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## Associations in Prison

Grace Li

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# Associations in Prison

Grace Li\*

*Incarcerated people create, lead, and participate in a variety of associations in prison. These associations educate and advocate for members, serve the broader prison population, cultivate social bonds, and promote the individual growth that happens in relationship with others. The associations do so in the face of byzantine regulations that burden their formation, membership, and operations. These rules go unchecked because the constitutional right of association is under protected in prisons. The deferential *Turner v. Safley* test for rights violations in prison prizes ease of prison administration over rights protection. Thus, though the right of association is a fundamental constitutional right, in prison it does not enjoy the level of protection of a fundamental right.*

*This Article builds a conceptual framework of associations in prison. It provides a typology of the organizations that exist in prisons today. Most of these operate as they would on the outside, as part of civil society, which fills gaps in government provision. The Article also explores the kinds of effects the associations have on members, which are democracy-enhancing in nature as well as communitarian and liberal. The Article then maps the types of limitations imposed on the groups by regulations and rules. By examining the unique challenges produced by and faced by these associations, the Article shows that broader associational jurisprudence can better protect fundamental aspects of associations by grappling with issues that arise in the unique context of incarceration.*

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#### INTRODUCTION

“Do your own time” is a mantra embedded in the public imagination about the experience of incarceration. The Supreme Court has expressed a similar view. In *Overton v. Bazzyetta*, a case limiting family visits to prisons, the Court wrote, “[A]s our cases have established, freedom of association is among the rights *least*

compatible with incarceration.”<sup>1</sup> For this proposition, it cited the 1977 case *Jones v. North Carolina Prisoners’ Labor Union*, in which the Court asserted:

Perhaps the *most obvious* of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls . . . .  
*Equally as obvious*, the inmate’s “status as a prisoner” and the operational realities of a prison dictate restrictions on the associational rights among inmates.<sup>2</sup>

In one sense, the quotation from the *Jones* Court accurately portrays the limitations on associative life in prison: the operations of prisons restrict association among incarcerated people. The regulations and rules governing the operation of prisons control almost all aspects of daily life, including associative life. Assigned housing is a source of involuntary association; as is the very fact of incarceration. Rules that dictate the placement of incarcerated people within the physical spaces of prisons, such as counts, movements, or lock-ins, limit when voluntary association can happen.

But the account in the quotation by the *Jones* Court is not exactly complete. People in prison do, of course, associate. Within times that allow for voluntary association, prisons are full of associative life, including relationships and friendships. In addition to those informal ways of relating to others, people in prison are regularly forming, joining, and participating in associations. These groups, clubs, or organizations do advocacy work, teach lessons, provide access to study materials, offer mutual aid, celebrate culture and racial affinities, and release news.<sup>3</sup> Some of the associations are umbrella organizations that host smaller groups and provide programming for members and the wider prison population. Some of them, such as religious groups, are long lasting and institutionally recognized, while others, such as gangs, operate underground.

Like associations on the outside, associations within prisons serve varied purposes. Associations meet needs that are not met by the state. Associations amplify individual voices and leverage the power of collective action in pursuing political or economic goals. They allow people to pursue ends that require or benefit from group activity, such as playing music together. They allow for dialogue, deliberation, negotiations, cooperation, and the kinds of learning, thinking, expression, and growth that happens only in relationship with others.<sup>4</sup> They give people the benefits of relational interaction, such as solidarity, companionship, and examples of other ways of being. They allow people to choose their associates and, in so choosing, to enact their worldviews.

For these reasons and more, the freedom of association is integral to the life of individuals and society. As such, the Supreme Court has recognized the freedom of association as a non-textual constitutional right.<sup>5</sup> Though association is ostensibly

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1. 539 U.S. 126, 131 (2003) (emphasis added).

2. 433 U.S. 119, 125–26 (1977) (emphasis added).

3. See *infra* Part II.

4. See Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3, 4 (Amy Gutmann ed., 1998).

5. NAACP v. Alabama, 357 U.S. 449, 462 (1958) (unanimous).

valued so much that the Supreme Court has extended to it the protection of a fundamental right, such protection does not apply for people who are incarcerated.<sup>6</sup> When a plaintiff alleging constitutional violations is incarcerated, the standard established by *Turner v. Safley*, requiring deference to prison officials, replaces the usual strict scrutiny standard.<sup>7</sup> Thus, for incarcerated people, the right to associate is commonly sacrificed in deference to prison officials' aims.

Though their legal protection is limited, associations do exist within prisons, and they do essential work. But, this Article argues, without stringent legal protection, associations in prison are overregulated. The associations' ability to operate is constrained by regulations and policies meant to control the power that people can amass through working together. Moreover, in some cases, for some of the very reasons that association is protected on the outside, association is disrupted in prisons. This Article explores the regulations and rules that govern the operation of the prisons and control those groups.

When incarcerated plaintiffs challenge rules and regulations, under *Turner*, courts defer to prison officials, who defend the policies in the name of security. This Article argues that these security concerns are overestimated. Because religious associations are subject to strict scrutiny protection,<sup>8</sup> they show that other associations can enjoy the same level of protection without undue security risk.

Return to the quotation by the *Jones* court. Beyond describing how association is limited in prison, the *Jones* Court's statement implies that there is something intrinsically incompatible between prisons and association.<sup>9</sup> This Article argues that, indeed, a full associative life cannot be realized within the current total institutions of American prisons. At the same time, humans need to associate with one another, and prisons exacerbate a need for associations and their effects. In an immediate, practical sense, associations should be allowed to operate under less restriction in prisons. More broadly, this Article argues that when prison operations conflict with a vital human need and constitutional right, maintaining the state of operations should not override protecting that human need and constitutional right.

The Article proceeds in four main parts. Part I contains an overview of theory about association and a summary of associational jurisprudence. This background provides context about why association is valuable and, indeed, elevated to the status of a fundamental right and what effects association can have. Part II explores the world of associations in prison. It begins by offering a typology of associations in prison. It then discusses both the effects of such groups and the challenges they create. Next, it examines the regulations and rules that govern associations. Part III examines *Jones*, the Supreme Court case that has explicitly addressed associations in prison, and the impacts of that case. *Jones* surfaces some of the anxieties, including

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6. See generally *Turner v. Safley*, 482 U.S. 78 (1987) (establishing a deferential standard for incarcerated litigants).

7. *Id.* at 81.

8. 42 U.S.C. § 2000cc-1.

9. *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 125–26 (“Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls.”).

race-based fears, undergirding government desires to control and limit associations in prisons. It also considers *Turner*, the case that codified the doctrinal test that governs challenges to violations of the constitutional rights for people in prison, including associational rights. Part IV argues that, as the important work of associations in prison shows, *Turner* deference ought to be abandoned so that the association doctrine can develop to grapple with the specific challenges of associations in prisons and other special contexts. In the meantime, progressive prison administrators who seek to promote associational life in prisons may serve some ameliorative purpose.

The Article makes several contributions. First, it focuses on associations themselves rather than associations as vessels for political organizing. This focus allows the Article to examine the effects of the associations beyond the usually highlighted democracy-promoting effects.

Second, and relatedly, the Article provides a typology of the associations in prisons and of the regulations and rules. There is little scholarly work on these organizations, and even less that examines the various types together. The Article does novel descriptive work of the groups. It provides a conceptual framework for understanding their functions as well as the functions of the regulations and rules that govern them.

Third, the examination of associations in prison teaches a larger lesson about the freedom of association. The kinds of legal protections afforded to the freedom of association that have developed respond to pressures that exist in contexts outside of prisons. In outside settings, associations form and operate without externally imposed burdens and without intersecting with the law at most stages of an association's life. Prisons are some of the few places where the freedom of association is controlled at almost every stage—and therefore where legal issues can arise at any of those stages. Therefore, challenges coming from the prison context may address aspects of associations taken for granted outside of prisons. In contrast to the *Turner* approach, which elides nuance and avoids engaging with the associational problems that arise in prison, a jurisprudence that includes cases addressing associational issues in prison would develop to more stringently protect associations generally.

Fourth, the Article suggests the importance of progressive prison administrators who would allow more association in prisons. Allowing more associational life may empower individuals in prison and lead to more momentum for the efforts of incarcerated activists. Moreover, incarcerated individuals would enjoy the intrinsic benefits of association.

Finally, the disruption of association is a defining characteristic of incarceration, but it does not have to be. This Article argues that, to allow for all the good that comes from associative life, prisons can and should disrupt association much less than currently occurs. The Article also implicates larger questions about how a system of state response to crime could operate if it did not prevent or break associative bonds: if incarceration ultimately cannot allow for the kind of associative life crucial to human flourishing, other methods of state response to crime might be more effective for crime control and more morally justifiable.

## I. FREEDOM OF ASSOCIATION

Associations are ubiquitous in the United States. Between the individual and the state, there are countless associations of varying levels of formality and longevity. There are birding groups; volunteer groups; fraternal organizations; groups for enjoying, learning, composing, practicing and performing music and the arts; language practice groups; chess clubs; sports and hunting clubs; poetry workshops; cooking clubs; and reading groups for Kapital, Ferrante, and hooks. There are also the families and religious institutions one is born into,<sup>10</sup> and there are universities, museums, corporations, neighborhood associations, labor unions, political parties, and international charitable organizations one joins. In *On Liberty*, John Stuart Mill identifies the “liberty . . . of combination” as an essential liberty along with liberty of thought and discussion and of tastes and pursuits.<sup>11</sup> Forming groups outside of family is a “human universal,” something people of different cultures independently come to.<sup>12</sup>

Beyond illustration by example, definitions are in order. To summarize, association, or associating, refers to various types of combination or joining together for some special purpose. Sociologist Mark Warren defines association as “those kinds of attachments we choose for specific purposes—to further a cause, form a family, play a sport, work through a problem of identity or meaning, get ahead in a career, or resolve a neighborhood problem.”<sup>13</sup>

Association is also defined by what it is not. Association is not the First Amendment right of assembly. Assembly refers to ad hoc gatherings, such as a street protest, while associations tend to be more permanent groups.<sup>14</sup> The act of associating can include many types of connections, linkages, and relationships, one of which is the association, meaning group or organization. Economist G. D. H. Cole defines associations as groups “pursuing a common purpose . . . by a course of cooperative action” with agreed upon rules and methods of common action.<sup>15</sup> He distinguishes associations from communities, which exist to further “the good life” of all members, and not merely for the furtherance of a specific, directed limited purpose.<sup>16</sup>

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10. See Michael Walzer, *On Involuntary Association*, in FREEDOM OF ASSOCIATION 64, 65 (Amy Gutmann ed., 1998).

11. JOHN STUART MILL, ON LIBERTY 12 (Elizabeth Rapaport ed., Hackett Publishing Company 1978) (1859).

12. See STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 436 (2002) (citing D.E. BROWN, HUMAN UNIVERSALS (1991)).

13. MARK E. WARREN, DEMOCRACY AND ASSOCIATION 39 (2001).

14. John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 491 (2010) (citing Charles E. Wyzanski, Jr., *The Open Window and the Open Door: An Inquiry into Freedom of Association*, 35 CALIF. L. REV. 336, 337 (1947)).

15. G. D. H. COLE, SOCIAL THEORY 37 (1920). Associations can also be differentiated from the state, which uses a monopoly over violence to achieve its ends. See WARREN, *supra* note 13, at 47. Donald Clemmer writes about the concept of the “prison primary group” as a “collectivity of prisoners who possess a common body of knowledge and interest sufficient to produce an understanding and solidarity which is characterized by a we-feeling, sentimental attachment, and unanimity, and which allows, at the same time, elements of competition and resistance among members only to the extent that cohesion is not disrupted.” DONALD CLEMMER, THE PRISON COMMUNITY 115 (1940). He writes that this primary group is more influential on behavior in prison than rules or regulations. *Id.*

16. COLE, *supra* note 15, at 37.

Associations, then, encompass a vast and diverse category of social organization. Scholars divide associations into three categories: primary associations, which include families and friendships; secondary (or intermediate) associations, which refer to such groups as civic groups, sports clubs, and religious associations; and tertiary associations, which refer to the memberships-based interest groups and professional organizations that predominately communicate with members via mailing lists.<sup>17</sup> This Article focuses on secondary associations.

Varying normative purposes and effects are attributed to these secondary associations. Generally, there are three perspectives on the roles that they play: democratic, communitarian, and liberal.<sup>18</sup>

The democracy-building school of thought focuses on the instrumental role of associations in bringing about democratic effects, such as “trust, respect, reciprocity, tolerance, responsibility, cooperation, public deliberation, and participation.”<sup>19</sup> It casts associations as springboards of civic virtue.<sup>20</sup> The democratic approach stems from Alexis de Toqueville’s *Democracy in America*.<sup>21</sup> De Toqueville argued that a liberal-democratic constitutional government needs associations to mediate between individuals and the state,<sup>22</sup> that associations allow for group representation of social interests outside of political parties, and that associations develop the habits, culture, and skills necessary for collective action.<sup>23</sup> Associations perform useful democracy-enhancing functions: informing and educating citizens, equalizing bargaining power, and providing alternative forms of governance.<sup>24</sup>

Communitarian perspectives emphasize that association supports social integration.<sup>25</sup> Association is valued because it can help individuals achieve intimacy, solidarity, mutual support, and group identity. Researchers have documented the effects of association on members, including providing friendship, solidarity, and support and supplying a venue for individuals to develop social identity and prestige and to find and practice their values.<sup>26</sup>

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17. See, e.g., WARREN, *supra* note 13, at 39. Nancy Rosenblum cautions that terms of “secondary” associations obscure important differences among groups in a vast category. NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 6 (1998).

18. WARREN, *supra* note 13, at 17.

19. Yael Tamir, *Revisiting the Civic Sphere*, in FREEDOM OF ASSOCIATION 214, 215 (Amy Gutmann ed., 1998).

20. See generally ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1984); MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT 96 (1998).

