inhibiting the prisoner-to-public communication right should receive the protections of the more rigorous *Martinez* standard.

2. The Prisoner-to-Public Communication Right Must Be Unfettered

Because politically powerless prisoners are completely reliant on corrections services for survival, prisoners should possess an unfettered right to communicate with the public. The proposed right of prisoner-to-public communication should thus protect prisoner-to-public communication from prison administrator review. Since virtually all prisoner outgoing mail sent from United States federal and state correctional institutions is subject to review by corrections authorities, this is both the most essential and controversial feature of the

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[136] *Id.* at 90–91 (noting, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation" and "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard").

[137] *Id.* at 91.

[138] *See supra* note 107 and accompanying text.

[139] For example, in the *Thornburgh* case, the Court found the prison regulation valid on its face due to the "broad discretion" necessary for prison administrators to "prevent internal disorder." Thornburgh v. Abbott, 490 U.S. 401, 428 (1989) (Stevens, J., concurring in part and dissenting in part). The Court also noted the regulation's importance in responding to several security concerns, including mail between institutions that might be used to communicate escape plans and to arrange assaults and other violent acts, and a growing problem with prison gangs. *Id.* In examining the majority's security concerns, Justice Stevens concluded that the concerns noted by the Missouri Division of Corrections and majority were not supported by the record. *Id.* at 430.

[140] The dissenting justices in *Turner* concluded that "if the standard can be satisfied by the low standard of nothing more than a '*logical* connection' between the regulation and any legitimate penological concern perceived by a cautious warden . . . it is virtually meaningless." *Turner*, 482 U.S. at 100 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

proposed right.[141] The prisoner-to-public communication right should be unfettered because review of prisoner mail stifles prisoner expression. Moreover, there are few penological purposes for prisons to review prisoner outgoing mail correspondence and prisoner mail review undermines prison accountability to the public.[142]

First, prisoner expression is necessarily restricted when subjected to prison official review. Stifling prisoner expression, especially to loved ones and those that provide prisoners a sense of connection to the outside, runs afoul of prisoner rehabilitation, and ultimately, public safety when the prisoner returns to society.[143] Even before the contemporary age of mass incarceration, Justice Marshall emphasized that the unfettered right to prisoner-public communication is indispensable given the realities of prison life and the chilling effect of prison administrators reading prisoner mail:

> It seems clear that this freedom may be seriously infringed by permitting correctional authorities to read all prisoner correspondence. A prisoner's free and open expression will surely be restrained by the knowledge that his every word may be read by his jailors and that his message could well find its way into a disciplinary file, be the object of ridicule, or even lead to reprisals. A similar pall may be cast over the free expression of the inmates' correspondents.[144]

Second, there are few legitimate penological purposes for reading prisoner mail. Marshall's concurrence in *Procunier* was notably suspicious of the penal objectives of prisoner mail review

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[141] *See* 28 C.F.R. 540.14 (2018) (the Federal Bureau of Prisons policy on correspondence notes that "[i]ncoming general correspondence may be read as frequently as deemed necessary to maintain security or monitor a particular problem confronting an inmate. . . . Outgoing mail . . . may be read and inspected by staff"); *see also* FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5265.14 2 (2011), https://www.bop.gov/policy/progstat/5265_014.pdf [https://perma.cc/6QNN-SVWK].

[142] Procunier v. Martinez, 416 U.S. 396, 423 (1974) (Marshall, J., concurring).

[143] *Id.* at 426. Citing the Second Circuit, Marshall noted in his *Martinez* concurrence:

> Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.
>
> and:
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> The harm censorship does to rehabilitation . . . cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts or criticisms of the prison in letters. This artificial increase of alienation from society is ill advised.

Id. (quoting Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) (en banc) (alteration in original) (footnotes omitted)).

[144] *Id.* at 423.

by officials.[145] In support, Justice Marshall made clear that the State's asserted penological interest, "that contraband weapons or narcotics may be smuggled into the prison via the mail," was unfounded when concerning prisoner outgoing mail.[146] Even in 1974, Marshall noted, inexpensive technology allowed for the x-ray imaging of the inside of mail for the purpose of detecting weapons and other improper paraphernalia.[147] Such alternative methods would not have the tendency to restrict content like the reading of prisoner mail, which might be critical of prison authorities or conditions.[148]

Justice Marshall questioned the wisdom of failing to recognize the unfettered prisoner-public communication right as a threat to public accountability of a major system within a democratic society.[149] His words are just as true today as they were in 1974, when he stated:

> [T]he mails are one of the few vehicles prisoners have for informing the community about their existence, and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.[150]

Additionally, when prison problems arise, often the only option for incarcerated people is to communicate the problem to someone outside the prison, like a family member or friend. Given limitations on the media in prisons, difficulties in the prisoner grievance process, and prisoner litigation obstacles,[151] the only means of holding prisons accountable for the treatment of prisoners and conditions resulting from prison overcrowding, is often independently drawing attention from the public eye. Communication of extraordinary prison problems to those on the outside is rendered ineffective if prison officials are allowed to freely review, and potentially intercept or otherwise discourage sending such communication.

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[145] *Id.* at 424–25.

[146] *Id.* at 424.

[147] *Id.* at 424–25.

[148] *Id.* at 425. Marshall also noted that "the reading of all prisoner mail is too great an intrusion on First Amendment rights to be justified by such a speculative concern" as prisoner plotting escape plans. *Id.*

[149] *Id.* at 427.

[150] *Id.*

[151] *See* discussion *infra* Sections IV.A and IV.C.

3. The Prisoner-to-Public Communication Right Must Be Unqualified

Prison administration would be in violation of the "unqualified" right of prisoner-to-public communication if it punished or otherwise retaliated against prisoners for exercising their communication right.[152] Although the *Procunier v. Martinez* majority recognized the right of prisoner-to-public communication, the importance of the unqualified nature of prisoner-to-public communication was best emphasized in the concurring opinion written by Justice Thurgood Marshall.[153]

Justice Marshall agreed with the majority in striking down the state of California's overly broad prisoner-to-public communication regulation but emphasized the need to reach that finding under a *prisoner's* unqualified right to use the mail.[154] When compared to the majority, Justice Marshall did not share the majority's view of tension between the prisoner-to-public communication right and the penological objectives of prisons.[155] Justice Marshall instead insisted that "prisoners are . . . entitled to use the mails as a medium of free expression not as a privilege, but rather as a constitutionally guaranteed right."[156]

Further, Justice Marshall insisted that an unqualified prisoner-to-public communication right was necessary for prison accountability to the public.[157] The rapid development of mass incarceration, growing exponentially unbeknownst to the general public for a number of years, suggests that Justice Marshall was right. For the proposed right of prisoner-to-public communication

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[152] Of course, prisoner communication to the public would be subject to the criminal laws of free citizens such that communication would carry the normal penalties associated with communication carrying criminal threats or otherwise facilitating criminal activity.

[153] *Martinez*, 416 U.S. at 422 (Marshall, J., concurring).

[154] *Id.* at 422–23.

[155] *Id.* Not only was Justice Marshall particularly protective of prisoner outgoing mail, he disagreed with the majority's view that reading prisoner mail might serve as a useful tool in the rehabilitative process. *Id.* at 425–26. In this context, Marshall also questioned whether prisons had come to adopt a rehabilitative model at all. *Id.* at 425–26. Assuming that prisons did have a rehabilitative function, Justice Marshall explained the policy of reading prisoner mail would have a "chilling effect on free expression", which would likely inhibit rehabilitative attempts. *Id.* at 426. Citing the Second Circuit, Justice Marshall further noted, "the harm censorship does to rehabilitation . . . cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing inmate thoughts or criticisms of the prison in letters. This artificial increase of alienation from society is ill advised." *Id.* (quoting Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) (en banc) (alteration in original) (footnotes omitted)).

[156] *Id.* at 423. Marshall also noted that the appropriate standard that the Court should have applied required a "substantial government interest and a showing that the means chosen to effectuate the State's purpose are not unnecessarily restrictive of personal freedoms." *Id.*

[157] *Id.* at 427.

to be effective at providing prison accountability to the public, it must be exercised without the fear of prison official retaliation.