21. See generally ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

22. See *id.* at 9.

23. WARREN, *supra* note 13, at 29–30.

24. Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC’Y 393, 424–25 (1992); WARREN, *supra* note 13, at 61.

25. WARREN, *supra* note 13, at 21.

26. Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 695 (2002) (first citing DAVID HORTON SMITH, GRASSROOTS ASSOCIATIONS 195–212 (2000) and ROBERT WUTHNOW, SHARING THE JOURNEY: SUPPORT GROUPS AND AMERICA’S NEW QUEST FOR COMMUNITY 183, 344–45 (1994); then citing James Kerri, *Anthropological Studies of Voluntary Associations and Voluntary*



Liberal perspectives emphasize the importance of the freedom of the individual to choose their attachments.<sup>27</sup> Key to having a self, political theorist George Kateb writes, is the ability to have the relationships of one's own choosing.<sup>28</sup> Separate from intimate relationships such as love and friendship, those "more limited, sometimes more casual or episodic or artificial," or "distant or formal or mediated or even abstract relationships" can contribute to self-discovery and self-expression.<sup>29</sup> Those relationships build identity.

Proponents of the liberal approach tend to write against the democracy-enhancing approach. They argue that associational effects are diverse, not all positive, and that many associations fail to foster the beliefs, tendencies, and voice necessary to support democracy or self-governance.<sup>30</sup> Civil society gives rise to all types of associations—sexist, racist, elitist, authoritarian—and these associations may instead foster nondemocratic tendencies. For Nancy Rosenblum, the pluralism of associational life itself ought to be protected even if the moral effects are varied or unpredictable.<sup>31</sup> Rosenblum's argument juxtaposes with that of John Rawls, who viewed associations as producing the social bonds and psychological development necessary for justice.<sup>32</sup> Rawls describes associations as breeding the virtues that make up the "morality of association:" "justice and fairness, fidelity and trust, integrity and impartiality."<sup>33</sup> These virtues, Rawls suggests, go hand in hand with developing "the intellectual skills required to regard things from a variety of points of view and to think of these together as aspects of one system of cooperation."<sup>34</sup> Moreover, associations cultivate the social attachments that motivate people to live up to the moral standards of the association as exemplified by associates.<sup>35</sup> For Rosenblum, it is the processes of joining and leaving associations that contribute to the "democracy of everyday life."<sup>36</sup>

The theories of the effects of association loosely echo the theories of the effects of free speech: ensuring that the truth emerges from the marketplace of

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*Action: A Review*, 3 J. VOLUNTARY ACTION RES. 10, 15–16 (1974); then citing *id.*; and then citing SMITH, *supra*, at 56, 195–212).

27. *See generally*, ROSENBLUM, *supra* note 17, at 36–40.

28. George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 48 (Amy Gutmann ed., 1998).

29. *Id.* at 37, 49.

30. Tamir, *supra* note 19, at 215 (adopting a liberal view that the state should not intervene in the autonomy of the civic sphere so that individuals can exercise their freedoms of association and expression and a communitarian view that this autonomy allows "communal, religious, and cultural lives to be shared and enjoyed").

31. *See* ROSENBLUM, *supra* note 17, at 18.

32. JOHN RAWLS, A THEORY OF JUSTICE 413 (1971); *see also* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS III:1:4–5 (D.D. Raphael & A.L. Macfie eds., Liberty Classics 1982) (1759) ("Bring [a human creature] into society, and he is immediately provided with the mirror which he wanted before. . . . [O]ur first moral criticisms are exercised upon the characters and conduct of other people[.] . . . [b]ut . . . other people are equally frank with regard to our own. We become anxious to know how far we deserve their censure or applause . . . We begin, upon this account, to examine our own passions and conduct . . .").

33. RAWLS, *supra* note 32.

34. *Id.* at 410, 414.

35. *Id.*

36. ROSENBLUM, *supra* note 17, at 16.

ideas, allowing individuals to seek self-fulfillment, and—most importantly—contributing to political debate and enabling democratic self-governance.<sup>37</sup> The democracy-building school of thought is most closely aligned with the way in which the right of association is legally protected. Unsurprisingly, the grounding of the association right as a cognate of free speech contributes to this view. The right to associate has achieved constitutional fundamental right status,<sup>38</sup> and the development of the constitutional right to association is the topic to which this Part now turns.

### A. The Constitutional Right to Associate

#### 1. Early Supreme Court Cases

Allusions to the right of association emerged in Supreme Court dicta before it was officially concretized as a constitutional right in 1958.<sup>39</sup> The right came into the Court's universe of concern amidst national paranoia over the threat of domestic communism.<sup>40</sup> The Supreme Court's first mention of the association right by name occurred in the 1927 case, *Whitney v. California*.<sup>41</sup> *Whitney* arose from the conviction of Charlotte Anita Whitney, a member of the Communist Labor Party, for criminal syndicalism.<sup>42</sup> While Whitney herself did not engage in speech constituting criminal syndicalism, the organization to which she belonged did.<sup>43</sup> In describing the rights at issue, the majority referred to the “rights of free speech, assembly, and association.”<sup>44</sup>

The right to associate continued to surface in the 1950s Supreme Court decisions concerning communism. These early cases share several characteristics: they tended to refer to the right to associate interchangeably with the right to assemble, and they tended to cast the right of association as a cognate of free speech.<sup>45</sup> They described it as a belief-oriented right, to be protected even as the government regulated conduct that went beyond speech.<sup>46</sup> Notably, the concerns at issue were balancing the right for people to express their beliefs by associating with certain groups—with the need to protect the public from illegal or illicit actions of those groups.

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37. Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 993–94 (2011) (summarizing the theories of free speech and citing their proponents).

38. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958).

39. *Id.* The cases here are merely flashpoints in the development of association jurisprudence. For an in-depth history of the origins of the associational right, see Inazu, *supra* note 14.

40. Inazu, *supra* note 14, at 488.

41. 274 U.S. 357 (1927).

42. *Id.*

43. *Id.*

44. *Id.* at 371. Ashutosh Bhagwat suggests that the Supreme Court's language indicates it treated the rights of free speech, assembly, and association as “distinct but coequal.” Bhagwat, *supra* note 37, at 984.

45. See, e.g., *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 409 (1950); *Wieman v. Updegraff*, 344 U.S. 183, 211 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

46. See, e.g., *Am. Commc'ns Ass'n*, 339 U.S. at 393; *Wieman*, 344 U.S. at 220 (Black, J., concurring); *Sweezy*, 354 U.S. at 245.

In its 1950 decision, *American Communications Association v. Douds*, the Supreme Court upheld the National Labor Relations Act's requirement that union officers submit affidavits disavowing membership in or support of the Communist Party.<sup>47</sup> Throughout the case, the Court referred to the freedom of association interchangeably with the freedom of assembly.<sup>48</sup> Chief Justice Vinson's majority opinion reasoned that, while "the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed," the Act reflected "legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct."<sup>49</sup>

In *Wieman v. Updegraff*, the Supreme Court struck down an Oklahoma statute that required state employees to affirm that they had not been a member, knowingly or not, of any group officially determined to be a "communist front or subversive organization."<sup>50</sup> Justice Frankfurter's concurrence referred to a "right of association peculiarly characteristic of our people," which he weighed against preventive measures to counter "[s]olid threats to our kind of government."<sup>51</sup>

In *Sweezy v. New Hampshire*, the Court emphasized a right to *political* association, writing that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association" and the exercise of "basic freedoms in America has traditionally been through the media of political associations."<sup>52</sup> The Court listed political association as a cognate of freedom of speech and freedom of communication and ideas.<sup>53</sup>

## 2. Establishment of the Non-Textual Right

It was not until 1958 that the Supreme Court explicitly established the non-textual constitutional right of association.<sup>54</sup> In *NAACP v. Alabama*, the Court held that an Alabama law requiring the National Association for the Advancement of Colored People (NAACP) to disclose its membership lists violated the associational rights of its members.<sup>55</sup> Justice John Harlan wrote, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."<sup>56</sup> In support of the idea that association advances advocacy, he cited cases that protect the right to assembly.<sup>57</sup>

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47. 339 U.S. 382 (1950).

48. *Id.* at 409.

49. *Id.* at 399, 409.

50. 344 U.S. 183, 186 (1952).

51. *Id.* at 195 (Frankfurter, J., concurring).

52. 354 U.S. 234, 250 (1957).

53. *Id.* at 245.

54. *See generally* *NAACP v. Alabama*, 357 U.S. 449 (1958).

55. *Id.* at 460.

56. *Id.*

57. *Id.* (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

Justice Harlan refrained, however, from limiting the right to *political* association. He added that “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters”—regardless of whether the association is political, curtailment of the freedom is subject to “the closest scrutiny.”<sup>58</sup>

Thus, the right to associate gained the status of a constitutional right.<sup>59</sup> At the same time, the *NAACP* Court declined to clearly delineate whether the source of the right was the First Amendment or the Fourteenth Amendment, which gave rise to two main competing theories about the source of the right. The incorporation theory is that association is protected by the First Amendment, which is incorporated by the Due Process Clause of the Fourteenth Amendment, making those rights applicable to the states.<sup>60</sup> The liberty theory holds that rights similar to First Amendment rights are independently protected by the Due Process Clause of the Fourteenth Amendment as implicit liberties.<sup>61</sup> Under the liberty theory, association is one of the implied liberties under the Fourteenth Amendment.<sup>62</sup>

The source of the right is important because First Amendment rights and Fourteenth Amendment liberties have garnered differing levels of protection over time. In the mid-twentieth century, the Court was more protective of “preferred” rights rooted in the First Amendment as compared with liberties rooted in the Fourteenth Amendment.<sup>63</sup> According to legal scholar John Inazu, “in a bizarre doctrinal twist,” the right of intimate association, rooted in the liberty interests protected by the Fourteenth Amendment, has since garnered greater constitutional protection than the expressive association rooted in the First Amendment.<sup>64</sup> In prison, the right to marry is explicitly protected but not the right to form political groups.<sup>65</sup>

Moreover, the source of a right implicates that right’s scope. If association is protected as a relative of free speech under the First Amendment, its protection will be limited by free speech jurisprudence, which focuses on protecting expression. In the mid-twentieth century, the association cases were developing in reaction to, and to protect, expressive political affiliations.

The Court may have declined to reveal the source of the right because Justices Douglas, Black, Frankfurter, and Harlan disagreed about its location.<sup>66</sup> Justice

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58. *Id.* at 460–61.

59. *Id.* at 460.

60. *See* Inazu, *supra* note 14, at 503 (explaining the two theories).

61. *Id.*

62. *Id.*

63. *Id.* at 504.

64. *Id.* at 558.

65. *See generally* Turner v. Safley, 482 U.S. 78 (1987) (striking down a regulation restricting marriage for people in prison). *See also infra* Part III.

66. *See generally* Inazu, *supra* note 14, at 502–29. Justices Frankfurter and Harlan argued that the right of association could be derived from the liberty of the Due Process Clause of the Fourteenth Amendment. *Id.* at 487. Chief Justice Warren and Justices Black, Douglas, and Brennan sourced it in the First Amendment. *Id.* Justice Douglas referred to these as a “bundle of rights,” and these rights were applied to the states because the Fourteenth Amendment had incorporated the First Amendment rights. *Id.* at 529. Justices Black and Douglas also suggested the right of association was part of the right of assembly. *Id.* at 487. Burt Neuborne argues that the equity of the statute reading allowed association

Harlan's description of the right in *NAACP v. Alabama* itself is ambiguous: the phrasing of "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech" could be compatible with both theories.<sup>67</sup> The right could be a First Amendment right incorporated under the Fourteenth Amendment. It could also be a Due Process implied liberty related to the freedom of speech and First Amendment rights. Indeed, Inazu suggests that Justice Harlan intentionally made the location of the source of the right ambiguous in the opinion to abate the concerns and win the votes of Justices Douglas, Frankfurter, and Black.<sup>68</sup>

In the cases that followed, the Court continued to locate the right ambiguously<sup>69</sup> or without internal agreement<sup>70</sup> in the First Amendment or in the Fourteenth Amendment. For instance, in *Healy v. James*, which involved the recognition of a Students for Democratic Society at a university, Justice Powell described association as "implicit in the freedoms of speech, assembly, and petition" and explained that the First Amendment was "made binding on the States by the Fourteenth Amendment."<sup>71</sup> However, in *Kusper v. Pontikes*, which involved the right to change political party affiliation between elections, Justice Stewart described the right merely as being "protected by the First and Fourteenth Amendments."<sup>72</sup>

### 3. Current Associational Jurisprudence

The 1984 decision in *Roberts v. United States Jaycees* marked the beginning of the contemporary understanding of the constitutional associational right.<sup>73</sup> In that case, the issue was whether the United States Jaycees, a national membership organization for young men's leadership training and civic engagement, had a right to exclude women from its membership.<sup>74</sup> The case focused on the right *not* to associate with certain people.<sup>75</sup>

Justice Brennan's majority opinion made a new distinction between two types of associational rights.<sup>76</sup> It distinguished between the right to intimate association, referring primarily to familial relationships, derived from the Court's privacy jurisprudence,<sup>77</sup> and a First Amendment right of association "for expressive

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to be read into the First Amendment between press and assembly because the tradition invites a reader to extend text to cover close analogies. Burt Neuborne, *The House Was Quiet and the World Was Calm the Reader Became the Book*, 57 VAND. L. REV. 2007, 2038, 2045 (2004).

67. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

68. Inazu, *supra* note 14, at 514.

69. *See* *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 543–544 (1963).

70. Justice Stewart locates it in the Fourteenth Amendment. *See* *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Justices Black and Douglas locate it in the First Amendment. *Id.* at 527–28 (Black, J., concurring).

71. 408 U.S. 169, 171, 181 (1972).

72. 414 U.S. 51, 56–57 (1973).