The most recent case visited by the Supreme Court on prisoner free speech rights, *Beard v. Banks*, determined that the four-part *Turner* test applies to facility regulations that withhold prisoner First Amendment rights as punishment.[158] *Banks* involved a Pennsylvania restriction imposed on prisoners in a high security supermax facility that absolutely banned newspapers, magazines, and photographs to these prisoners.[159] The ban only allowed "legal and personal correspondence, religious and legal materials, two library books and writing paper."[160]

Applying the *Turner* test, the court upheld the ban, noting it must provide "substantial deference to the professional judgment of prison administrators."[161] The Supreme Court agreed with the prison official defendants reasoning that the particularly high-risk inmates had already been deprived of every other right possible to gain compliance of prison rules, so depriving them of First Amendment rights was "a significant behavioral incentive."[162] According to the Court, the free speech limitation was upheld because "providing increased incentives for better prison behavior" for "particularly difficult inmates" is a legitimate penological interest.[163]

It is hard to know how broadly *Banks* might apply to other types of prisoner rights deprivation, such as the proposed right of prisoner-to-public communication. Justice Stevens dissented, noting that there seemed to be no limit on the Court's finding that it is permissible to take away items that a prisoner

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[158] *See* Beard v. Banks, 548 U.S. 521, 524, 529 (2006) (citing Turner v. Safley, 482 U.S. 78, 89 (1987). To justify using prisoner First Amendment rights as punishment, the *Banks* court cited to previous precedent, wherein the Court "upheld a prison's 'severe' restriction on the family visitation privileges of prisoners with repeat substance abuse violations." *Id.* at 533 (citing Overton v. Bazzetta, 539 U.S. 126, 134 (2003)). In doing so, the Court stated, "withholding such privileges 'is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.'" *Id.* (quoting *Overton*, 539 U.S. at 134). Citing case similarities, the Court stated, despite the constitutional dimensions of both cases, that both cases required the Court to defer to the prison administrators' "experience-based conclusion that the policies help to further legitimate prison objectives." *Id.*

[159] *Id.* at 525–26.

[160] *Id.* at 526.

[161] *Id.* at 528 (quoting *Overton*, 539 U.S. at 132) (internal quotation marks omitted).

[162] *Id.* at 535. Dismissing Banks' claim that, "increased contact with the world generally favors rehabilitation," the Court decided that although the restriction was "severe" the plaintiff Banks failed to illustrate that it did not meet a penological objective. *Id.* at 534, 536. Hence, the scarcely resourced prisoner has the burden of showing that the litigated prison regulation fails to meet a reasonable penological objective. *Id.* at 534–36.

[163] *Id.* at 530.

values to promote better behavior, and he feared the ruling could be used to justify the deprivation of even more fundamental constitutional rights.[164]

Regardless, the proposed unqualified right to prisoner-to-public communication would appropriately and explicitly limit the Supreme Court's ruling in *Banks* so that prisoner-to-public communication rights could not be withheld as punishment. The prisoner-to-public communication right's goal of promoting prison accountability far outweighs any penological gains that could be realized from withholding the right from prisoners. The prisoner-to-public communication right would therefore be an appropriate limitation to the *Banks* holding, especially considering the *Banks* Court did not specifically extend its holding to apply beyond the rights addressed in that case.

Even when involving prisoners considered high-risk or dangerous like in *Banks*, the prisoner-to-public communication right would provide several penological benefits. For example, prisoner correspondence exercised under the prisoner-to-public communication right might enlighten the public about the very situations that it should be concerned about, such as prison vulnerabilities that caused the prisoner's dangerous behavior or prisoner subjection to unreasonable distress after the prisoner has exhibited dangerous behavior. Additionally, prisoner exercise of the prisoner-to-public communication right might prove therapeutic in addressing the prisoner's high-risk behavior or lead to the discovery of an undiagnosed mental illness suffered by the dangerous prisoner.

Further, granting incarcerated people an unqualified right to be free from punishment and retaliation when communicating with the public is consistent with federal court precedent holding that it is unconstitutional to retaliate against inmates for writings.[165] Moreover, unless prisoner speech interferes with

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[164] *Id.* at 546–47 (Stevens, J., dissenting). However, *Banks* suggests that *Turner's* reasonable relations test might apply to any prisoner first amendment right deprivation regulations by facilities. *Id.* at 531–33 (plurality opinion).

[165] Simmat v. Manson, 535 F. Supp. 1115, 1117–18 (D. Conn. 1982) (where the court held that "[t]he plaintiff's First Amendment right to freedom of expression includes the right to express himself without punitive retaliation"); *see also* Silva v. Di Vittorio, 658 F.3d 1090, 1104, 1106 (9th Cir. 2011) (prisoner properly stated a retaliation claim where prison facility transferred him to another correctional facility and confiscated sixteen boxes of legal files for the purpose of preventing his testimony against the transferring facility); Meriwether v. Coughlin, 879 F.2d 1037, 1040, 1045 (2d Cir. 1989) (damage award upheld when jury found that inmates were transferred for exercising First Amendment right to meet with prison superintendent to complain about prison conditions); Jackson v. Thurmer, 748 F. Supp. 2d 990, 1000 (W.D. Wis. 2010) (court acknowledged precedent holding that an individual should not be punished for "'pure thought'" (citing Doe v. City of Lafayette, 377 F.3d 757, 765 (7th Cir. 2004))).

rehabilitation or other penological interests, lower courts have been willing to protect even seemingly negative content on behalf of prisoners as long as it involves external expression.[166]

4. Form of Prisoner-to-Public Communication

The form of allowable unqualified prisoner communication is the most elusive feature of the proposed right. At a minimum, correctional policies overseeing the proposed right should guarantee unqualified and unfettered prisoner-to-public communication through the mail. The Supreme Court has on various occasions emphasized the importance of the mail in its prisoner free speech jurisprudence, with Justice Marshall noting, "'use of the mails is almost as much a part of free speech as a right to use our tongues.'"[167] Additionally, ceasing correctional facility mail review practices would either save the prison resources or allow them to be used in other ways.

The right should encourage prisons to adopt policies on prisoner-to-public communication that would be in the best interest of prisoner rehabilitation. Given the availability of technological advances in the area of communication, the proposed right should encourage as many means of safe prisoner-to-public communication as possible. Prison administration could also use access to prisoner-to-public communications that go beyond the mail—like access to messaging, videoconference, and social media—as privileges and incentives toward meeting rehabilitative benchmarks.[168]

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[166] *See* Medina v. City of Philadelphia, No. Civ.A.03-1971, 2004 WL 1126007, at *1, *4 (E.D. Pa. May 19, 2004) (finding that the plaintiff "presented a viable First Amendment claim against Defendants for confiscation of his manuscripts" where Plaintiff had been working on a manuscript about the Latin Kings).

[167] Procunier v. Martinez, 416 U.S. 396, 422 (1974) (Marshall, J., concurring) (quoting Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)).

[168] Telecommunication companies such as American Prison Data Systems, Edovo and JPay are beginning to develop software and other technology that attempts to close the digital divide between prisoners and the public when accessing such forums. These companies claim that "offering educational and entertainment content . . . can help improve prisoner behavior and reduce the chances of recidivism" on release. *See* Dan Tynan, *Online Behind Bars: If Internet Access Is a Human Right, Should Prisoners Have It?*, GUARDIAN (Oct. 3, 2016, 6:00 EDT), https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay [https://perma.cc/A6SP-4UY9]; *see also* Aysha Kerr & Matthew Willis, *Trends & Issues in Crime and Criminal Justice: Prisoner Use of Information and Communications Technology*, AUSTRALIAN INST. OF CRIMINOLOGY 1–2, 14 (Oct. 2018), https://aic.gov.au/publications/tandi/tandi560 [https://perma.cc/3Y2C-VZ9Z].

B. Limitations on the Proposed Right of Prisoner-to-Public Communication

1. No Public-to-Prisoner Communication

As noted above, restrictions that place limitations on most prisoner outgoing speech are subject to the more rigorous *Martinez* standard.[169] When the prisoner communication is directed inside prisons, however, the unqualified and unfettered right of prisoner-to-public communication would not apply. In other words, the right would only extend to prisoner communication directed to the public, but not public communication directed at prisoners, nor would it include prisoner communication to other prisoners.

In *Thornburgh v. Abbott*, prisoners filed a class action challenging Federal Bureau of Prisons censorship rules that permitted the warden to reject publications "detrimental to the security, good order, or discipline of the institution . . . [that] might facilitate criminal activity."[170] The Bureau also enforced an "all-or-nothing" practice that kept class action inmates from reviewing acceptable portions of publications if any part was deemed to violate the Bureau restriction.[171] Applying the more restrictive *Martinez* standard, the United States Court of Appeals for the District of Columbia remanded the case "for an individualized determination of the constitutionality of the [forty-six] exclusions" at issue.[172]

The Supreme Court reversed, reasoning that the court of appeals was in error in that the less restrictive *Turner* standard, not *Martinez*, applied despite the provisions involving the free speech rights of non-inmate free citizens.[173] Justice Blackmun writing for the 6-3 majority reasoned that the more restrictive *Martinez* standard did not apply to the regulations in question because *Martinez* involved prisoner "outgoing correspondence" and the present question in *Thornburgh* involved third party publications entering prison facilities.[174] Then, applying *Turner*'s reasonable

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[169] *See supra* Section III.A.1.

[170] Thornburgh v. Abbott, 490 U.S. 401, 404–05 (1989) (quoting 28 C.F.R. § 540.71(b) (1988) (internal quotation marks omitted)).

[171] *Id.* at 406–07 n.8.

[172] *Id.* at 404.

[173] *Id.* at 413–14.

[174] *Id.* at 413. Moreover, the Court explained that potentially dangerous outgoing communication is more likely to fall within "readily identifiable categories" such as "escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion." *Id.* at 412. As a result, the Court limited the *Martinez'* holding to regulations concerning outgoing correspondence, stating "[t]he implications if outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Id.* at 413.

relationship standard and four-factor test, the *Thornburgh* Court upheld the Federal Bureau of Prison's regulation.[175]

After *Thornburgh*, even restrictions on prisoner speech not intended for other prisoners will be viewed under the less restrictive *Turner* standard if the prison defendant can illustrate that the prisoner's speech has negative consequences to the internal function and safety of the facility.[176] Since the Court has explicitly denied prisoner right to access to external communications from the public, the prisoner-to-public communication right is increasingly important to prisoner rehabilitation and public safety.

2. No Prisoner-to-Public Communication for the Purpose of Forming Unions

Similarly, the Supreme Court's limitation on prisoner ability to organize and form labor unions illustrates the importance of the proposed prisoner-to-public communication right. In *Jones v. North Carolina Prisoners' Labor Union*, the Supreme Court held that prison restrictions on prisoner ability to organize within the prison walls, and potentially associate with prison unions on the outside, were constitutional.[177] By 1975 toward the end of the prisoner rights movement, the

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[175] *Id.* at 419. In looking at the first of the *Turner* factors, the Court was tasked with determining whether the governmental objective underlying the restriction is rationally related to a legitimate penological objective and is content neutral. *Id.* at 414. Noting that the content neutral question was a close one, the Court rejected the plaintiff's argument that the Bureau restrictions placed limitations on content since the warden was specifically authorized to reject publications from a non-exhaustive list of criteria that included sexually explicit publications such as homosexual publications (intended for the same sex as the institution population). *Id.* at 415–16. The Court found that as long as the distinctions between publications are based "solely on the basis of their potential implications for prison security," prison officials should be given high deference in maintaining the security of its facilities. *Id.* at 415. Further, the Court agreed with the Government that even if materials weren't "likely" to lead to a prison security risk, it is acceptable for a warden to exclude materials that would "create an intolerable risk of disorder under the conditions of a particular prison at a particular time." *Id.* at 417. In applying the second "alternative means" factor, the Court found that the Bureau regulations permitted a number of publications to be received by prisoners, and also, that the prisoners had alternative means of communicating. *Id.* at 418. As to the third "impact and allocation" factor, the Court found that "the right in question [to receive specific publications] 'can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike,'" and in such cases the courts should defer to the "'informed discretion of corrections officials.'" *Id.* (quoting *Turner*, 482 U.S. at 90). Finally, in resolving the fourth "alternative methods" factor, the Court determined that there were no obvious alternatives that would guard against the danger to which the regulations were aimed, and therefore, the Bureau's rule was "not an 'exaggerated response.'" *Id.*

[176] An example of where a lower court has decided that the outward writings of inmates were inappropriate is Frink v. Arnold, 842 F. Supp. 1184, 1186–87, 1192 (S.D. Iowa 1994).

[177] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125–26, 136 (1977).

Prisoners Labor Union had two thousand prison "inmate members in 40 different prisons in the State of North Carolina."[178] The State, "unhappy with these developments" proscribed regulations that forbade "inmates from soliciting other inmates to join [the Union], barred all meetings of the Union, and refused delivery of packets of Union publications mailed in bulk to several inmates for redistribution among other prisoners."[179] Although the regulations did not outright prohibit union membership, solicitation and any union activity of any kind was not permitted.[180] Union prisoner plaintiffs filed suit to challenge the restrictions.[181]

In 1977, the Supreme Court heard the case.[182] According to the Court, the appropriate standard when evaluating prisoner association rights is to consider whether the regulations are "rationally related to the reasonable . . . objectives of prison administration," as established in *Pell v. Procunier*.[183] Under the *Pell* rational relationship standard, the Court decided that there is no prisoner right to associate with prison labor union organizations and that the North Carolina regulations constructively preventing Union membership did not offend the First and Fourteenth Amendments.[184]

Despite this limitation, *Jones* affirms the importance of prisoner access to public communication as expressed in *Martinez* and *Pell*.[185] Although the Court reasoned that the formation of the prisoners' union "pos[ed] the likelihood of disruption to prison order or stability," the reasoning to uphold the restrictions rested in part on the availability of communication alternatives and the fact that the Union's "speech" was directed inside of the correctional facilities.[186] In banning the Union solicitation or organization, the Court reasoned the prison had merely "affected one of several ways in which inmates may voice their complaints to, and seek relief from prison officials."[187] Additionally, the *Jones* Court

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[178] *Id.* at 122.

[179] *Id.* at 121–22.

[180] *Id.* at 122.

[181] *Id.* at 122–23. The district court concluded that it was "'unable to perceive why it [was] necessary or essential to security and order in the prisons to forbid solicitation of membership in a union permitted by the authorities'" and resolved the case on behalf of the Union. *Id.* at 123–24.

[182] *Id.* at 119.

[183] *Id.* at 129; *see also* Pell v. Procunier, 417 U.S. 817, 822 (1974).

[184] *Jones*, 433 U.S. 119 at 136.

[185] *Id.* at 130–33.

[186] *Id.* at 130–33.

[187] *Id.* at 130 n.6. In dissent, Justice Marshall noted that the court had taken "a giant step backwards" in recognizing prisoner rights and reemphasized the need of

proclaimed that the prohibition of bulk mailing did not run afoul to prisoner First Amendment rights "since other avenues of outside informational flow by the Union" remained available.[188]

Nevertheless, the implications of this ruling are clear—prisoners have no right to organize with other prisoners or outside advocacy organizations if such activity could be viewed as a threat to facility internal security. The fact that prisoners have no right to organize unions makes the right to prisoner-to-public communication even more important to the millions incarcerated across the United States.

IV. RATIONALES SUPPORTING THE RIGHT OF PRISONER-TO-PUBLIC COMMUNICATION

Recognizing the right to unqualified and unfettered prisoner-to-public communication is a necessary step in permanently reducing prison populations. There are several reasons this proposed right is important to transformative justice reform, such as the incentives of public accountability, prisoner rehabilitation, and public safety.

A. Prison Accountability to the Public

Despite use of enormous state and federal resources and taxpayer dollars spent each year on corrections,[189] the public knows little about the conditions or effectiveness of the corrections system.[190] This is primarily because prisons are not

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strict scrutiny analysis as the appropriate level of scrutiny for evaluating regulations that restrict prisoner freedom of speech and expression. *Id.* at 139–40 (Marshall, J., dissenting). Further Marshall warned, putting the free speech rights of prisoners in the hands of prison personnel, would inevitably "err on the side of too little freedom," especially since prison and public criticism could potentially cost a warden or other prison officials a job. *Id.* at 142.

[188] *Id.* at 130–31.