73. 468 U.S. 609 (1984).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 617–18. In 1965, the Court recognized the right of privacy in *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), and tied privacy to the liberty of the Fourteenth Amendment.

purposes,”<sup>78</sup> or “for the purpose of engaging in . . . [and] as an indispensable means of preserving” the enumerated First Amendment rights.<sup>79</sup> The case ended the ambiguity of the right’s source. It located intimate association in the Fourteenth Amendment and expressive association in the First.<sup>80</sup>

As for the Jaycees, the Court ruled that, given the state’s compelling interest in eliminating gender discrimination and the fact that requiring admission of women would not interfere with the group’s “freedom of expressive association” or freedom to “disseminate its preferred views,” the rule requiring the Jaycees to accept women did not violate the Constitution.<sup>81</sup>

In the 2000 case *Boy Scouts of America v. Dale*, the Supreme Court continued to apply the reasoning from *Roberts*.<sup>82</sup> The Boy Scouts had revoked the plaintiff’s adult membership and assistant scoutmaster position because he identified as gay and was a gay rights advocate.<sup>83</sup> The right at issue was the right of the Boy Scouts to exclude a gay scoutmaster. The Court reaffirmed the steps of its analysis from *Roberts* and progeny.<sup>84</sup> In determining whether a First Amendment expressive associational right is protected, one must determine first whether the group engages in expression, public or private.<sup>85</sup> The analysis then requires a determination of whether the regulation in question would “affect[] in a significant way the group’s ability to advocate public or private viewpoints.”<sup>86</sup> Applying the analysis, the Court found that forcing the Boy Scouts to include Dale as a member would impair their ability to express a message of hostility to gay people.<sup>87</sup>

Chief Justice Rehnquist specified in *Dale* that associations need not associate for the purpose of disseminating a message to be protected under the First Amendment, but rather, they must “merely engage in expressive activity that could be impaired in order to be entitled to protection.”<sup>88</sup> He also specified that the First Amendment does not require that every member of the group agree on every issue for the policy to be considered expressive association.<sup>89</sup> However, *Dale* did focus on whether the expressive content of the group would be curtailed by the regulation.<sup>90</sup>

Associational jurisprudence is currently bifurcated into expressive association on the one hand and intimate association on the other. It overlooks the importance

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78. *Roberts*, 468 U.S. at 623.

79. *Id.* at 618.

80. *See id.*

81. *Id.* at 610, 618. The cases following *Roberts* applied the same approach: *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) and *New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988) both allowed regulation of the associations’ memberships, relying on the state’s strong interest in controlling discrimination and the fact that the associations did not engage in much expressive activity.

82. 530 U.S. 640 (2000).

83. *Id.*

84. *Id.*

85. *Id.* at 655.

86. *Id.* at 648.

87. *Id.* at 655–56.

88. *Id.* at 655.

89. *Id.*

90. *Id.*

of non-expressive, non-intimate association—important for reasons beyond democracy-enhancing ones—because the types of cases that arise in the free world have to do with associations’ interest in exclusion or with their political messaging. By contrast, in controlled institutions like prisons, fundamental aspects of associations are regulated and therefore can be at issue, such as whether they are allowed to form and which members they can include.<sup>91</sup> Because associations in the free world generally exist without such constraints, the associational jurisprudence has developed without grappling with the issues that plague associations in prison.

## II. ASSOCIATIONS IN PRISON

People in prison gained rights-bearing status in the 1960s, but prisons nonetheless disrupt and force association. People are banished, often far from family and chosen communities,<sup>92</sup> in prisons that employ restrictive visiting policies,<sup>93</sup> contract with extractive phone companies,<sup>94</sup> and upkeep increasingly anachronistic internet-free or closed-universe internet systems.<sup>95</sup> People in prison are prevented from (in most cases) leaving the prison for schooling, most medical

91. See *infra* Part II.

92. See generally Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison*, MARSHALL PROJECT (Dec. 18, 2019), <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison> [<https://perma.cc/4NEB-PN4T>]; Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 197 (Marc Mauer & Meda Chesney-Lind, eds., 2002); Prison Gerrymandering Project, *The Problem*, PRISON POL’Y INITIATIVE <https://www.prisonersofthecensus.org/impact.html> [<https://perma.cc/ZKW4-XCJV>] (last visited Aug. 24, 2023).

93. Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 *YALE L. & POL’Y REV.* 149, 163 (2013) (footnote omitted); *Overton v. Bazette*, 539 U.S. 126, 134 (2003).

94. See, e.g., Maxwell Slackman, *Calling from Prison: Economic Determinants of Inmate Payphone Rates*, 10 *J.L. ECON. & POL’Y* 515, 521 (2014); Alexander H. Pitofsky, *Profit and Stealth in the Prison-Industrial Complex*, *POSTMODERN CULTURE J. INTERDISC. THOUGHT CONTEMP. CULTURES* (Jan. 2002), <http://www.pomoculture.org/2013/09/19/profit-and-stealth-in-the-prison-industrial-complex> [<https://perma.cc/USC5-2XLL>]; WORTH RISES, *THE PRISON INDUSTRY: HOW IT STARTED. HOW IT WORKS. HOW IT HARMS*. 48 (2020), <https://worthrises.org/s/The-Prison-Industry-How-It-Started-How-It-Works-and-How-It-Harms-December-2020.pdf> [<https://perma.cc/J8L6-MCQM>]; Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 *HARV. L. & POL’Y REV.* 205, 209, 212 (2019).

95. E.g., Max Kutner, *With No Google, the Incarcerated Wait for the Mail*, *NEWSWEEK* (Jan. 25, 2015 2:12 PM EST), <https://www.newsweek.com/people-behind-bars-google-answers-arrive-mail-301836> [<https://perma.cc/KZ75-EKCH>]. The Federal Bureau of Prisons, for example, allows email on a closed system akin to collect calls, charging per minute of use. See *TRULINCS Topics*, FED. BUR. PRISONS, <https://www.bop.gov/inmates/trulincs.jsp> [<https://perma.cc/C5KE-7B9L>] (choose “starting correspondence”) (last visited Aug. 24, 2023); *Inmate Admission & Orientation Handbook*, FED. BUR. PRISONS 12 (2023), [https://www.bop.gov/locations/institutions/bry/bry\\_ao\\_handbook.pdf?v=1.0.0](https://www.bop.gov/locations/institutions/bry/bry_ao_handbook.pdf?v=1.0.0) [<https://perma.cc/K7V5-BSQ7>]. Many systems use a version LexisNexis, which offers an offline database for prison libraries. *Inmate Law Library Solutions*, LEXISNEXIS, [https://www.lexisnexis.com/en-us/corrections/default.page?utm\\_source=Google%20Performance%20Max&utm\\_medium=CPC&utm\\_term=mkt+print&utm\\_content=PPC\\_00pct\\_AB\\_corrections&utm\\_campaign=7015G0000004H2cQAE&gclid=Cj0KCQjw\\_5unBhCMARIsACZyzS3CivA0vMEt1Ff0FfiI9H1\\_7ISz5PeB3-ITnI1iTaGCP\\_3gz0HKIaAhQEEALw\\_wcB](https://www.lexisnexis.com/en-us/corrections/default.page?utm_source=Google%20Performance%20Max&utm_medium=CPC&utm_term=mkt+print&utm_content=PPC_00pct_AB_corrections&utm_campaign=7015G0000004H2cQAE&gclid=Cj0KCQjw_5unBhCMARIsACZyzS3CivA0vMEt1Ff0FfiI9H1_7ISz5PeB3-ITnI1iTaGCP_3gz0HKIaAhQEEALw_wcB) [<https://perma.cc/829L-T3SH>] (last visited Aug. 24, 2023).

examinations, and even family deaths.<sup>96</sup> They have no opportunities to hold jobs with living wages and are instead required to work at rates orders of magnitude below minimum wage on the outside.<sup>97</sup> They are surveilled and controlled in their movements.<sup>98</sup> Their movement is limited to the areas where they are housed, outside of which they are escorted and often shackled.<sup>99</sup>

Some of the violence of prison is immediately tangible and related to both forced association and the banishment aspect of incarceration. Physical and sexual violence are routine.<sup>100</sup> People are given substandard, even dangerous, food no

96. See generally Emily Widra & Wanda Bertram, *Compassionate Release Was Never Designed to Release Large Numbers of People*, PRISON POL'Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/> [<https://perma.cc/ZG5H-2PG6>] (describing the difficulty in obtaining compassionate release); Dwayne Hurd, *The Singular Sorrow of Grieving Behind Bars*, MARSHALL PROJECT (Nov. 10, 2017), <https://www.themarshallproject.org/2017/11/10/the-singular-sorrow-of-grieving-behind-bars> [<https://perma.cc/55QC-AE8R>] (describing a man's experience grieving for family while incarcerated).

97. Compare Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/7AG8-C5CN>] (reporting prison wages for each state), *with State Minimum Wages*, NAT'L CONF. STATE LEG., <https://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [<https://perma.cc/6MYD-4FKA>] (last updated Aug. 30, 2022) (reporting state minimum wages for non-prison labor).

98. See Barry Schwartz, *Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 229, 229 (1972); Kentrell Owens, Camille Cobb & Lorrie Faith Cranor, "You Gotta Watch What You Say": *Surveillance of Communication with Incarcerated People*, PROC. 2021 CHI CONF. ON HUM. FACTORS IN COMPUTING SYS. (2021), [https://homes.cs.washington.edu/~kentrell/static/papers/FMIP/Owens\\_CHI\\_2021\\_camera\\_ready.pdf](https://homes.cs.washington.edu/~kentrell/static/papers/FMIP/Owens_CHI_2021_camera_ready.pdf) [<https://perma.cc/6A5C-NR8C>].

99. See generally *24 Hours in Prison*, N.C. DEP'T OF PUB. SAFETY <https://www.doc.state.nc.us/dop/hours24.htm> [<https://perma.cc/2S5D-T33D>] (last visited Aug. 24, 2023) ("Movement from one area of the prison to another is restricted. . . . Correctional officers escort them to the kitchen as a group."). See *Shackling of Pregnant Women in Jails and Prisons Continues*, EQUAL JUST. INITIATIVE (Jan. 29, 2020), <https://eji.org/news/shackling-of-pregnant-women-in-jails-and-prisons-continues/> [<https://perma.cc/5YM4-7DNR>]; Amar D. Bansal & Lawrence A. Haber, *On a Ventilator in Shackles*, 26 J. GEN. INTERNAL MED. 3878 (2021).

100. See generally Amended Complaint, *United States v. Alabama*, No. 22:20-cv-01971-RDP (May 19, 2021); Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL'Y INITIATIVE (June 8, 2021), [https://www.prisonpolicy.org/blog/2021/06/08/prison\\_mortality/#:~:text=The%20number%20of%20homicides%20in,secure%2C%20they%20are%20largely%20unsafe.&text=The%20rate%20of%20homicide%20in,sex%2C%20and%20race%2Fethnicity](https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/#:~:text=The%20number%20of%20homicides%20in,secure%2C%20they%20are%20largely%20unsafe.&text=The%20rate%20of%20homicide%20in,sex%2C%20and%20race%2Fethnicity) [<https://perma.cc/RSP4-83EF>]; Chandra Bozelko, *Why We Let Prison Rape Go On*, N.Y. TIMES (Apr. 17, 2015), <https://www.nytimes.com/2015/04/18/opinion/why-we-let-prison-rape-go-on.html> [<https://perma.cc/5C85-9HV9>]; ALLEN J. BECK, MARCUS BERZOFSKY, RACHEL CASPAR & CHRISTOPHER KREBS, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES*, 2011-12-UPDATE, at 6 (2014), <https://bjs.ojp.gov/library/publications/sexual-victimization-prisons-and-jails-reported-inmates-2011-12-update> [<https://perma.cc/W23A-NA3F>]; COLETTE MARCELLIN & EVELYN F. MCCOY, *PREVENTING AND ADDRESSING SEXUAL VIOLENCE IN CORRECTIONAL FACILITIES* (2021), <https://www.urban.org/sites/default/files/publication/104230/preventing-and-addressing-sexual-violence-in-correctional-facilities.pdf> [<https://perma.cc/E4RS-6KGB>]. The pervasive climate of violence in prisons is devastating even for those who are not directly involved. Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), <https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/> [<https://perma.cc/2ERK-RHL7>]; Meghan A. Novisky & Robert L. Peralta, *Gladiator School: Returning Citizens' Experiences with Secondary Violence Exposure in Prison*, 15 VICTIMS & OFFENDERS 594, 594 (2020).



longer allowed to be sold in the free-world.<sup>101</sup> They are left to the risks of diseases rampant in prison such as HIV, Hepatitis C, tuberculosis, and COVID-19.<sup>102</sup>

Association is controlled just as virtually all aspects of life are controlled in prison. The disruption and control of association is part of the point of prison, and it may be one of the most punishing aspects of incarceration, but it is also a vestige of older ideas about reforming people through solitary contemplation and work. In the nineteenth century, many types of association among incarcerated individuals were prohibited in prisons across the country. The Pennsylvania System held people in solitary confinement for their entire sentence, and in the 1820s, penologists in New York State developed the Auburn System of prison management, in which people in prisons worked and ate together in silence during the day and were alone in their cells at night.<sup>103</sup> Reforms in the early 1900s decreased the use of isolation, physical punishment, and silence.<sup>104</sup>

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101. E.g., Paul Egan, *Prison Food Worker: 'I Was Fired for Refusing to Serve Rotten Potatoes'*, DETROIT FREE PRESS (Aug. 25, 2017), <https://www.freep.com/story/news/local/michigan/2017/08/25/prison-trinity-kinross-fired-rotten-potatoes/596849001/> [<https://perma.cc/38WE-C65H>]; Paul Egan, *Inmates Sick After Maggots Found in Prison Cafeteria*, USA TODAY (July 1, 2014, 9:21 AM ET), <https://www.usatoday.com/story/news/nation-now/2014/07/01/inmates-sick-maggots-prison/11890175/> [<https://perma.cc/Y5W5-45NM>]; Whitney M. Woodworth, *Lawsuit: Inmates at 4 Oregon Prisons Fed 'Not for Human Consumption' Food*, STATESMAN J. (May 10, 2017, 5:43 PM PT), <https://www.statesmanjournal.com/story/news/crime/2017/05/10/prison-food-spoiled-oregon-not-for-humans/101528742/> [<https://perma.cc/N296-RSF7>]; see, e.g., Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1401–02 (2022). See generally LESLIE SOBLE, KATHRYN STROUD & MARIKA WEINSTEIN, *EATING BEHIND BARS: ENDING THE HIDDEN PUNISHMENT OF FOOD IN PRISON 15* (2020), <https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars-Release1.pdf> [<https://perma.cc/SYS3-MT94>]; Joe Fassler & Claire Brown, *Prison Food Is Making U.S. Inmates Disproportionately Sick*, ATLANTIC (Dec. 27, 2017) <https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/> [<https://perma.cc/FQG4-9SCZ>]; Alysia Santo & Lisa Iaboni, *What's in a Prison Meal?*, MARSHALL PROJECT (July 7, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal> [<https://perma.cc/C74N-V8H8>].

102. *HIV and Prisoners*, AVERT, <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/prisoners> [<https://perma.cc/VVN3-9NHZ>] (Mar. 30, 2023); Hossain M. S. Sazzad, Luke McCredie, Carla Treloar, Andrew R. Lloyd & Lise Lafferty, *Violence and Hepatitis C Transmission In Prison—A Modified Social Ecological Model*, PLOS ONE (Dec. 1, 2020), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0243106&type=printable> [<https://perma.cc/B5S9-Z6VL>]; USAID, *TUBERCULOSIS IN PRISONS: A GROWING PUBLIC HEALTH CHALLENGE* (2014), <https://www.usaid.gov/sites/default/files/2022-05/USAID-TB-Brochure.pdf> [<https://perma.cc/8L4X-LZCN>]. The impact of COVID-19 in prisons has been devastating and well-documented, despite poor testing and reporting on the part of prison administrators. See COVID PRISON PROJECT, <https://covidprisonproject.com/> [<https://perma.cc/3LEA-VGJP>] (last visited Aug. 25, 2023); *Covid Behind Bars Data Project*, UCLA LAW (last visited Feb. 13, 2022), <https://uclacovidbehindbars.org/> [<https://perma.cc/DCR9-J3Y7>]; Jenny E. Carroll, *COVID-19 Relief and the Ordinary Inmate*, 18 OHIO ST. J. CRIM. L. 427, 434–39 (2021); Brennan Klein, Brandon Ogbunugafor, Benjamin J. Schafer, Zarana Bhadracha, Preeti Kori, Jim Sheldon, Nitish Kaza, Emily A. Wang, Tina Eliassi-Rad, Samuel V. Scarpino & Elizabeth Hinton, *The COVID-19 Pandemic Amplified Long-Standing Racial Disparities in the United States Criminal Justice System*, MEDRXIV (Jan. 11, 2022), <https://www.medrxiv.org/content/10.1101/2021.12.14.21267199v2.full.pdf> [<https://perma.cc/WH4D-B7MX>].

103. Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & SOC. INQUIRY 1604 (2018); see also Lisa Jorgensen, *Criminal Diversions: Newspapers, Entertainment, Sport, and Physical Culture in New York Prisons, 1899-1920*, at 3 (2016) (unpublished Ph.D. dissertation, Concordia University) (on file with author).

104. Jorgensen, *supra* note 103, at 6, 66.

Limiting association happens too as a result of operational ease.<sup>105</sup> Rather than having officers escort several individuals from one part of the prison to another, then supervise a group meeting, and then escort each of the group members back to their housing areas, it is simpler to leave them in their housing areas or individual cells.

At the same time, prison administrations control associational bonds to prevent people from working in concert with each other out of fear based both on assumptions about the violent nature of people in prison as well as past instances of real violence or takeovers of prisons.<sup>106</sup> But the very types of mass uprising that prison administrators fear happen in response to scarcity and need.<sup>107</sup> So too, do other types of associations arise to address gaps in provisions from the prisons. The harms—mundane and acute—of incarceration are some of the reasons people in prison form associations. Some associations, such as political associations, directly address these issues through advocacy, legal work, or mutual aid. Other associations are indirect acts of resistance. They allow people to learn, organize, and find potential avenues of relief, legal, administrative, or otherwise. Yet others are salves: groups that generate hope, joy, comradery, and solidarity. Many associations do a mix of the above.

Outside of their instrumental value, associations are a form of fundamental resistance to a core attribute of prison: isolation of individuals. Incarcerated individuals are deprived of choice, and this manifests in restrictions of freedom of movement, forming social bonds, and identity-building. The fact that incarcerated people form and participate in associations gives voice to a human need that runs counter to the model of security maintenance that prizes warehousing and individual reform.

Associations in prison have been the subject of emerging scholarly interest for their part in prisoners' rights movements.<sup>108</sup> The development of associations is inextricably tied to in-prison social movements, including the Black liberation, workers' rights, and abolition movements.<sup>109</sup> These collective actions have done critical work to enhance the rights, power, and visibility of people in prison. Many of the uprisings and strikes of the 1960s and 1970s, as well as those of the last decade, originated or benefited from associations in prison, including study groups,

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105. See *infra* Part III.

106. See, e.g., *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 132–33.

107. See, e.g., HEATHER ANN THOMPSON, *BLOOD IN THE WATER* 32 (2016) (listing demands).

108. See generally DAN BERGER & TOUSSAINT LOSIER, *RETHINKING THE AMERICAN PRISON MOVEMENT* (2018) (examining various movements and efforts by prisoners to challenge prison conditions and inequality). Large scale collective actions in prisons and jails began in the 1950s and reached their height in the 1970s. See *id.* at 48, 66, 73 (describing demonstrations, protests, and strikes across the nation with demands such as better food, less use of solitary confinement, and more opportunities for parole and good time). In 1972, there were at least forty-eight prison uprisings across the country. BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON RIOTS, 1971–1986*, at 18 (1991). Demands included protections against physical and sexual abuse, proper health care, higher wages, and due process protections. BERGER & LOSIER, *supra*, at 75. In the late 1960s and early 1970s, the uprisings in prison worked in tandem with movements on the outside, in particular the Black Power and New Left movements. *Id.* at 73.

109. See generally BERGER & LOSIER, *supra* note 108.

mutual aid groups, unions, and political organizations.<sup>110</sup> Moreover, associations in prison have played a critical role in building the capacity, skills, reach, and connections fueling the collective actions. The associations are, in many cases, precursors to the movements.

While political organizing and collective actions are important parts of the story of associations in prison, this Article trains its focus on the associations themselves rather than their political aims or impacts. As the Article will argue, it is not just the instrumental value of their political ends that makes associations so essential, but also the kind of flourishing they cultivate. They have communitarian benefits, such as developing mutual support and group identity. They also have liberty-related effects, such as allowing people to choose the kinds of relationships and groups they want to identify with, spend time with, and take part in shaping. In these ways, they are simply an important part of life.

While there are myriad groups in prison, this Article focuses on those that are created and led by incarcerated people. This excludes the groups that are primarily led by outside-sponsors, such as college programs,<sup>111</sup> and groups primarily run by the prison and its staff, contractors, and subcontractors, such as most drug rehabilitation programming.<sup>112</sup>

Lastly, COVID-19 has ravaged prisons and upended what routines and few freedoms were afforded to incarcerated individuals. Many prisons have been regularly employing lockdowns of housing areas, at least nominally to combat the spread of the disease.<sup>113</sup> The changes made in response to COVID-19 could well

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110. *Id.* at 76.

111. See generally *National Directory of Higher Education in Prison Programs*, ALL FOR HIGHER EDUC. IN PRISON, <https://www.higheredinprison.org/national-directory> [<https://perma.cc/ZDD9-DKDL>] (last updated Feb. 2023); Sylvia G. McCollum, *Prison College Programs*, 74 PRISON J. 51 (1994) (describing benefits of prison college programs and their vulnerabilities).

112. See, e.g., *Substance Abuse Treatment*, FED. BUREAU PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) [<https://perma.cc/N6LB-S3YE>] (last visited on Aug. 25, 2023) (describing the federal prison system's "drug abuse treatment strategy"); LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, ALCOHOL AND DRUG USE AND TREATMENT REPORTED BY PRISONERS 3 (July 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/adutrpspi16st.pdf> [<https://perma.cc/S4FD-ABQR>].

113. See Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?*, MARSHALL PROJECT (Apr. 15, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down> [<https://perma.cc/EQS3-JC3S>] ("Some prison units contain one-person cells and others are large rooms packed with bunk beds. Sometimes lockdown means at least 23 hours a day alone in a cell, but other times it means long, idle days restricted to two- to four-person cubicles or on the bed in an open-bay dormitory."); Emily Widra & Wanda Bertram, *More States Need to Use Their "Good Time" Systems to Get People Out of Prison During COVID-19*, PRISON POLY INITIATIVE (Jan. 12, 2021), <https://www.prisonpolicy.org/blog/2021/01/12/good-time/> [<https://perma.cc/7E7D-AZ4G>] ("During the pandemic, people in prison have had to comply with much stricter rules than usual, including lockdowns that subject entire prisons to conditions akin to solitary confinement.") (internal quotation marks omitted); see also Harlin Pierce, *When the Prison Banned Board Games, We Played Chess in Our Minds*, MARSHALL PROJECT (Feb. 11, 2021, 10 PM), <https://www.themarshallproject.org/2021/02/11/when-the-prison-banned-board-games-we-played-chess-in-our-minds> [<https://perma.cc/SK5B-ANPT>].

remain in place due to the perceived convenience to security staff.<sup>114</sup> This Article does not delve into the impacts of COVID-19 on associations in prison.

### *A. Typology of Associations in Prison*

This Section provides a conceptual framework for understanding groups in prison. First, it introduces types of groups, provides historical context, and describes some key features and special topics unique to each. Next, it describes some of effects the groups have, as well as the unique challenges they present.

The main types of groups this Section highlights are self-advocacy groups, newspapers, recreational groups, “gangs” and “security threat groups,” and religious groups. The self-advocacy groups, newspapers, and recreational groups are officially sanctioned organizations or clubs. They have permission to meet and institutional support but also must abide by the manifold rules and regulations that govern their formation, operations, and membership.<sup>115</sup> “Security threat groups” are forbidden by prison administrations, and religious groups enjoy a uniquely high level of protection.<sup>116</sup>

#### *1. Self-Advocacy Organizations*

One major type of association in prison is the category of organizations that engage in self-advocacy on political issues. The political issues often have to do with the members’ sentences, conditions of confinement, treatment in prison, or with issues faced by their home communities, such as gun violence. These groups receive official recognition and permission to meet. Many of these groups, once officially recognized, make use of their already-formed charters, permissions, and infrastructures to form sub-groups or projects to meet the needs of their members

114. E.g., Katie Meyer, ‘More Harm Than Good’: Most Pa. Prisoners Are Vaxxed, but Isolating COVID Rules Remain, WHYY (June 18, 2021), <https://whyy.org/articles/more-harm-than-good-most-pa-prisoners-are-vaxxed-but-isolating-covid-rules-remain/> [<https://perma.cc/SV76-TM7V>] (“Maria Bivens, a spokeswoman for DOC, concedes that things aren’t back to normal yet, and says select COVID-19 changes may well be permanent in certain prisons.”); Hicham Raache & Kaitor Kay, *Report: OK Co. Jail Leader Heard Saying ‘COVID Is Our Friend’*, KFOR, <https://kfor.com/news/local/ok-co-jail-leader-heard-saying-covid-is-our-friend/> [<https://perma.cc/4QRQ-37XS>] (last updated Feb. 8, 2022, 10:28 PM CST) (“Jail Administrator Greg Williams says that the COVID-19 pandemic is the ‘greatest thing that has ever happened’ to the jail and that it was a ‘built-in excuse’ to keep members of the media out of the jail, which has had myriad problems over the past few years.”).

115. Michael Ryan Alexander, *Correctional Recreation: An Overview* 1, 7 (Spring 2017) (Bachelors of Integrated Studies Thesis, Murray State University) (available at <https://digitalcommons.murraystate.edu/cgi/viewcontent.cgi?article=1018&context=bis437> [<https://perma.cc/M9N7-NNEN>]).

116. Because this Section focuses on associations founded and led by incarcerated people, it does not explore branches of outside organizations, such as Toastmasters International, the Jaycees, and the Veterans Association. Michelle Inderbitzin, Joshua Cain & Trevor Walraven, *Learning and Practicing Citizenship and Democracy Behind Bars*, in *THE VOLUNTARY SECTOR IN PRISONS* 68–70 (Laura S. Abrams, Emma Hughes, Michelle Inderbitzin & Rosie Meek eds., 2016) (describing prisoner-led clubs and coauthored with elected leaders of the Lifers’ Unlimited Club at the Oregon State Penitentiary); George W. Knox, *Problem of Gangs and Security Threat Groups (STG’s) in American Prisons Today: A Special NGCRC Report*, 12 J. GANG RSCH. 1 (2004), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/problem-gangs-and-security-threat-groups-stgs-american-prisons> [<https://perma.cc/F7KM-NLK4>].

or the broader prison population. Examples of their work include political advocacy,<sup>117</sup> volunteering and fundraising,<sup>118</sup> outreach,<sup>119</sup> and study and peer education.<sup>120</sup> Some of these groups are organized by people of a certain type of sentence, such as lifers and long-termers<sup>121</sup> or military veterans.<sup>122</sup> Some are ordered by race, culture, or ethnic group.<sup>123</sup>

Today's advocacy groups have historical precursors in groups created by incarcerated people and groups created by prison administrators to aid in prison governance. One of the first years marked by reforms that gave incarcerated people some power to organize and govern prison operations was 1913.<sup>124</sup> In the mid-twentieth century, the Nation of Islam did some of the most influential work, including radically transforming the legal rights and institutional standing of incarcerated people. By the 1950s and 1960s, it had created an organizational structure among its members in prison, won key lawsuits that allowed incarcerated plaintiffs to assert their rights in federal court,<sup>125</sup> and laid the groundwork for collective actions in the coming decades.<sup>126</sup> Members asserted, through protest and litigation, that they had the right to study, pray, and spend time collectively.<sup>127</sup> They sought to be recognized as groups with structure and collective interests.<sup>128</sup> By doing so, they challenged the expectation of the prison system that each individual had to

117. Appellant's Brief at 37, *Mass. Prisoners Ass'n Pol. Action Comm. v. Acting Governor*, 435 Mass. 811 (2002) (No. 2000-P-1359), 2001 WL 34920047.