[189] In a report by the Prison Policy Initiative, it is estimated that "the system of mass incarceration costs the government and families of justice-involved people at least $182 billion every year." Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/PDF6-WTQM]. "The [prison] industry is dominated by two large publicly traded companies—CoreCivic ([formerly known as] Corrections Corporation of America (CCA)) and The GEO Group—as well as one small private company, Management & Training Corp (MTC)." *Id.* The report estimates that these companies "received $3.9 billion in revenue from mass incarceration and immigration detention" in 2015, "and made [$374 million] in profits" for the 2015 fiscal year. *Id.* There is also plenty of profit generated in the system of mass incarceration in other industries such as bail bond companies, specialized phone services, and commissary vendors. *See id.*

[190] *See* John Immerwahr & Jean Johnson, *The Revolving Door: Exploring Public Attitudes Toward Prisoner Reentry* 2 (Working Discussion Paper for the Urb. Inst.'s Reentry Roundtable, Mar. 2002), https://www.urban.org/sites/default/files/

subject to the same media scrutiny as other public institutions. In 1974, the Supreme Court decided *Pell v. Procunier*, a case involving First Amendment media access claims by a number of prisoners and journalists.[191] Under the challenged regulation, media were denied requests to interview specific prisoners face-to-face and prisoners were also disallowed from initiating media interviews.[192] Despite the fact that prisons are responsible for the ongoing care and safety of human beings, the *Pell* Court ruled that prison restrictions on media access to prisons and prisoners are constitutional as long as they are imposed in a content neutral manner.[193]

The *Pell* decision essentially deprived prisoners and the public of prison accountability through the media. Though the Court acknowledged "[t]he constitutional guarantee of a free press 'assures the maintenance of our political system and an open society,'" it refused to grant media a right of access to prisons beyond that of any other citizen, which is typically highly restricted.[194] The Supreme Court has made clear in other cases that the media does not receive more protection than any other individual when speech is directed into a prison or deals with access to a prison or prisoner.[195] In upholding regulations that disallowed face-to-face prisoner interviews by media, the Court emphasized the fact that alternative

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publication/60766/410804-The-Revolving-Door.PDF [https://perma.cc/5LY4-KW64] (noting that despite a wealth of criminally oriented television shows, the public knows very little about prison life or prisoner re-entry).

[191] Pell v. Procunier, 417 U.S. 817, 819–20 (1974). The prisoner and journalist plaintiffs challenged a regulation that limited prisoner visitors "to individuals who have either a personal or professional relationship to the inmate—family, friends of prior acquaintance, legal counsel, and clergy." *Id.* at 827. The state's penological purpose of this policy was purportedly to "permit inmates to have personal contact with those persons who will aid in their rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security." *Id.* Like in *Martinez*, the Court acknowledged that prisoners "retain[ ] those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Id.* at 822.

[192] *Id.* at 819.

[193] *Id.* at 827–28. The Court however took note that "under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher." *Id.* at 822.

[194] *Id.* at 832. (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)). Although media plaintiffs argued the regulation requiring face-to-face interviews with specific inmates constituted "governmental interference with their newsgathering activities," the Court declared that "[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 833–34. In failing to recognize a media right of access, the *Pell* majority declared that media only enjoy a privilege to prison and prisoners versus a right to access. *Id.* at 834.

[195] *See* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978); Saxbe v. Wash. Post Co., 417 U.S. 843, 856–57, 875 (1974) (Powell, J., dissenting) (like *Pell*, *Saxbe* dealt with press requests to interview specific named inmates, but in federal prisons).

mechanisms for communication with the media were provided.[196] Unfortunately, the alternative form of communication suggested by the Court in *Pell* was mail communication, which is subject to review by prison officials.[197]

In light of deference to prison regulations that restrict media access to prisons, the importance of recognizing an unqualified and unfettered prisoner-to-public communication right cannot be overemphasized.[198] In a very critical dissenting opinion, Justice Douglas, joined by Justices Marshall and Brennan, explained the press's very important role in the function of a democratic society, emphasizing the special importance of this role in the prison setting.[199] As also noted by the dissent in *Pell*, "[t]he average citizen is most unlikely to inform himself about the operation of the prison system. . . . He is likely instead, in a society which values a free press, to rely upon the media for information."[200]

The Supreme Court has repeatedly recognized the importance of prisoner free speech to the issue of public accountability.[201] Justice Thurgood Marshall especially understood

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[196] *See Saxbe* 417 U.S. at 824–26 (majority opinion). The Court also suggested that the prisoner's "unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison," was an additional means of communicating with the media. *Pell*, 417 U.S. at 825. The dissenting Justices were unimpressed by the alternative form of communication available between media and prisoners, stating, "'[t]his reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations.'" *Id.* at 838 (Douglas, J., dissenting) (citing NLRB v. Fruit Packers, 377 U.S. 58, 79–80 (Black, J., concurring)).

[197] *See supra* note 141.

[198] Additionally, following the San Quentin and related riots, prisons "had ceased to capture the public attention as it had a few years earlier . . . [m]ainstream newspapers generally no longer had beat reporters for prison issues, and undercover journalists no longer got jobs in prisons to report on conditions inside." Berger, *supra* note 81, at 225.

[199] *Pell*, 417 U.S. at 837–41 (Douglas, J., dissenting). Justice Douglas noted:

> Crime, like the economy, health, education, defense, and the like, is a matter of grave concern in our society and people have the right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it. "On any given day, approximately 1,500,000 people are under the authority of [federal, state and local prison] systems. The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison, 98% will return to society." The public's interest in being informed about prisons is thus paramount.

Id. at 840 (footnotes omitted).

[200] *Id.* at 841. The dissent additionally insisted that the only issue appropriately before the court was whether the complete ban on interviews with inmates selected by the press went beyond what was necessary for the protection of the governmental interest. *Id.* at 840.

[201] *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 130 (1977) (stating that the regulation limiting prisoner organizing as a union organizing was not unconstitutional in part because "First Amendment speech rights were" barely

the plight of prisoners and the need to maintain contact with the outside world[202] from his previous experience working as an attorney for the NAACP Legal Defense and Education Fund representing the rights of black criminal defendants in a pre-civil rights era. In his concurring opinion in *Martinez*, Justice Marshall made an unprecedentedly strong case in favor of the right to unfettered prisoner-to-public communication by mail well before mass incarceration as we know it today.[203] Justice Marshall urged that the need for an unfettered prisoner right to use the mail is essential to prison accountability and prisoner fair treatment.[204]

B. Prisoner Rehabilitation and Public Safety

The prisoner perspective is important to providing dignity to prisoners, which is necessary in meeting prison rehabilitative goals and reducing prison populations. The meaning of being a prisoner is highly censored by correctional facility authorities, and, as a result, disregarded by the public. This disassociation from prisoners and society creates a dehumanizing effect and the true stories of incarcerated people, their daily lives, and family dynamics are missing from the daily lives of those on the outside. Silencing an inmate's expression does not further a prison's rehabilitative goals, and in fact, likely hinders them.[205] As noted by Justice Thurgood Marshall's concurring opinion in *Procunier v. Martinez*:

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. . . . [A] prisoner needs a medium for self-expression.[206]

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implicated"); Procunier v. Martinez, 416 U.S. 396, 418 (1974) ("The interests of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment."); *Pell*, 417 U.S. at 824 (quoting the same language in *Martinez* and holding that because prisoners were allowed mail communication as an alternative means to media face-to-face interviews, this was sufficient).

[202] *Martinez*, 416 U.S. at 423–28 (Marshall, J., concurring).

[203] *Id.*

[204] *Id.* at 427.

[205] Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 857 (2002) (Prisoners have the capacity to progress or degenerate in response to their environment and "it is undeniable that since approximately ninety percent of all inmates will one day be released, allowing prisoners to communicate with the outside world has important consequences." (footnote omitted)).

[206] *Martinez*, 416 U.S. at 428.

Additionally, once a person is convicted of a crime and incarcerated, he or she is under the care of the corrections system until the end of the prison term.[207] Although some monetary assistance from prisoner families is possible through commissary accounts,[208] the corrections institution must meet all prisoner basic needs. Because prisoners' complete dependence on correctional facilities is inevitable, it is important to hold corrections to several layers of institutional accountability, including to the public.[209] Prisoner communication with the public is especially important, because without it, other serious human rights violations could occur at the hands of prison officials. Courts and corrections institutions should be especially reluctant to erode prisoner free speech rights in light of the suppressive impact on a disadvantaged demographical group and communities of color.[210]

Given the broad range of potential prison objectives—including deterrence, incapacitation, rehabilitation, retribution, and restitution—prisoners should be provided ample opportunity to inform the public of the prison's success at meeting these objectives.[211] Moreover, rehabilitation is not solely on behalf of the prisoner; it is also vital to public safety.[212] Nevertheless, the justice system does not regulate prisons for effectiveness in rehabilitation, and in fact, several prison system regulatory difficulties make effective prisoner rehabilitation unlikely.

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[207] Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.").

[208] 28 C.F.R. §§ 506.1–506.2 (2018).