118. *Id.*; *Powell v. Goord*, 823 N.Y.S.2d 579, 580 (2006).

119. Scott Howard Whiddon, "To Live Outside the Law, You Must Be Honest" – Words, Walls, and the Rhetorical Practices of the Angolite 183 (2006) (Ph.D. dissertation, Louisiana State University 2006) (on file with author).

120. *See, e.g.*, Emily Nonko, *The Study Group Bringing Bell Hooks to Prisons*, NEXT CITY (Apr. 3, 2019), <https://nextcity.org/urbanist-news/the-study-group-bringing-bell-hooks-to-prisons> [<https://perma.cc/9YUE-LBFK>].

121. *Farid v. Ellen*, 593 F.3d 233, 236–37 (2d Cir. 2010); *Yount v. Pa. Dep't of Corr.*, 886 A.2d 1163, 1166 (Pa. Commw. Ct. 2005).

122. Appellant's Brief at 19, *Mass. Prisoners Ass'n Pol. Action Comm. v. Acting Governor*, 435 Mass. 811 (2002) (No. 2000-P-1359), 2001 WL 34920047 (referencing *American Veterans in Prison*).

123. *See* Renelinda Arana-Bressler, *Rebuilding Society Behind Prison Walls: Examining the Structure of Prisoner-Run Reform Organizations* 57 (2008) (PhD dissertation at Princeton University) (ProQuest) (providing examples such as the Hispanic Organization in Shelbyville Prison, which aimed "[t]o make known and support Latin-American Culture through cultural, educational, and recreational activities"); Michelle Inderbitzin, Joshua Cain & Trevor Walraven, *Learning and Practicing Citizenship and Democracy Behind Bars*, in *THE VOLUNTARY SECTOR IN PRISONS*, *supra* note 116, at 69–70 (describing Asian Pacific Family, Uhuru Sasa, and other affinity and cultural clubs); *see, e.g.*, *Reid v. Coughlin*, 634 N.Y.S.2d 236, 237 (1995) (Caribbean African Unity group in New York); *Garcia v. New York State Div. of Parole*, 657 N.Y.S.2d 415, 417 (1997) (Hispanic Inmate Organization).

124. Jorgensen, *supra* note 103, at 2.

125. *See, e.g.*, *Cooper v. Pate*, 378 U.S. 546 (1964) (holding that an incarcerated plaintiff alleging discrimination on the basis of religion stated a cause of action and accordingly denying the defendant's motion to dismiss).

126. BERGER & LOSIER, *supra* note 108, at 67; *see also* Zoe Colley, "All America Is a Prison": *The Nation of Islam and the Politicization of African American Prisoners, 1955-1965*, 48 J. AM. STUDIES 393, 393 (2014).

127. CHRISTOPHER E. SMITH, *THE SUPREME COURT AND THE DEVELOPMENT OF LAW* 20 (2016); *see also* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 528 (2021).

128. James B. Jacobs, *Race Relations and Prisoner Subculture*, 1 CRIME & JUST. 1, 8 (1979).

“do his own time.”<sup>129</sup> Prison staff and administrators, with the urgency of an “authoritarian regime” maintaining its social order, responded with suppression, retaliatory firing, restriction from regular activities, and isolation.<sup>130</sup> For example, in 1961, one man was killed and four wounded when prison staff tried to disband a Muslim gathering.<sup>131</sup>

The Nation of Islam’s efforts led to such paradigm shifting Supreme Court cases as *Cooper v. Pate*. *Cooper v. Pate* established the right of incarcerated plaintiffs to assert unconstitutional treatment in prison.<sup>132</sup> The Nation of Islam also gained the right to receive the same opportunities for religious practice as practitioners of other religions in *Sewell v. Pegelow*.<sup>133</sup>

Through the 1960s and early 1970s, the Nation of Islam and the Black Panther Party disseminated what was considered politically radical ideology throughout prison and ran mutual aid programs.<sup>134</sup> Study groups formed among politically conscious incarcerated people, particularly incarcerated Black people.<sup>135</sup> These study groups were the forerunners of the Black Guerilla Family and later college programs.<sup>136</sup> Many of these groups were unofficial and surreptitious. For example, the Angola Panthers held educational meetings under the guise of playing sports.<sup>137</sup>

In the same period, demonstrations roiled prisons and jails in the United States.<sup>138</sup> The Attica uprising in western New York marked a turning point. In 1971, incarcerated men took control of the prison yard for four days, issuing demands including religious freedom for Muslims, parole reform, and humane living and work conditions.<sup>139</sup> Governor Rockefeller ended the demonstrations in a bloodbath when he sent in State Troopers and other police to retake the prison; nearly forty people were killed, including officer-hostages and almost thirty incarcerated men.<sup>140</sup>

In the aftermath of Attica, prison officials tried new measures. In the early 1970s, prison officials created formally recognized “Inmate Councils” of elected

129. *Id.*

130. CHRISTOPHER E. SMITH, THE SUPREME COURT AND THE DEVELOPMENT OF LAW 20 (2016) (quoting James Jacobs, *The Prisoners’ Rights Movement and Its Impacts*, in CORRECTIONAL CONTEXTS: CONTEMPORARY AND CLASSICAL READINGS 231–47 (James W. Marquart & Jonathan R. Sorensen eds., 1997)).

131. DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS’ LABOR UNION 19 (2011).

132. *Id.* (discussing *Cooper v. Pate*, 378 U.S. 546 (1964)).

133. 291 F.2d 196 (4th Cir. 1961).

134. Gabrielle Corona, *Food, Punishment, and the Angola Three’s Struggle for Freedom, 1971–2019*, 27 S. CULTURES 77, 79–80 (2021) (describing political education movements).

135. See Kevin D. Sawyer, *George Jackson, 50 Years Later*, S.F. BAY VIEW (Aug. 6, 2021), <https://sfbayview.com/2021/08/george-jackson-50-years-later/> [<https://perma.cc/Z6KZ-6Q23>] (describing the Black Awareness Community Development Organization at San Quentin State Prison).

136. *Id.*

137. Corona, *supra* note 134, at 80 (describing prisoner-led political education movements).

138. See generally BERGER & LOSIER, *supra* note 108, at 72–102.

139. Heather Ann Thompson, *Lessons from Attica: From Prisoner Rebellion to Mass Incarceration and Back*, 28 SOCIALISM & DEMOCRACY 153, 162–63 (2014).

140. *Id.* at 165; see also Dennis Cunningham, Michael Deutsch & Elizabeth Fink, *Remembering Attica Forty Years Later*, PRISON LEGAL NEWS (Sept. 15, 2011) <https://www.prisonlegalnews.org/news/2011/sep/15/remembering-attica-forty-years-later/> [<https://perma.cc/V7R8-LX5G>].

representatives who participated in running the prisons.<sup>141</sup> For instance, the Illinois Stateville prison administration engaged gang leaders in one of the early informal “Inmate Councils” called the Adult Basic Learning Enterprise Project, or Project ABLE.<sup>142</sup> The program had two goals: to curb the power of major street gang organizations that had proliferated the facility (and brought with them institutional knowledge about organizing and group solidarity), and to do so in a manner that would prevent a situation like Attica.<sup>143</sup> Project ABLE’s executive council members were given freedom of movement throughout the prison, as they were tasked with keeping the peace and liaising between incarcerated individuals and prison administrators when grievances arose.<sup>144</sup> By 1972, with a change of administration, the group’s formal privileges were revoked.<sup>145</sup>

While Project ABLE’s Inmate Council system reported some successes, the ethics of such a system are fraught. Project ABLE employed a similar governance structure, putting incarcerated people in charge of others in the prison, as the “building tender” system, sometimes known as the “turnkey” system,<sup>146</sup> used in Texas prisons from the in the 1970s to mid-1980s to maintain order.<sup>147</sup> Building tenders used state-sanctioned violence to enforce cooperation and delegated power to friends and informants.<sup>148</sup> They discouraged other organized groups in the prison, such that, until the late 1970s, the Black Muslims were the only other significant group in the Texas prison system.<sup>149</sup> *Ruiz v. Estelle* ended this system.<sup>150</sup>

At the same time that “Inmate Councils” were created by prison officials, labor unions were created by incarcerated people.<sup>151</sup> Many of the uprisings in the 1960s and 1970s had already taken the form of strikes. In 1970, a group of attorneys and formerly incarcerated individuals supporting a strike at Folsom prison created the United Prisoners Union (UPU).<sup>152</sup> Within two years, more than thirty prisons in nine states saw efforts to build unions.<sup>153</sup> By the mid-1970s, in-prison labor

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141. BERGER & LOSIER, *supra* note 108, at 111.

142. *Id.* at 109.

143. *See generally id.*

144. *Id.*

145. *Id.*

146. R.V. Gundur, *The Changing Social Organization of Prison Protection Markets: When Prisoners Choose to Organize Horizontally Rather than Vertically*, 25 TRENDS ORGANIZED CRIME 408, 413–14 (2018).

147. Michelle Lynn Burman, *Resocializing and Repairing Homies within the Texas Prison System: A Case Study on Security Threat Group Management, Administrative Segregation, Prison Gang Renunciation and Safety for All* 45 (Dec. 2012) (Ph.D. dissertation, University of Texas at Austin) (on file with Texas ScholarWorks).

148. Gundur, *supra* note 146, at 412, 414.

149. *Id.*

150. *See Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

151. BERGER & LOSIER, *supra* note 108, at 112.

152. *Id.* at 90.

153. *Id.* For histories of worker strikes and unionization, see, for example, Heather Ann Thompson, *Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LAB.: STUD. WORKING-CLASS HIST. AMS. 15 (2011); Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 248–61 (2016); Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1506–19 (2019).

unions included more than 11,000 members.<sup>154</sup> Unions made many of the same demands as had been made in other uprisings, including having rights to organize, legal help and medical care, and more humane conditions.<sup>155</sup> At the same time, they added a focus on wages and working conditions by providing a framing theory that the incarcerated were part of a “convicted class.”<sup>156</sup>

In Massachusetts’ Walpole prison, the chapter of the New England Prisoners’ Reform Association (NPRA) union gained more support than the Inmate Advisory Council.<sup>157</sup> Members of the prison population voted for the union instead of the Council to negotiate with the prison administration.<sup>158</sup> The NPRA union in Walpole was born out of a coalition between the inside-outside organization NPRA and the Boston chapter of the Black Panther Party.<sup>159</sup> When the staff union launched a strike and walked off the job in March 1973, NPRA took over running the prison with the support of a cultural organization and outgrowth of the Black Panther Party called Black African Nations Toward Unity (BANTU), among other organizations.<sup>160</sup> During this period of self-governance, NPRA created and provided programming in the prison.<sup>161</sup> Weeks later, officials retook the facility by force, and within months guards controlled the facility again.<sup>162</sup> NPRA failed to win recognition of the state labor relations commission, and by late 1974, NPRA’s Walpole chapter was defunct.<sup>163</sup> Other labor union chapters also failed to gain recognition from their state relations boards.<sup>164</sup> In 1977, the *Jones* decision doomed labor unions’ efforts in prison across the country.<sup>165</sup>

Prisons abandoned federal- and state-run education and reform programs in the 1980s and 1990s as the dominant theory of punishment shifted away from rehabilitation,<sup>166</sup> though associations in prisons were still filling the gaps in meeting needs that the government was failing to meet. For example, in the fight against HIV and AIDS, the Prisoner Education Project on AIDS (PEPA) in Auburn prison in New York and the AIDS Counseling and Education (ACE) program in Bedford Hills prison in New York were the first AIDS peer-education programs in prisons.<sup>167</sup> Officials were suspicious of the groups’ peer counseling, which they saw

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154. TIBBS, *supra* note 131, at 156.

155. BERGER & LOSIER, *supra* note 108, at 90.

156. *Id.*

157. *Id.* at 115.

158. *Id.*

159. *Id.*

160. *Id.* at 116.

161. *Id.*

162. *Id.* at 117.

163. *Id.*

164. *See, e.g.*, TIBBS, *supra* note 131, at 155 (noting that Green Haven labor union failed to gain recognition in 1972).

165. *See supra* Part II.

166. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 61 (2002).

167. *See generally* Kathy Boudin & Judy Clark, *A Community of Women Organize Themselves to Cope with the Aids Crisis: A Case Study from Bedford Hills Correctional Facility*, 1 COLUM. J. GENDER & L. 47 (1991).



as political organizing;<sup>168</sup> however, by the late 1990s, many peer counseling programs had become prison-sanctioned organizations.<sup>169</sup>

However, the changes made to curb the power of unions, political blocks, and activists were to stay. These legal, political, and policy changes made it much harder not only to organize but also for groups and associations to gather and form. Space became an issue, and groups had to meet higher benchmarks to be allotted the space and resources for meetings.<sup>170</sup> At the same time, even today, some of the organizational structure and knowledge of older groups remains. Just as the same people in power in gangs, building tender systems, and Inmate Councils retained power in new leadership positions, many of the founding leaders of today's self-advocacy groups created those groups using institutional knowledge and power from their previous leadership roles in political groups.

The first-order issues that today's self-advocacy organizations attempt to tackle tend to include conditions of confinement or aspects of the criminal system that directly affect the members' sentences. For example, the Pennsylvania Lifers' Association (PLA), a group run by incarcerated men sentenced to natural life in prison,<sup>171</sup> was founded to change legislation concerning parole eligibility for people sentenced to life.<sup>172</sup> One of the group's main activities has been lobbying for relevant proposed legislation. Project for A Calculated Transition (PACT), a decades-old group in New York, uses legal, administrative, and legislative channels to improve prison conditions.<sup>173</sup> Acting as the "law firm at Green Haven,"<sup>174</sup> PACT has assigned its members to work on cases,<sup>175</sup> including class action lawsuits challenging the conditions of confinement.<sup>176</sup>

To assist their members' ability to self-advocate, the groups also provide educational components, just as their historical analogues did. For the men of Green Haven, PACT was "their university."<sup>177</sup> A large part of PACT's work involved conducting legal education. PACT members employed in the legal library sometimes gave lectures on criminal law and procedure. In this way, PACT taught its members about legal issues relevant to their criminal appeals.<sup>178</sup> In the 1990s, the group held workshops on timely topics, like the election of Governor George Pataki and the passage of the Prison Litigation Reform Act (PLRA), the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Adoption and Safe Families Act

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168. *Id.* at 54.

169. BERGER & LOSIER, *supra* note 108, at 166.

170. *Id.* at 157.

171. Frances N. Huber, *Communicating Social Support Behind Bars: Experiences with the Pennsylvania Lifers' Association 2* (Dec. 2005) (Ph.D. dissertation, Pennsylvania State University) (on file with author). While PLA still exists, it is unclear whether its practices have changed since the writing of Frances Huber's PhD dissertation.

172. *Id.*

173. Eleanor Roberts, *PACT: An Oral History*, YALE SAW STUDENT PAPER SERIES (forthcoming 2023) (on file with author).

174. *Id.*

175. *Id.*

176. *Id.* at 4.

177. *Id.* at 92.

178. *Id.* at 81.

(ASFA).<sup>179</sup> Other topics selected by peer-led education efforts have included substance use,<sup>180</sup> sexual violence,<sup>181</sup> and sexual health education.<sup>182</sup> In fact, for public health issues in prison such as the HIV/AIDS crises, peer-education has been a crucial resource within an officially abstinence-only policy scheme.<sup>183</sup> Some study groups study topics beyond those immediately relevant to practical change or direct advocacy efforts. Groups have taken up such subjects as toxic masculinity,<sup>184</sup> prison abolition,<sup>185</sup> and political and sociological theory about criminality and criminal justice using a non-Eurocentric analytical framework.<sup>186</sup>

This type of self-guided education grew out of the study groups of the 1960s and 1970s, including informal or clandestine groups sharing reading and writing, mutual aid groups helping with legal cases, ad hoc study groups, and more formalized peer education groups.<sup>187</sup> They supplement the state-provided adult basic learning and high school equivalency classes with subject matter directly relevant to the students.

Much like the non-governmental organizations of civil society, the groups engage in a variety of other activities as needed, and many of the groups have expanded beyond their original missions. Groups perform direct mutual aid within prisons and with their home communities. PACT raises money to support members' home communities through the proceeds from the copy machine they allow others in the prison to use for a fee.<sup>188</sup> PLA has engaged in other efforts, such as running restorative justice and self-development programming for members and non-members and fundraising for non-profit charities through collaborations with external organizations.<sup>189</sup>

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179. *Id.* at 83.

180. *Id.*

181. Grant J. Devilly, Laura Sorbello, Lynne Eccleston & Tony Ward, *Prison-Based Peer-Education Schemes*, 10 *AGGRESSION & VIOLENT BEHAV.* 219, 226 (2005).

182. *Id.* at 219, 223; Olga A. Grinstead, Barry Zack & Bonnie Faigeles, *Collaborative Research to Prevent HIV Among Male Prison Inmates and Their Female Partners*, 26 *HEALTH EDUC. & BEHAV.* 225, 231–32 (1999); *Peer Education Programs*, NAT'L HEPATITIS CORRECTIONS NETWORK, <https://www.hcvinprison.org/resources/71-main-content/content/200-peereducation> [https://perma.cc/UY2V-DUH7] (last visited March 9, 2022) (describing peer education programs about hepatitis); Joseph Bick, *Birth and Evolution of a Prison Based Inmate Peer Education Program: The California Medical Facility Experience*, NAT'L HEPATITIS CORR. NETWORK [https://www.hcvinprison.org/images/stories/Peer\\_Education\\_5\\_Bick.pdf](https://www.hcvinprison.org/images/stories/Peer_Education_5_Bick.pdf) [https://perma.cc/7395-RCGJ] (last visited Aug. 25, 2023) (describing HIV peer education system in California).

183. Devilly et al., *supra* note 181, at 223.

184. Nonko, *supra* note 120.

185. *The Study Groups*, DREAMING FREEDOM PRACTICING ABOLITION, <https://abolitioniststudy.wordpress.com/about-the-study-groups/> [https://perma.cc/EA59-234H] (last visited Aug. 25, 2023).

186. Roberts, *supra* note 173, at 48.

187. Simone Weil Davis & Bruce Michaels, *Ripping Off Some Room for People to “Breathe Together”: Peer-to-Peer Education in Prison*, 42 *SOC. JUST.* 146, 149 (2015).

188. Roberts, *supra* note 173, at 48.

189. *Id.* at 33, 73; *see also* Inderbitzin et al., *supra* note 116, at 56 (describing Lifers' Unlimited Club in Oregon).

## 2. Newspapers

Another key type of association is the collective that creates and puts out newspapers, or other media, such as radio programs or podcasts.<sup>190</sup> While publishing is typically not considered associative, as the publisher sends media unidirectionally to readers, the production itself brings together a staff, including editors, writers, designers, and printers who work together closely and regularly, spending, in cases such as the *San Quentin News*, sixty hours a week in the newsroom.<sup>191</sup> This team builds its own collective identity based on shared trade and experience.<sup>192</sup>

For the readership, too, the publications serve as foundations for associational life. The newspapers create a shared understanding of the events and passage of time of the community in the prison as well as a shared culture. They help writers and readers to make meaning of their experiences.

At the end of the 1800s, while there were no “inmate organizations,”<sup>193</sup> in-prison journalism was developing. The creation of in-prison newspapers has been an associative endeavor at least since the 1890s, when at least fifteen states had established prison newspapers with editorial boards and writing staffs.<sup>194</sup> The early twentieth century newspapers praised prison administration on the one hand and discussed the hypocrisy of punishment on the other.<sup>195</sup>

Between the 1930s to the 1960s, in-prison journalism reached its zenith in volume and institutional support. During that period, over half of all prisons in the United States produced newspapers published by incarcerated people.<sup>196</sup> The circulation of what has been termed the “Penal Press,” after the Associated Press, was approximately 240,036, with 80,416 non-incarcerated readers.<sup>197</sup> The newspapers of this time were sanctioned by the state and prison administrators, and accordingly, administrators provided financial and material support to print the

190. While this Section discusses newspapers, radio programs and podcasts do much of the same work. One example is *Ear Hustle*, a podcast that began in 2017 hosted by Earlonne Woods, who was incarcerated, and Nigel Poor, a volunteer at San Quentin. San Quentin had produced a public radio program in the past, as had Angola.

191. WILLIAM J. DRUMMOND, PRISON TRUTH: THE STORY OF THE SAN QUENTIN NEWS 66, 80 (2020).

192. Joshua A. Mitchell, *Circulation, Exchange, and the Penal Press*, 31 AM. PERIODICALS 37, 40 (2021) (citing RUSSELL N. BAIRD, THE PENAL PRESS 11 (1967)).

193. JAMES MCGRATH MORRIS, JAILHOUSE JOURNALISM: THE FOURTH ESTATE BEHIND BARS 63 (reprt. 2002).

194. *Id.* at 47. In-prison journalism has existed since 1800, when William Keteltas published *Forlorn Hope* in a New York prison. Kalen M. A. Churcher, *Journalism Behind Bars: The Louisiana Penitentiary's Angolite Magazine*, 4 COMM'N CULTURE & CRITIQUE 382, 385 (2011).

195. Katy Ryan & Yvonne Hammond, *Work & Hope and the West Virginia State Penitentiary*, 11 W. VA. HIST.: J. REG'L STUD. NEW SERIES 29, 31 (2017). For example, *Work & Hope* of West Virginia exposed the use of whipping, paddling, bucking, and gagging after torture was no longer allowed. *Id.* at 29–39. Editors of the *New Era* of Kansas believed that newspapers ought to contribute to improving prisons across the country. MORRIS, *supra* note 193, at 83.

196. Mitchell, *supra* note 192, at 37, 48.

197. *Id.* (citing BAIRD, *supra* note 196, at 12.). Editors used “Penal Press” as an allusion to the Associated Press and used “PP” to indicate a reprint from a Penal Press affiliate. *Id.*

newspapers<sup>198</sup> through “inmate welfare funds” and vocational training funds.<sup>199</sup> Notably, the papers circulated between prisons.<sup>200</sup> Editors of papers at different prisons traded papers via mail, commented on each other’s papers,<sup>201</sup> and included reprints from other Penal Press papers in their own papers. The papers included columns by prison administrators, but at the same time, editors were able to publish more critical or politicized work by reprinting articles rather than publishing local authors.<sup>202</sup>

By the end of the 1960s, the Penal Press, subject to stricter censorship,<sup>203</sup> gave way to more politically radical and underground publications, which were often limited in their circulation to their originating institutions.<sup>204</sup> Some papers still had a national circulation, such as *The Outlaw*, which published demands for a strike in 1968, parole reform, better food and conditions, and living wages.<sup>205</sup> In the 1980s, the number of in-prison publications declined due to budget cuts, crack downs in the name of safety, and lack of interest.<sup>206</sup>

Today’s newspapers created in prison resemble a mix of mainstream and alternative journalism and include both reporting and digests about legal or criminal justice issues.<sup>207</sup> They act as small-town newspapers, community newsletters, zines, and digests, delivering information useful to their inside readership. They also set the tone for how the editorial board wants their incarcerated community to be perceived by outside readers. As with other associations in prison, newspaper staffs fill a function created by prison life and its demands.

In-prison newspapers report the goings on and incidents in the prison.<sup>208</sup> By simply covering happenings in the prison<sup>209</sup> and providing dates, names, and details<sup>210</sup> inadequately or inaccurately recorded elsewhere,<sup>211</sup> prison newspapers contest or expand the coverage by prison administrators’ records and outside

198. *Id.* Many publications relied on state funding and subscription fees from outside readers. *Id.*

199. DRUMMOND, *supra* note 191.

200. Mitchell, *supra* note 192, at 37, 40. Exchanges were not new: publications such as the *Star of Hope* engaged in exchanges in the 1900s. Jorgensen, *supra* note 103, at 39.

201. Mitchell *supra* note 192, at 37, 41.

202. BAIRD, *supra* note 196, at 72.

203. *See, e.g.*, MORRIS, *supra* note 193, at 164.

204. Mitchell, *supra* note 192, at 52; DRUMMOND, *supra* note 191, at 72.

205. DAN BERGER, *America Means Prison*, in CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 84 (2015).

206. Churcher, *supra* note 194, at 386; *see also* Denise S. Caspersen, A Case Study of the Prison Newspaper *Conner’s Insight* at the R. B. (Dick) Conner Correctional Center in Hominy, Oklahoma 78 (1990) (M.S. thesis, Oklahoma State University) (on file with author).

207. Churcher, *supra* note 194, at 391.

208. MORRIS, *supra* note 193, at 121 (describing the creation of newspapers at Japanese internment camps in World War II to meet the need of reporting goings-on within the camps). DRUMMOND, *supra* note 191, at 68 (describing reporting in the 1960s and 1970s in the *San Quentin News*).

209. Churcher, *supra* note 194, at 388.

210. Ryan & Hammond, *supra* note 195, at 29, 35.

211. *See, e.g.*, Adam Quinn, *Aboveground, Underground, and Locked Down: Radical Prison Newspapers in Washington, 1975-90*, 141 RADICAL HIST. REV. 151, 155 (2021); *see also id.* at 167 (publishing an account of a brutal rape with witness accounts and documentation of injuries).

journalism. In some cases, they break stories not covered in the outside press.<sup>212</sup> They also provide a shared understanding of facts.

Newspapers in prison can also play the functions of a community newsletter. For example, *Conner's Insight*, a paper started in the 1980s in Oklahoma, informs staff and incarcerated people about events<sup>213</sup> and programming updates that the staff want to be shared<sup>214</sup> as well as “Club News,” which provides a list of clubs and reports out about the events, projects, and fundraisers of organizations in the prison.<sup>215</sup> In this way, newspapers support other groups in the prison by allowing them to attract members or donors and giving them an avenue to report out on their work and activities. Many of the newspapers also include creative work, art, and humor. These sections provide a creative outlet and create shared culture, sometimes through criticism or satire.<sup>216</sup>

The newspapers can also resemble digests on topics pertinent to inside readership: legal- and criminal justice-related news, editorials about prison reforms, and columns having to do with self-help, religion, and other topics loosely grouped as aiding “rehabilitation” or growth.<sup>217</sup> In times of greater political action, newspapers like the *Red Dragon*, a quarterly Washington state publication in the 1970s and 1980s, coordinated organized action,<sup>218</sup> and published continuous coverage of news on political prisoners, legal proceedings, prison policies, administrative actions, and movements in prison.<sup>219</sup> More recently, newspapers have included legal information. For instance, *The Prison Legal News* provides current information about cases and other prison-related news.<sup>220</sup>

Beyond transmitting information, newspapers in prison do the important work that newspapers do everywhere—they provide a ritual of creating and maintaining shared culture,<sup>221</sup> solidify collective identity, contextualize temporality, give meaning to current events and to readers, and give readers a shared understanding of their experience, in the “nonnormative time” of incarceration.<sup>222</sup>

Over 450 newspapers have been published by incarcerated people since 1800.<sup>223</sup> Some decades-long running papers, including Minnesota’s *Prison Mirror*,

212. *Id.* at 167.