[209] *See* Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062, 1067 (1979) ("The larger political community provides prison officials with little incentive to take the risks inherent in changing the current structure. Individual citizens rarely have a stake in prison conditions, so prison officials often have no external constituency to demand accountability or provide political support. Administrators are often evaluated by their superiors in terms of their success in maintaining low-visibility and low-cost prison conditions. Because public officials are often unwilling to allocate funds necessary to provide adequate resources, existing problems are intensified by shortages of staff, space, and other resources." (footnotes omitted)).

[210] *See supra* note 6 and accompanying text.

[211] *See* Pell v. Procunier, 417 U.S. 817, 822–23 (1974) ("An important function of the corrections system is the deterrence of crime . . . his isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity . . . . [S]ince most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody.").

[212] NAT'L RESEARCH COUNCIL, *supra* note 7, at 150 ("[T]he formerly incarcerated may be more involved in crime after prison because incarceration has damaged them psychologically in ways that make them more rather than less crime prone . . . has exposed them to violent or other risky contexts, or has placed them at risk of crime because of imprisonment's negative social effects on earnings and family life.").

C. Difficulties Regulating Prisons

The right of prisoner-to-public communication is needed because the ways in which the prison industry is regulated make it difficult to confront mass incarceration and ensure prisoner basic rights are met. In addition to the way prisons are regulated, other features of the U.S. prison system make reform that would reduce prison populations difficult, including but not limited to, the profitability of the prison industry,[213] public opinion and implicit biases about criminal behavior and penal punishment,[214] and the lack of national statistics and data on prison populations.[215] Each of these realities presents a seemingly insurmountable hurdle on its own, unmanageable within the scope of this article. Nevertheless, understanding the way prisons are generally regulated deserves specific attention in examining the need for a right of prisoner-to-public communication. Certainly, if prisons were adequately regulated through some means or processes other than the courts, the right of prisoner-to-public communication might be less necessary.

Some of the difficulty in regulating prisons exists because most prisons are run at the state level with facilities locally maintained under policies and practices that vary from state to state and from facility to facility.[216] Also, there is no uniform set

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[213] *See* Wagner & Rabuy, *supra* note 189.

[214] The complicated historical underpinnings and relationship between slavery and modern corrections has heavily influenced criminal justice philosophy and the need to lock people up to feel safe. Like slavery, American criminal justice philosophy is driven largely by punishment and authority, and a number of parallels can be drawn between slavery and the modern mass incarceration justice system. Because of these very similarities and historical underpinnings, pro-prison policy has failed the public by most measures of institutional success, and further disadvantaged black communities. A report by The Sentencing Project notes, "[a] complex set of factors contributes to the severity and selectivity of punishment in the United States, including public concern about crime and racial differences in crime rates." NAZGOL GHANDNOOSH, THE SENTENCING PROJECT RACE & PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES, 3 (2014). The report concludes that "[w]hite Americans are more punitive than people of color," that "[m]edia crime coverage fuels racial perceptions of crime," and that the actions and statements of policymakers also "amplify the public's racial associations of crime." *Id. See generally* MUHAMMAD, *supra* note 32.

[215] While the Department of Justice Bureau of Justice Statistics reports data on the size of the U.S. prison population, the lack of data on many important measurable factors in prisons remains a significant obstacle to justice reform. *See* BUREAU OF JUST. STATS., https://www.bjs.gov/ [https://perma.cc/ZPY4-U93K]. As noted by the National Research Council, "[n]o mandatory reporting requirement exists for most key indicators or measures, and many prison systems do not systematically assess or report them . . . there is little or no standardization of this process . . . little or no quality control over the data; and no outside, independent oversight." NAT'L RESEARCH COUNCIL, *supra* note 7, at 165.

[216] The only authority held by the federal government in regulating states prisons is under the Civil Rights of Institutionalized Person Act. *See* Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. § 1997 (2012)); *see also infra* Section IV.C.5.

of standards by which state prisons operate. The United States Code of Federal Regulations only scarcely addresses prison administration in federal prisons, deferring largely to the warden at any given facility on the majority of issues related to prisoner and institutional management.[217] Hence, in both federal and state prison systems, prison administrators at each facility largely determine policies and standards.

Prison regulation is otherwise accomplished by a number of uncoordinated, unrelated, and fragmented systems and processes that do not address the problems of prison administration in a cohesive or exhaustive manner. The primary means of prison regulation include accreditation, prisoner grievances, prisoner litigation, state oversight, and investigations by the U.S. Department of Justice.

1. Prison Accreditation

Prison accreditation is ineffective at confronting the problem of prison overuse and prison conditions for a number of reasons. First, the entity that issues correctional accreditations, the American Correctional Association (ACA), uses self-imposed accreditation standards with no government input.[218] All functions of the ACA are privatized, and there are no federal reporting requirements for the ACA.[219] Typically, local

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[217] *See generally* 28 C.F.R. §§ 500–599 (regulating prison management and administration). For example 28 C.F.R. § 544.21, which regulates postsecondary education programs for inmates, notes that "[t]he Warden or designee must appoint a postsecondary education coordinator (ordinarily an education staff member) for the institution" and that "[t]he postsecondary education coordinator is responsible for coordinating the institution's postsecondary education program" but does not specify what postsecondary education programs prisons must make available, nor sets any standards for the effectiveness of such programs).

[218] The private nonprofit organization is the entity providing accreditation to prisons, jails and other detention facilities. The members are mostly current and former corrections officials. According to the company's website, it publishes "operational standards designed to enhance correctional practices for the benefit inmates, staff, administrators, and the public." *Standards Information—ACA Standards*, AM. CORR. ASS'N https://www.aca.org/aca_prod_imis/aca_member/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx [https://perma.cc/7P6P-X3XQ]. The ACA's accreditation standards address both adult and juvenile facilities. *See id.* These self-promulgated standards are divided into mandatory and non-mandatory standards. *See id.* In order for a prison facility to receive accreditation, it must meet all mandatory standards and ninety percent of non-mandatory standards. *Id.* The ACA's website admits, "[d]ue to differences in mission, physical plant, and jurisdictional intricacies, not all standards may apply to a given facility." *Id.*

[219] Nevertheless, local departments of correction often base statutory standards on ACA standards. For example, standards prescribed by Tennessee Corrections Institute state, "[n]otwithstanding subsection (a), the standards for the square footage of single-occupancy or multi-occupancy cells in both new and existing local correctional facilities in this state shall be the minimum standards required by the American Correctional

governments acquire and build correctional facilities as needed, and the federal government does not require accreditation by the ACA for any correctional facility to operate.[220]

Second, the ACA does not regularly interact with any prison environment. Once a facility is accredited, the ACA does not provide oversight or ongoing monitoring of correctional facilities outside of the reaccreditation process.[221] The ACA is also not responsible for enforcement of its standards and overseeing whether facilities are consistently following the ACA standards.[222] Facilities have been documented to write policies and procedures consistent with the ACA standards just prior to accreditation visitation and audit. Because the audits are announced months in advance, agencies tend to relax adherence to standards between accreditation audits.[223] In fact, the value of the ACA accreditation standards is also questionable because ACA-accredited facilities are not necessarily any more effective than non-accredited facilities in terms of safety and violence, especially at the hands of prison staff.[224]

Association's Performance-Based Standards for Adult Local Detention Facilities, as amended by the 2008 Standards Supplement." TENN. CODE ANN. § 41-4-140(f) (2010).

[220] *Id.* § 41-4-140(a)(1).

[221] The process for initial accreditation lasts twelve to eighteen months and consists of "a series of reviews, evaluations, audits and hearings." *Standards FAQ*, AM. CORR. ASS'N http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us/FAQs/ACA_Member/Standards_and_Accreditation/Standards__FAQ.aspx?hkey=b1dbaa4b-91ef-4922-8e7d-281f012963ce [https://perma.cc/UPR3-Q7WX]. During the accreditation process, "[t]eams of auditors, referred to as Visiting Committees, are formed to conduct compliance audits of agencies seeking accreditation and reaccreditation." AM. CORR. ASS'N, MANUAL OF ACCREDITATION POLICY AND PROCEDURE 10 (2017), http://www.aca.org/ACA_Prod_IMIS/docs/standards%20and%20accreditation/ALM-1-3_15_17-Final.pdf [https://perma.cc/JZ4A-N262]. After receiving initial accreditation, facilities must seek reaccreditation every three years. *Id.* at 9.

[222] As a side note, the Supreme Court has ruled that ACA standards do not create any enforceable rights on behalf of prisoners nor set minimum standards for prisons. As noted by Court in *Bell v. Wolfish*, while the recommendations or standards of organizations like the ACA may be instructive, they "do not establish the constitutional minima." Bell v. Wolfish, 441 U.S. 520, 543–44 n.27 (1979). Instead, the Court noted, the standards merely "establish goals recommended by the organization." *Id.* Additionally, ACA standards have been criticized that the standards are not on par with "federal case law and that the standards need documented rationale." David R. Ralphs, Evaluating American Correctional Association Accreditation of Adult Correctional Institutions 35 (May 2006) (unpublished M.A. dissertation, The University of Texas at Arlington) http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7043&rep=rep1&type=pdf [https://perma.cc/56HM-87QN].

[223] George Wagner, *Accreditation: The Pathway to Excellence*, CORRECTIONS TODAY, Oct. 1999, at 26.

[224] A 2006 study on the effectiveness of accreditation revealed that

> ACA accredited facilities were often more crowded than non-accredited facilities . . . the level of violence was often higher at accredited facilities compared to non-accredited facilities. The illness-related death rates of inmates was higher at ACA accredited facilities than it was at non-accredited

Additionally, loss of accreditation status is rare despite pervasive negative systemic findings in adult prisons accredited by the ACA.[225] This is because the ACA accreditation process primarily examines whether the facility seeking accreditation has adopted standards as recommended by the ACA, rather than whether the facility is regularly in compliance with such standards.[226] The ACA also receives criticism because there has been "no objective validation" of ACA standards.[227] The question of the ACA's role in prison safety is also dubious because the organization financially benefits from prison growth.[228]

Similarly, the National Commission on Correctional Health Care (NCCHC) provides facility accreditations related to health services and mental health.[229] Like the ACA, the NCCHC sets its own standards, offers a voluntary accreditation program, and correctional facilities do not require accreditation from the NCCHC to operate. Additionally, at least one court has found that healthcare services provided by correctional facilities are unconstitutional despite NCCHC accreditation.[230]

2. Prisoner Grievances

Most states statutorily require that its department of corrections set prisoner grievance procedures for facilities operating within that system.[231] Nevertheless, the prisoner

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facilities, however rates of deaths caused by other inmates was lower in ACA accredited facilities compared to non-accredited facilities.

Ralphs, *supra* note 222, at 74.

[225] For example, several months following "a 'glowing' review in a routine inspection" by the ACA, several "officers were indicted in federal court on charges of [inmate abuse]." *See* Dave Boucher, *Conflict of Interest Questions Arise in TN Prison Audit*, TENNESSEAN (Sept. 21, 2015, 3:23 PM, CT) https://www.tennessean.com/story/news/politics/2015/09/21/conflict-of-interest-questions-arise-in-tn-prison-audit/72570304/ [https://perma.cc/3NM9-BX6E].

[226] *Standards Information—ACA Standards*, *supra* note 218.

[227] Ralphs, *supra* note 222.

[228] The ACA charges a large fee for its accreditation services, it has obvious financial incentives for providing accreditation to detention facilities. *See* Ralphs, *supra* note 222, at 17.

[229] *When Correctional Health Administrators Need Assistance*, *They Turn to NCCHC*, NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, https://www.ncchc.org/accreditation-facility-services [https://perma.cc/456P-UDPM].

[230] *See* Graves v. Arpaio, 48 F. Supp. 3d 1318, 1338 (D. Ariz. 2014) ("Compliance with NCCHC standards is not equivalent to complying with constitutional standards. Nationally recognized best practices may exceed constitutional standards in some areas and fall short in others.").

[231] However, there is no uniformity amongst states in grievance procedures and a prisoner's grievance rights largely rest on what state and facility the prisoner just so happens to wind up in. PRIYAH KAUL ET AL., MICH. L. PRISON INFO. PROJECT, PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 1 (2015) http://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf [https://perma.cc/8C2X-EH6R].

grievance process is an ineffective way of addressing the problems experienced by prisoners due to the many pitfalls embedded within typical prisoner grievance policies.

First, the complexity of prison grievance policies makes prisoner grievances ineffective at attacking prison problems and the deeply systemic issues that perpetuate mass incarceration. Many policies impose complicated and burdensome procedural requirements that may, in effect, bar prisoners from seeking redress for legitimate grievances.[232] For example, many policies "require that the prisoner submit grievance forms to a specified staff member," while other policies expect prisoners themselves to determine which staff member has authority to address grievances.[233] The various grievance procedures set by correctional facilities can be especially challenging for prisoners that have educational or mental health deficits.

Second, the potential of retaliation by prison personnel following a prisoner grievance makes prisoners unlikely to report many problems they experience in prisons. For most jurisdictions, including the Federal Bureau of Prisons, "grievance procedures begin with a requirement that the prisoner seek 'informal resolution.'"[234] Informal resolution "require[s] prisoners to attempt to resolve the grievance by requesting a conversation with staff."[235] Informal resolution requirements in the grievance process raise retaliation concerns, however, because if a prisoner's grievance is staff-related, and the staff member becomes aware of allegations against them, they may retaliate toward the prisoner with the grievance.[236] Especially if the prisoner does not receive a legal remedy, this

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[232] For example, the first task of the prisoner is to figure out whether the grievance is redressable under the prison's grievance policy or not. *Id.* at 5. Several jurisdictions do not define what is and what is not grievable, and "where jurisdictions *do* offer definitions of grievable and non-grievable matters, those definitions vary greatly." *Id.* (emphasis in original). Additionally, "[t]he vast majority of states require prisoners to fill out specified forms in order to successfully claim their grievances." *Id.* at 12. While some "prisons have all forms readily available for prisoners in areas like the library or cafeteria . . . other prisons require that the prisoner request each form they might need from various staff members." *Id.* Moreover,

> [g]rievance policies may [even] require prisoners to use a particular type of paper or include specific information in the complaint. . . . West Virginia requires that the "inmate may only attach one 8.5 x 11 inch page with writing on a single side. Only one staple may be used to affix the pages together. The inmate may not tear, fold, or affix tape to the forms, except that the forms may be folded and placed into a number 10 envelope."

Id. at 13.

[233] *Id.* at 12.

[234] *Id.* at 11.

[235] *Id.*

[236] *Id.*

raises concerns given that such prison staff members work in the aggrieved prisoner's living environment and is at least in part responsible for the prisoner's care.

Third, complicated prison grievance policies often interfere with prisoner ability to redress prison conditions and prisoner rights violations in federal courts should the grievance process fail. In 2006, the U.S. Supreme Court determined that the Prison Litigation Reform Act (PLRA) requires that prisoners properly exhaust all available administrative remedies before access to federal courts, including the prisoner grievance process set by the prison facility in which the incarcerated person is housed.[237] Furthermore, the Court in *Woodford v. Ngo* interpreted the PLRA's exhaustion provision to completely bar lawsuits if prisoners fail to comply with any procedural elements of a facility grievance policy.[238] Under *Woodford*, even minor procedural good faith errors might render a prisoner's harm unredressable administratively and/or with courts.

Finally, the covert nature of the prisoner grievance process makes it difficult to identify systemic problems or collectively address the problems that prisoners experience at other facilities within a system. Although many states maintain statistical information for the number of grievances filed, few share the success rate of these grievances and a number do not share and/or maintain statistical information about prisoner grievances at all.[239]

3. Prisoner Litigation

When a prisoner grievance fails, the next line of recourse a prisoner has in exercising rights or leveraging better prison conditions and treatment is litigation. Prisoner litigation has been largely ineffective in promoting prison population reductions and improving prison conditions, however, because of the lack of adequate legal representation for most prisoners. Additionally, a number of extraordinary procedural requirements and limitations make prisoner litigation generally ineffective at addressing the problems created by mass incarceration.

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[237] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66, 1321–71 (1996) (codified as amended at 42 U.S.C. § 19973 (2012)); *see also* Woodford v. Ngo, 548 U.S. 81, 84–85, 90 (2006).

[238] Woodford, 458 U.S. at 90.

[239] *See* KAUL ET AL., *supra* note 231, at 26–31.

a. Access to Legal Counsel

Incarcerated people have very little access to the legal counsel and resources necessary to address prison problems through litigation. As discussed *supra*, most prisoners come from situations of poverty, and many suffer from educational or mental health deficits.[240] Moreover, the Sixth Amendment right to a public defender does not apply to post-conviction proceedings that might address prison conditions.[241] Hence, court-appointed attorneys for indigent prisoners are generally not available to litigate issues related to prisoner rights and prison conditions.