213. Caspersen, *supra* note 206, at 80.

214. Eleanor M. Novek, “Heaven, Hell, and Here”: *Understanding the Impact of Incarceration through a Prison Newspaper*, 22 CRITICAL STUD. MEDIA COMM’N 281, 292 (2005).

215. Caspersen, *supra* note 206, at 91, 101.

216. The 1954 April Fools issue of the *Angolite* featured headlines such as “Beer Goes on Sale Here Tomorrow.” Mitchell, *supra* note 192, at 37, 44.

217. Caspersen, *supra* note 206, at 103–105 (1990); Novek, *supra* note 214.

218. *Id.* at 161 (describing newspaper calling for a statewide prison protest movement with demands such as expelling police and guard unions from the AFL-CIO, ceasing punishment of queer sex, and ending the use of corporal punishment for incarcerated Native Americans).

219. Quinn, *supra* note 211, at 159.

220. *Id.* at 152.

221. Churcher, *supra* note 194, at 382, 391 (2011); JAMES W. CAREY, *A Cultural Approach to Communication*, in COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY 13 (1992).

222. Mitchell, *supra* note 192, at 37, 44 (citing HESTER BLUM, THE NEWS AT THE ENDS OF THE EARTH: THE PRINT CULTURE OF POLAR EXPLORATION 93 (2019)).

223. *American Prison Newspapers, 1800-2020: Voices from the Inside*, JSTOR, <https://www.jstor.org/site/reveal-digital/american-prison-newspapers/?searchkey=1660083215311&pagemark=eyJw>

Louisiana's *The Angolite*, and California's *San Quentin News* continue to be published,<sup>224</sup> along with *The Prison Legal News*, a national magazine dedicated to legal cases and criminal justice related issues.<sup>225</sup> In addition to these longstanding presses, some smaller newspapers, in many cases supported by college programs, exist today as well.<sup>226</sup> These papers, fashioned more in the vein of newsletters, tend not to take up the political topics of their predecessors.

### 3. Recreational, Sports, and Arts Groups

Other organizations and clubs form around games, sports, and the arts. Many of these organizations are initiated by prisons, which see these areas, unlike political organizing, as part of a rehabilitative schedule or as a productive way to pass the time. They often involve outside sponsors who lead the activity. This is the case with many music groups,<sup>227</sup> book clubs,<sup>228</sup> sports teams,<sup>229</sup> long-distance running clubs,<sup>230</sup> and chess clubs.<sup>231</sup>

In the 1930s, wardens at prisons like Sing Sing, a New York state prison, were starting football programs, where the in-prison team would play outside teams.<sup>232</sup> Some of the recreational and sports groups today still compete against people from the outside.<sup>233</sup> Though many of these groups are not initially founded by incarcerated people, many of them are still independent groups rather than in-prison-run classes.

Sometimes control of the groups changes hands. For example, before 1995, SCI-Graterford of Pennsylvania's music program had over sixty musicians in

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224. Mitchell, *supra* note 192, at 52; DRUMMOND, *supra* note 191, at 65 (the *San Quentin News* has been published since 1940, with some discontinuances).

225. *Frequently Asked Questions*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/faq/> [https://perma.cc/3KW6-7425] (last visited Aug. 25, 2023).

226. See *infra* Section II.B.

227. See generally Mary L. Cohen, *Select Musical Programs and Restorative Practices in Prisons Across the US and the UK*, in HARMONIZING THE DIVERSITY THAT IS COMMUNITY MUSIC ACTIVITY (Don D. Coffman ed., 2010).

228. Karen Lausa, *What I Learned From the Neo-Nazi in My Prison Book Club*, MARSHALL PROJECT (Aug. 10, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/08/10/what-i-learned-from-the-neo-nazi-in-my-prison-book-club> [https://perma.cc/JAB7-A53T].

229. Lyle May, *The Death Row Basketball League*, MARSHALL PROJECT (Mar. 16, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/03/16/the-death-row-basketball-league> [https://perma.cc/GK3B-48HS].

230. Jeff Burtka, *Freedom Run: Sport Programs in Prison Aim to End Recidivism*, GLOBAL SPORT MATTERS (July 22, 2019), <https://globalsportmatters.com/culture/2019/07/22/freedom-run-sport-programs-in-prison-aim-to-end-recidivism/> [https://perma.cc/3J85-HR36].

231. Pierce, *supra* note 113.

232. Dan Daly, *The National Forgotten League: Prison Football*, FOOTBALL OUTSIDERS (Sept. 30, 2012, 5:49 PM), <https://www.footballoutsiders.com/ramblings/2012/dan-daly-book-excerpt#main-content> [https://perma.cc/LY6F-22DN].

233. Inderbitzin et al., *supra* note 116, at 70–72 (describing prisoner-led clubs and coauthored with elected leaders of the Lifers' Unlimited Club at the Oregon State Penitentiary); Sheri-Lynn Sunshine Kurisu, *Carceral Civil Society: Citizenship and Communities in a U.S. Prison 88* (2018) (Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with the Illinois Digital Environment for Access to Learning and Scholarship)

independent bands practicing largely without supervision.<sup>234</sup> The Secretary viewed this program as “highly dangerous”<sup>235</sup> and changed the policy such that outside of religious and therapeutic music playing, musicians could only attend music classes and perform in an annual talent show or “special event,” for which they were allotted a few hours of practice time.<sup>236</sup> As a result, music program participation waned because musicians, such as members of the band Dark Mischief, were uninterested in being re-appropriated as a church or therapy band, felt they had insufficient practice time, or felt they did not need classes.<sup>237</sup>

Groups like the band Dark Mischief are examples of associations that are intrinsically important, that allow people to “be human”<sup>238</sup> and to be themselves. For that reason, their existence is contested by prison staff and members of the public who believe people in prison should suffer and endure hardship. Moreover, echoes of the state’s concerns in the *Jones* case sound here: prison administrators want the groups to be positively influenced by outside community members rather than merely practicing amongst themselves and influencing each other.

#### 4. *Gangs and Security Threat Groups*

One cannot discuss groups in prisons without discussing “gangs”<sup>239</sup> and “security threat groups.” The kinds of concerns these groups generate are twofold: one, that groups are engaging in illegal activity, and two, that they are operating outside of the rules of the prisons. Illegal activity, this Article argues, should be addressed by criminal statutory schemes. For operating outside of the rules of the prisons, stricter regulations for sanctioned groups are irrelevant, and harsh punishments are, as this Section will show, ineffective. Underground groups arise out of crises of demand prisons create.

Definitions of such groups vary across institutions and jurisdictions, from the National Gang Intelligence Center’s definition of prison gangs as “self-perpetuating criminal entities,”<sup>240</sup> to the Department of Justice’s definition, “consisting of a select group of incarcerated individuals who have an organized hierarchy and who are governed by an established code of conduct.”<sup>241</sup> Many of the prison groups known as gangs have a paramilitary structure<sup>242</sup> and require a strict oath of lifetime

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234. *Young v. Beard*, No. CIV A 04-2211, 2007 WL 339031, at \*5 (E.D. Pa. Jan. 31, 2007), *aff’d*, 284 F. App’x 958 (3d Cir. 2008).

235. *Id.*

236. *Id.* at 5–10.

237. *Id.*

238. *Id.*

239. While some scholars prefer to not use the word “gang” and instead use the term “prison group,” this Article uses the word “gang” because it addresses various types of organizations that could be referred to as prison groups, while keeping faith in the reader’s willingness to suspend potential prior assumptions about such groups that the word invokes.

240. NAT’L GANG INTEL. CTR., NATIONAL GANG REPORT 15 (2015), <https://www.fbi.gov/file-repository/stats-services-publications-national-gang-report-2015.pdf/view> [<https://perma.cc/FDU9-28VZ>].

241. *Prison Gangs*, DEP’T OF JUSTICE (Apr. 29, 2021), <https://www.justice.gov/criminal-ocgs/gallery/prison-gangs> [<https://perma.cc/9J5R-YLEQ>].

242. Burman, *supra* note 147, at 51.

allegiance involving a mandated entrance assignment,<sup>243</sup> and some employ intricate bureaucracies and strategic plans.<sup>244</sup> “Security threat group” is the term prison administrations use to refer to gangs and other unsanctioned organizations.

By the early 1970s, prisons in many states, including Illinois, California, Pennsylvania, and Washington, had gangs.<sup>245</sup> More than half of state and federal prison systems reported gang activity by the mid-1980s.<sup>246</sup> After the building tender system ended in Texas, some of the former building tenders became high ranking gang members,<sup>247</sup> and the gangs did the things the building tenders used to do, such as maintaining order, but also controlling the drug market and, in doing so, “taking advantage of people” and even killing.<sup>248</sup> At the same time, former members of “Inmate Councils” created their own service and political advocacy oriented organizations.<sup>249</sup>

With the Burger Court’s hands-off approach to prisoners’ rights, the political shifts to the right in the 1980s, and the waning of outside support and outside movements, the large-scale prison movements lost momentum in the 1980s. At the same time, states around the country built new prisons designed to limit movement and congregation through more fractured living spaces and expanded use of solitary confinement.<sup>250</sup> Construction and use of supermax prisons began at least in 1983 with Marion Penitentiary<sup>251</sup> and continued into the 1990s and 2000s.<sup>252</sup> Solitary confinement wings within prisons and supermax prisons were used to isolate key movement leaders and gang leaders, though their use eventually expanded to include anyone perceived to have committed rule infractions.<sup>253</sup> In the 1990s, the

243. See, e.g., Matt DeLisi, James O. Spruill, David J. Peters, Jonathan W. Caudill & Chad Trulson, “Half In, Half Out:” *Gang Families, Gang Affiliation, and Gang Misconduct*, 38 AM. J. CRIM. JUST. 602 (2013); Dalton L. Glass, *The Impact of Security Threat Group Designation on Discretionary Parole Release Decisions* 26 (May 2017) (M.A. thesis, Sam Houston State University) (on file with Scholarly Works at SHSU).

244. Graema Wood, *How Gangs Took Over Prison*, ATLANTIC (Oct. 1, 2014), <https://www.theatlantic.com/magazine/archive/2014/10/how-gangs-took-over-prisons/379330/> [<https://perma.cc/6A96-K8WE>]. In the last few decades, less rigidly hierarchical, horizontally organized groups, such as Tangos in Texas, offer protection for members without the structure and leadership of a gang. R.V. Gundur, *Negotiating Violence and Protection in Prison and on the Outside: The Organizational Evolution of the Transnational Prison Gang Barrio Azteca*, 30 INT’L CRIM. JUST. REV. 30, 48 (2020); Burman, *supra* note 147, at 103.

245. Meghan M. Mitchell, Kallee McCullough, Jun Wu, David C. Pyrooz & Scott H. Decker, *Survey Research with Gang and Non-Gang Members in Prison: Operational Lessons from the LoneStar Project*, TRENDS ORGANIZED CRIME 4, 381 (2018).

246. Glass, *supra* note 243, at 23.

247. Burman, *supra* note 147, at 49.

248. *Id.*

249. For example, Forgotten Voices in Sing Sing in New York was made up of members of the Inmate Liaison Committee. Telephone Interview with Sean Kyler, Operations Manager, Vera Inst. Just. (Feb. 1, 2022) (notes on file with author).

250. BERGER & LOSIER, *supra* note 108, at 143.

251. Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J.F. 222, 224 (2016).

252. H. Daniel Butler, O. Hayden Griffin, III & W. Wesley Johnson, *What Makes You the “Worst of the Worst?” An Examination of State Policies Defining Supermaximum Confinement*, 24 CRIM. JUST. POL’Y REV. 676, 678 (2012) (discussing relationship between STG designation and supermax confinement).

253. BERGER & LOSIER, *supra* note 108, at 144, 146.



Department of Justice developed funding for state and federal prisons to address “Security Threat Groups” on the condition that they used the STG Management Unit, a type of solitary confinement.<sup>254</sup>

As with other organizations, people form and join gangs because of certain needs that are unable to be fulfilled by the institution of the prison. As David Skarbek describes, the state cannot provide the governance demanded by incarcerated people; as a result, incarcerated people create alternative modes of governance in the form of gangs, or “protective associations.”<sup>255</sup> As prison populations increased in the 1970s and 1980s, he explains, community norms that worked in close-knit, homogenous groups were no longer enough for proper governance.<sup>256</sup> Gangs stepped in to provide the physical safety for their members that the prison staff were unable to provide. Prison staff, too, have relied on gangs, just as they have relied on building tenders and “Inmate Councils” to keep things “running smoothly.”<sup>257</sup> In a 2012 national survey of prison staff, a quarter said they met with gang leaders on an “as needed” basis.<sup>258</sup>

Gangs also control what prison administrators call the “contraband” market. As Skarbek explains, “[p]rison is set up so that most of the things a person wants to do are against the rules,”<sup>259</sup> so people must come up with ways to access those things. Contraband can range from criminalized substances to alcohol to certain types of food, certain literature, cellphones and their parts, and a host of items that are excluded from the white list of possessions. Gangs provide a system of access.

From one perspective, gangs can be seen as kind of unsanctioned self-advocacy group. The members face unsafe conditions in the prison and the inability to gain access to goods they desire, and the gangs provide physical protection and access to the goods in acts of mutual aid. Gangs also engage in traditional types of self-advocacy. They organize nonviolent direct actions, such as boycotts to decrease prison profits, hunger strikes of food from the institution, and sit-ins or stand-ins to gain the attention of prison staff to make demands for better conditions.<sup>260</sup> In some cases, leaders of rival gangs have worked together to organize the actions.<sup>261</sup>

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254. Bonnie Kerness & Jamie Bissonette Lewey, *Race and the Politics of Isolation in U.S. Prisons*, 22 *ATL. J. COMM’N* 21, 33 (2014).

255. David Skarbek, *Prison Gangs, Norms, and Organizations*, 82 *J. ECON. BEHAV. & ORG.* 96, 96 (2012).

256. *Id.* at 97.

257. Kurisu, *supra* note 233, at 42; Jennifer M. Ortiz, *Gangs and Environment: A Comparative Analysis of Prison and Street Gangs*, 2 *AM. J. QUAL. RES.* 97, 111 (2018).