Although prisoners have a right to access the courts,[242] the Supreme Court has stated that prisoners have no right to access prison law libraries or other legal materials that would assist in criminal appeals, § 1983 claims, or habeas corpus actions.[243] In 1977, the Supreme Court held in *Bounds v. Smith* that states have an obligation to provide adequate law libraries or acceptable alternative means of acquiring legal knowledge.[244] The Supreme Court severely limited the breadth of this holding, however, when it decided *Lewis v. Casey* almost twenty years later. The Court held that prison administrators have virtually no affirmative duties to ensure prisoners have access to courts and prisoners possess no affirmative rights to materials that would aid in the preparation of legal pleadings.[245] As a result, prisoner meaningful access to legal materials and assistance in prisons has severely diminished in the years since *Lewis*.[246]

Finally, the "jailhouse lawyer" usually does not exist and may be lawfully suppressed from assisting other inmates if the state provides some reasonable alternative to assist inmates legally.[247] Additionally, the Supreme Court decided in *Shaw v.*

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[240] Not only do prison demographics reflect a population that face mental health challenges, but "a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." Johnson v. Avery, 393 U.S. 483, 487 (1969).

[241] Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976); Wolff v. McDonnell, 418 U.S. 539, 569–70 (1974).

[242] *See* Younger v. Gilmore, 404 U.S. 15, 15 (1971) (per curiam); *Johnson*, 393 U.S. at 485; *Ex parte* Hull, 312 U.S. 546, 549 (1941).

[243] Lewis v. Casey, 518 U.S. 343, 350–51 (1996).

[244] Bounds v. Smith, 430 U.S. 817, 817–18 (1977).

[245] *Lewis*, 518 U.S. at 350. According to the *Lewis* majority, the State has only negative duties such as "prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents . . . and . . . requiring state courts to waive filing fees . . . or transcript fees . . . for indigent inmates" and had virtually no affirmative duties to ensure prisoners have access to courts. *Id.* (citations omitted).

[246] DAVIS, *supra* note 34, at 57–59 (discussing the disestablishment of educational programs in prisons).

[247] While *Johnson v. Avery* recognized the right of inmates to associate in the preparation of legal actions and that without the assistance of jailhouse lawyers, many

Murphy that prisoners have no right to contact other prisoners for the purpose of legal services.[248]

b. Procedural Hurdles to Litigation

Following the prisoner rights movement of the 1960s, and the resulting explosion of prisoner litigation in federal court, the Supreme Court and Congress established a number of additional mandates that severely limit prisoner-plaintiff access to federal court.[249] For example, in 1995, the Supreme Court decided *Sandin v. Conner*, requiring that prisoners asserting due process violations illustrate that the prisoner has suffered an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[250] As the dissent in *Sandin* predicted, lower federal courts have had significant difficulty deciding when prisoners have suffered an "atypical and significant hardship," and prisoners have had difficulty meeting this confusing burden.[251]

A year later, the Supreme Court made litigation even more difficult for prisoner-plaintiffs by creating additional pleading requirements specific only to prisoners. In *Lewis v. Casey*, the Court examined the right of prisoner access to courts and decided the constitutional right of access to courts does not create an affirmative right of prisoner access to adequate prison law libraries.[252] Under *Lewis*, before a prisoner may claim denial of a right of access to court, prisoners must illustrate that the claim the prisoner would have brought—had the prisoner been afforded

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prisoners would never be able to bring effective claims, there is no recognized constitutional right for the jailhouse lawyer to provide legal services if the prison provide other alternatives. *Johnson*, 393 U.S. at 490. Literature supports that prison lawyer assistance is generally effective. *See* John F. Meyers, Comment, *The Writ-Writers: Jailhouse Lawyers Right of Meaningful Access to the Courts*, 18 AKRON L. REV. 649, 650 (1985) ("Jailhouse lawyers do not have the travel difficulties that outside counsel may have; they are compatible with the prison population and the types of problems that exist in the prison; they are inexpensive; they are able to screen the frivolous claims even more quickly than attorneys.").

[248] Shaw v. Murphy, 532 U.S. 223, 225, 231 (2001).

[249] *See generally* Susan N. Herman, *Slashing and Burning Prisoner's Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998) (describing in detail the "counter-revolution" that disadvantages prisoner-plaintiffs).

[250] Sandin v. Conner, 515 U.S. 472, 484 (1995).

[251] *Id.* at 490 n.2. This is because the "ordinary incidents" of prison life vary greatly by prison facility and jurisdiction and the Supreme Court has not given guidance as to what constitutes "the ordinary incidents of prison life." *Id.*; *see also* Wilkinson v. Austin, 545 U.S. 209, 223 (2005) ("In *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. . . . This divergence indicates the difficulty of locating the appropriate baseline . . . .").

[252] *See* Lewis v. Casey, 518 U.S. 343, 350–51 (1996).

opportunity to research the claim or were provided other appropriate legal assistance—would have been nonfrivolous.[253]

Finally, the Prison Litigation Reform Act (PLRA), enacted by Congress in 1996 presents a number of obstacles to prisoner-plaintiffs.[254] Because the PLRA was passed in response to the influx of prisoner litigation in federal courts, it contains several provisions specifically designed to limit the number of prisoner lawsuits.[255] Under the PLRA, if a plaintiff fails to meet any one of the many procedural requirements, they also lose the right to relief in federal court.

Most significantly, the PLRA's exhaustion requirement has proven to be one of the more difficult obstacles for prisoners to overcome.[256] Additionally, the PLRA: (1) severely limits the type of relief prisoner plaintiffs may be awarded; (2) imposes a provision barring court access after three unsuccessful *forma pauperis* actions; (3) limits attorney fees that may be recouped by prisoners; (4) outlines provisions instructing loss of good time if the court finds that the prisoner's claim was malicious or harassing; and (5) requires that prisoners suffer a physical injury before relief may be requested, discouraging claims for prisoners who have only suffered mental or emotional harms.[257]

The provisions of the PLRA have also been held to apply to juvenile cases.[258] Given the fact that many prisoners suffer from

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[253] *See id.* at 352–53. Critics of *Lewis* have compared the ruling to the "civil death" prisoners experienced upon incarceration in the nineteenth and early twentieth century. *See* Herman, *supra* note 249, at 1232.

[254] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended at 42 U.S.C. § 1997e (2012)).

[255] *See*, *e.g.*, 18 U.S.C. § 3626(a)(1)(A) (2012); *see also* Porter v. Nussle, 534 U.S. 516, 524–25 (2002) (stating, "[b]eyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits"); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1634 (2003) ("The most dramatic effect of the PLRA on individual inmate cases has been the decrease in district court filings coded by the Administrative Office as inmate civil rights cases."); Kathleen J. McCabe, Comment, Woodford v. Ngo*: Creating A Barrier to Justice Using the PLRA Exhaustion Provision*, 17 TEMP. POL. & CIV. RTS. L. REV. 277, 302 (2007) ("Legislative history indicates that one of the goals of the PLRA was to reduce the quantity of prisoner suits brought in federal court." (footnote omitted)).

[256] *See* McCabe, *supra* note 255 at 302.

[257] The PLRA states:

> The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended at 18 U.S.C. § 3626(a)(1)(A) (2012).

[258] Lewis *ex rel.* Lewis v. Gagne, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) (holding that PLRA applies to minors who are adjudicated delinquent and civilly detained).

mental health conditions, have limited education, and limited access to legal services,[259] the requirements of *Sandin*, *Lewis*, and the PLRA are particularly daunting.[260] The PLRA's limitations suggest the proposed right of prisoner-to-public communication might be the only potential for recourse for many prisoners.

4. Federal Court Oversight

Given the numerous prisoner litigation obstacles and the federal court tradition of judicial restraint in prison administration, the threat of federal oversight of prisons has been ineffective in promoting reduction of prison populations and improving conditions. Even after numerous years and threats of federal takeover, instances of federal courts and agencies taking control of a states' entire deteriorating prison systems are rare.[261] Federal court intervention typically begins with prisoner lawsuits claiming a pattern of problems or constitutional violations in a facility. Thus, the federal government does not unilaterally decide what prisons need attention, and prisoners must typically first satisfy the numerous obstacles of litigating in federal court as described, *supra*.[262] In the rare instance that such prisoner lawsuits are successful, the lawsuit may well result in a consent decree or memorandum of agreement where the state agrees to turn over authority of some or all of its corrections system to the Department of Justice or a federal judge.

States are typically highly resistant to the federal takeover route because federal intervention is costly[263] and

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[259] *See* s*upra* Section IV.C.3.

[260] As a side note, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has also presented serious obstacles for people in state prisons seeking federal writ of habeas corpus relief from a federal court, including a one-year statute of limitations on habeas claims. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat 1214; John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 291–92 (2006).

[261] Take Oklahoma's prison problems for example, where all three of its female prisons operate well over maximum population levels, at 129 percent design capacity. The Oklahoma prison system has been entangled in budget deficits and deteriorating conditions for a number of years, but federal takeover has not advanced. *See* Ben Botkin, *Weighing the Odds of a Federal Takeover of State Prisons*, OKLA. WATCH, http://oklahomawatch.org/2017/12/17/weighing-the-odds-of-a-federal-takeover-of-state-prisons [https://perma.cc/X5HU-3]; *see also* Cindy Chang & Joel Ruben, *After Years of Scandal, L.A. Jails Get Federal Oversight, Sweeping Reforms*, L.A. TIMES (Aug. 5, 2015, 7:10 PM) http://www.latimes.com/local/lanow/la-me-ln-federal-jail-oversight-20150804-story.html [https://perma.cc/26AN-XPF5].

[262] *See* discussion *supra*, notes 236–260.

[263] *See* William A. Taggart, *Redefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections*, 23 LAW & SOC'Y REV. 241, 248 (1989) ("Judicial influence on state spending is neither direct or

threatens to cripple states from making their own prison policy decisions.[264] In light of budget deficits often leading to the conditions warranting takeover, corrections departments often turn to the for-profit industry for relief in running their prison systems, an industry which faces its own problems, hurdles, and obstacles to regulation.[265]

5. The United States Department of Justice & Civil Rights of Institutionalized Persons Act

The United States Department of Justice's authority under Civil Rights of Institutionalized Persons Act (CRIPA) has also not been effective in addressing mass incarceration and the resulting conditions. CRIPA was passed in 1980 to protect the rights of prisoners and individuals at other state residential institutions.[266] CRIPA authorizes the Department of Justice (DOJ), at the attorney general's request, to investigate conditions at correctional facilities run by state or local governments to determine whether violations of the Constitution or federal law exist.[267] Under CRIPA, the DOJ may file a lawsuit against the state if a DOJ investigation reveals that the facility has demonstrated a "pattern or practice" of denying civil rights and the conditions are so "egregious or flagrant," prisoners have been subjected to "grievous harm."[268]

The DOJ's resources and capacity to handle the influx of complaints and inquiries it receives about the thousands of prisons, jails, and other facilities to which CRIPA applies is one of the biggest limitations of the DOJ addressing reform. In 2016, for example, the DOJ received over seven thousand CRIPA-related citizen complaint letters, emails, and inquiries from the

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overt; attention is focused on what must be done to improve prison conditions should a state desire to keep the doors of its facilities open.").

[264] David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454 (2010).

[265] *See id.* at 1461–62. ("Approximately eight percent of all U.S. prisoners, and fifteen percent of federal prisoners, are housed in privately operated correctional institutions, making these facilities a significant and growing part of the correctional landscape. Private facilities present a special oversight problem. While the profit motive may increase the temptation to cut corners on staffing, medical care, and other essential services, private prisons are subject to even less scrutiny than their public counterparts. As private corporations, they are typically not subject to open meeting and freedom of information laws that apply to state and local departments of corrections." (footnotes omitted)).

[266] Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. § 1997 (2012)) (stating that CRIPA applies to juvenile justice facilities, adult jails and prisons, nursing facilities, and facilities for individuals with psychiatric or intellectual and developmental disabilities).

[267] *Id.* at § 3, 94 Stat. 350 (codified as amended at 42 U.S.C. § 1997a (2012)).

[268] *Id.*

White House and Congress;[269] only four of the nation's 1,821 prison facilities were under monitoring by the DOJ.[270] Additionally, only two investigations were opened against prisons in the DOJ under CRIPA: one a statewide investigation of the Georgia Department of Corrections and the other an investigation of the Fishkill Correctional Facility in New York.[271] The DOJ issued no findings letters in reference to any of these prison facilities.[272]

The way prison problems come to the attention of the DOJ also renders CRIPA ineffective at addressing the many problems caused by mass incarceration. Because of the voluminous number of complaints received by the DOJ,[273] CRIPA investigations are often responsive to conditions that are widely publicized through the media.[274] A systematic representation of harm must be present before the Department of Justice will take action.[275] Prisons that have the most egregious conditions can slide under the radar, simply because of a tighter lid on violations by the facility. As described *supra*, a number of limitations on prisoner free speech impair the ability of prisoners to communicate with members of the public, media, and, therefore, the DOJ for purposes of seeking prison condition improvements.[276]

Additionally, local facilities can push back on CRIPA investigation requests and sometimes do.[277] State facilities

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[269] *See* U.S. DEP'T OF JUST., ACTIVITIES UNDER THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSON ACT FISCAL YEAR 2016, 10 (2016), https://www.justice.gov/crt/page/file/1019881/download [https://perma.cc/LT43-UPEY].

[270] *Id.* at 7.

[271] *Id.* at 8.

[272] *See id.* at 8. A findings letter generally sets out all problematic conditions, practices, and policies of a facility following initial and subsequent investigations by the Department of Justice. *See id.* at 2, 8.

[273] *See Rights of Persons Confined to Jails and Prisons*, DEP'T OF JUST. (Aug. 8, 2015), https://www.justice.gov/crt/rights-persons-confined-jails-and-prisons [https://perma.cc/E2PQ-CPB3] ("We receive hundreds of reports of potential violations each week. We collect this information and it informs our case selection. We may sometimes use it as evidence in an existing case. However, we cannot bring a case based on every report we receive.").

[274] Alex Hecht, *Civil Rights of Institutionalized People*, 36 MD. B.J., no. 1, Jan./Feb. 2003, at 33, 34 ("CRIPA actions often involve a state-run mental hospital or facility that has been maligned or widely publicized in the media. ACRIPA investigation may also coincide with a widely publicized death of a resident, say, by medication overdose. Affected patients and residents may also alert DOJ to unhealthy and hazardous conditions.").

[275] According to the Department of Justice website, "[e]vidence of harm to one individual only—even if that harm is serious—is not enough" and only if the Department finds systemic problems will it "send the state or local government a letter that describes the problems and what says what steps they must take to fix them." *See* DEP'T OF JUST., *supra* note 273.

[276] *See supra* Section III.B.

[277] *See* Fred Cohen, *Overreaching & Underachieving: The Justice Department & Juvenile Facilities*, 46 No. 2 CRIM. L. BULL. ART 2, 1, 2–9 (2010). Cohen questions whether

typically set at least some of the terms and parameters of investigations. Those terms and parameters can serve to deflect DOJ monitors from fundamental problems at a facility. Finally, the effectiveness of the DOJ in using CRIPA authority toward facility reforms is strongly tied to the prosecutorial objectives of the Department, which can vary significantly from one administration to the next.

The covert nature of prison regulation and vast obstacles to prisoner grievances and litigation warrant consideration of the proposed prisoner-to-public communication right.

CONCLUSION

It is perplexing why any group of American citizens would need to engage in a hunger strike on U.S. soil in order to be heard.[278] As we evaluate our own personage and criminal justice philosophy in seeking reforms that would create significant and sustainable reductions in prison populations, the unfettered prisoner narrative is essential. Providing prison accountability and transparency through unfettered access to the prisoner narrative would encourage prison policies and practices focused more appropriately on prisoner rehabilitation and public safety. In light of the well-documented problems with the criminal justice system for politically powerless groups and knowing what we now know about prison regulation, recognizing an unqualified and unfettered right of public-to-prisoner communication is a necessary step toward transformative criminal justice reform.

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the DOJ has a right of access under CRIPA. *Id.* at 2. In discussing the weaknesses of the DOJ's approach to reform in youth facility investigations and findings, Cohen states:

> There is no measure aimed at the requisite quantity or minimal quality of mental health care providers; nothing on mental health units, admission and discharge criteria; nothing on treatment teams and the inclusion of security-oriented staff, training—and much more is missing. Thus, we have the Justice Department doing too much yet failing to do enough; the dilemma of a misguided reformer.

Id. at 9.

[278] *See* discussion *supra*, Introduction.