258. George W. Knox, *THE PROBLEM OF GANGS AND SECURITY THREAT GROUPS (STG’S) IN AMERICAN PRISONS AND JAILS TODAY: RECENT FINDINGS FROM THE 2012 NGCRC NATIONAL GANG/STG SURVEY* (2012), <https://www.ngcrc.com/corr2012.html> [<https://perma.cc/HRG2-4GC4>].

259. Wood, *supra* note 244.

260. Kurisu, *supra* note 233, at 49.

261. *Id.* at 54.

At the same time, gangs and their members have been responsible for violence against others in prison,<sup>262</sup> coercing others in the prison,<sup>263</sup> and exerting control over their members.<sup>264</sup> Leaders can develop unchecked power, and the paramilitary structure can be altogether illiberal. Even participation in democracy-promoting collective actions has at times been compulsive for gang members, some of whom have not even known the underlying motivation for the protest.<sup>265</sup> In the hunger strikes of California in the 2010s (protesting the long-term solitary confinement of gang leaders), some members participated because they “took [a letter from a leader] as an order from a general.”<sup>266</sup> Similarly, in dealing in the contraband market, the fact that there is no official regulation of the market, and thus no option for legal recourse, opens the door for violence as a means to resolve disputes.

Prisons have tried to control and eradicate gangs by isolating leaders in solitary confinement units and supermax prisons with twenty-four-hour lockdown.<sup>267</sup> In many instances, the only way to leave solitary confinement is to go through a years-long “debriefing” process in which the person must repudiate the gang’s activities and provide information about the gang.<sup>268</sup> Some, having already left the gang or falsely accused of being in a gang, can never complete the debriefing process and return to general population because they have no information to tell.<sup>269</sup> Actions by prisons to control or eradicate gangs have been neither fully effective nor properly targeted. Given the continued vitality of gangs, it seems that isolating leaders has not curtailed gang action. As mentioned above, in some cases gang leaders are still able to broadcast messages from isolation units.

When prison officials try to disband gangs and isolate leaders, the effects include ending the capacity for collective action at all within certain prisons.<sup>270</sup> People incarcerated in Illinois expressed that the end of gang rule led not only to the end of collective protest but also to an ethos change—it began “the age of the individual.”<sup>271</sup>

262. DeLisi et al., *supra* note 243, at 604; Meghan M. Mitchell, Chantal Fahmy, David C. Pyrooz & Scott H. Decker, *Criminal Crews, Codes, and Contexts: Differences and Similarities across the Code of the Street, Convict Code, Street Gangs, and Prison*, 38 *DEVIAN'T BEHAV.* 1197, 1208 (2017).

263. Yok-Fong Paat, Eddie Hernandez, Trina L. Hope, Jennifer Muñoz, Hector Zamora Jr., Michael H. Sanchez & Sonny Contreras, “Going Solo” or Joining Gangs While Doing Time: Perceptions of Prison Gangs Among the Formerly Incarcerated, 41 *JUST. SYS. J.* 259, 268 (2020); Wood, *supra* note 244 (describing a new-arrival questionnaire that asks about background and resources that could be valuable to the gang, which is checked against official databases and social media accounts).

264. See, e.g., Burman, *supra* note 147, at 10.

265. Kurisu, *supra* note 233, at 49, 55.

266. Benjamin Wallace-Wells, *The Plot from Solitary*, *N.Y. MAG.* (Feb. 21, 2014), <https://nymag.com/news/features/solitary-secure-housing-units-2014-2/> [<https://perma.cc/NJ5R-6KKA>].

267. Kurisu, *supra* note 233, at 66.

268. See, e.g., Sarah Kline, *Confronting Administrative Segregation in Texas: Ending Automatic Lockdown for Suspected Gang Affiliated Members*, 19 *TEX. TECH. ADMIN. L.J.* 197 (2017) (describing Texas’ GRAD program); see also Justin L. Sowa, Note, *Gods Behind Bars: Prison Gangs, Due Process, and the First Amendment*, 78 *BROOK. L. REV.* 1593, 1595 (2012).

269. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 *CALIF. L. REV.* 1115, 1128 (2015); see also Kurisu, *supra* note 233, at 102 (2018).

270. See Kurisu, *supra* note 233, at 67.

271. *Id.* at 81.

Prisons frequently misidentify and overidentify people as gang members. California's "gang validation model" assigns point values to criteria including gang-affiliated tattoos, literature, or photographs.<sup>272</sup> Expressions of ethnic identity or political radicalism can be counted as gang-related.<sup>273</sup> Racial identity, ethnicity, and geographic origin are conflated with gang affiliation.<sup>274</sup> Departments of correction have labeled all Asians or all Native Americans as gangs.<sup>275</sup> Determining whether a group is a security threat group includes nebulous and discretion-based measures, such as, in Connecticut, "patterns of expansion or decline of group membership."<sup>276</sup> Bad faith use of special restrictions for gang members also occurs, including reported retaliatory gang validation proceedings.<sup>277</sup>

Some unauthorized religious, ethnic, or political organizations are labeled gangs or security threat groups.<sup>278</sup> In Florida, a security threat group can be one that has three or more members who have a "potential to act in concert to pose a threat or potential threat" to anyone or the "secure and orderly operations" of any department of corrections agency or function.<sup>279</sup> Similarly, in Kansas, regulations state that a "security threat group" is "any ongoing formal or informal organization, association, or group of three or more persons with a common name or identifying sign or symbol, but without specific approval by the warden."<sup>280</sup>

The Free Alabama Movement (FAM) is an example of an unsanctioned underground political group that is labeled as a security threat group by the Alabama prison system.<sup>281</sup> FAM's demands include an end to mass incarceration and "modern day slavery," and its members theorize that the racialized economic exploitation of imprisoned labor is the perpetuating force behind mass incarceration

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272. 15 CAL. CODE REGS. §§ 3378.2(b)(5), (6), (13); *see also* Phillip Kassel, *The Gang Crackdown in Massachusetts' Prisons: Arbitrary and Harsh Treatment Can Only Make Matters Worse*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 37, 43 (1998) (describing a similar process in Massachusetts).

273. Wallace-Wells, *supra* note 266.

274. Dale Noll, *Building a New Identity: Race, Gangs, and Violence in California Prisons*, 66 U. MIAMI L. REV. 847, 862 (2012).

275. Bonnie Kerness, *No Separate Justice*, AM. FRIENDS SERV. COMM. (June 23, 2015), <https://www.afsc.org/friends/no-separate-justice> [<https://perma.cc/5ABY-WJE6>].

276. *Administrative Directive: Security Risk Groups (No. 6.14)*, CONN. DEP'T CORR. (2013), <https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0614pdf.pdf> [<https://perma.cc/J47X-D6M9>].

277. Sowa, *supra* note 268, at 1602.

278. Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1667–68 n.55 (2019).

279. FLA. ADMIN. CODE ANN. r. 33-601.250(1)(c) (2022).

280. KAN. ADMIN. REGS. 44-12-325(c) (2022).

281. Annabelle Parker, *'Let's Just Shut Down': An Interview with Spokesperson Ray of the Free Alabama Movement*, S.F. BAYVIEW (Dec. 2, 2014), <https://sfbayview.com/2014/12/lets-just-shut-down-an-interview-with-spokesperson-ray-of-the-free-alabama-movement/> [<https://perma.cc/WC7H-RUZQ>].

today.<sup>282</sup> The group organized work stoppages in Alabama prisons in 2014,<sup>283</sup> then nationwide in 2016 with a strike of more than 24,000 participants.<sup>284</sup> As the organization has been deemed a “security-threat group,” the members have resorted to using contraband cellphones, social media, radio programs, and print materials published to the organization’s website to conduct their political organizing.<sup>285</sup>

Regulating gangs surfaces tricky questions about prison administration. When groups exist against the institution rules, what steps is the institution justified in taking to curtail the groups’ activities? What duties does the administration have to protect individuals from coercion? Indeed, prison officials have a duty under the Eighth Amendment to protect incarcerated people from a known danger. In *Farmer v. Brennan*, the Supreme Court held that under the Eighth Amendment, prison officials have a duty to “provide humane conditions of confinement . . . [and to] ‘take reasonable measures to guarantee the safety of the inmates . . . .’”<sup>286</sup> The prison administration may not be able to guarantee physical safety due to constraints on population, space, and scarcity that are outside of the control of the prison officials.<sup>287</sup> Prison officials owe obligations to individuals facing physical risks, but in addition to those, what obligations do prison officials owe with respect to keeping out drugs and weapons that would contribute to the underground markets, which then lead to disputes resolved by violence and coercion?

282. See *Announcement of Nationally Coordinated Prisoner Workstoppage for Sept 9, 2016*, IWWW (Sept. 9, 2016, 11:07 AM), <https://archive.iww.org/content/announcement-nationally-coordinated-prisoner-workstoppage-sept-9-2016/> [<https://perma.cc/D2MU-AWR8>]; see also FREE ALABAMA MOVEMENT BOOK, FREE ALA. MOVEMENT 4, 12 (2014), <https://freealabamamovement.files.wordpress.com/2019/08/fam-book.pdf> [<https://perma.cc/E28H-2GFF>]; Bennu Hannibal Ra-Sun, *Let the Crops Rot in the Fields (Short Version)*, FREE ALA. MOVEMENT (Feb. 26, 2015), <https://freealabamamovement.wordpress.com/2015/02/26/let-the-crops-rot-in-the-fields/> [<https://perma.cc/H9T7-2CKQ>].

283. Josh Eidelson, *Exclusive: Inmates to Strike in Alabama, Declare Prison Is “Running a Slave Empire”*, SALON (Apr. 18, 2014, 5:30 PM EDT), [https://www.salon.com/2014/04/18/exclusive\\_prison\\_inmates\\_to\\_strike\\_in\\_alabama\\_declare\\_they%E2%80%99re\\_running\\_a\\_slave\\_empire/](https://www.salon.com/2014/04/18/exclusive_prison_inmates_to_strike_in_alabama_declare_they%E2%80%99re_running_a_slave_empire/) [<https://perma.cc/FM62-U29V>].

284. Daniel Teehan, *Inside the Dangerous World of Prison Organizing*, CURRENT AFF., (Apr. 2, 2021), <https://www.currentaffairs.org/2021/04/inside-the-dangerous-world-of-prison-organizing> [<https://perma.cc/7AD5-LFB4>]; IWOC, *Strike Tracking State by State 10–11*, <https://docs.google.com/document/d/1kyq-sEN5RRjWd9xDYp8Tq0U2zwquqTYHkGptnL-ZNbw/edit> [<https://perma.cc/S463-U5Z3>] (last visited Aug. 25, 2023); see also Dan Berger, *Rattling the Cages*, JACOBIN (Nov. 8, 2016), <https://www.jacobinmag.com/2016/11/prison-strike-slavery-attica-racism-incarceration/> [<https://perma.cc/ZXZ4-H5RB>].

285. See, e.g., Eidelson, *supra* note 283 (describing use of contraband cellphones by Free Alabama Movement co-founder Hannibal while in solitary confinement); BLOGTALK RADIO, *FREEALABAMAMOVEMENT*, <https://www.blogtalkradio.com/freealabamamovement/13> [<https://perma.cc/X95K-MVHE>] (Free Alabama Movement’s radio show) (last visited Aug. 25, 2023); James Kilgore, *“We’re Freedom Fighters”: The Story of the Nationwide Prison Labor Strike*, TRUTHOUT (Sept. 18, 2016), <https://truthout.org/articles/we-re-freedom-fighters-the-story-of-the-nationwide-prison-labor-strike/> [<https://perma.cc/2XQ8-V7LS>]; AL JAZEERA ENGLISH, *The Stream - The Labour Rights Fight in US Prisons*, YOUTUBE (Sept. 26, 2016), [https://www.youtube.com/watch?v=3RjCqn\\_F9ck](https://www.youtube.com/watch?v=3RjCqn_F9ck) [<https://perma.cc/8TLE-7EWR>]; Berger, *supra* note 284; Emma Grey Ellis, *How to Organize the Largest US Prison Strike Ever . . . From Inside Prison*, WIRED (Sept. 9, 2016, 10:34 AM), <https://www.wired.com/2016/09/endprisonslavery/> [<https://perma.cc/2FWS-KCYC>].

286. 511 U.S. 825, 831 (1994).

287. See, e.g., *id.* at 385 (Blackmun, J., concurring) (“The responsibility for subminimal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature.”).

The power and potential violence of gangs and other groups that act against prison rules are factors that explain or justify the intensive regulations around organizations in prisons. Even if extrinsic factors, such as limited resources, contribute to gang violence, prison administrators, who cannot resolve resource scarcities without legislative and structural changes, must still operate the prisons. While these issues and a more thorough exploration of gangs in prison merit their own paper, the next Section begins to explore these questions.

### 5. *Religious Groups*

Prisons historically employed religion as part of the schedule of reform.<sup>288</sup> Central to the history of religious groups in prison is the history of the Nation of Islam, outlined above. Religion is crucial to many incarcerated people, at rates higher than for people on the outside.<sup>289</sup> Just as on the outside, collective religious practices are a key part of worship.<sup>290</sup> For example, the tenets of Islam dictate that congregating prayer is preferable to solitary prayer.<sup>291</sup> In addition to group worship, religious groups engage in collective learning and discourse. The Five Percenters, an offshoot of the Nation of Islam, form “ciphers,” groups where members quiz each other on their beliefs, participate in one-on-one conversations, and hold conventions.<sup>292</sup>

Religious groups fill a spiritual need that is common to people everywhere and potentially more potent in prison, but they also play an important and unique role in prisons due to the relative dearth of other groups that provide mentorship, education, and community. Religious groups in prison often break along racial and ethnic lines, but otherwise they require no special skills or talent and tend not to have the exclusive membership criteria certain politically- or production-oriented groups do. Religious communities, especially the ones that are historically politically active, act as intellectual communities and sources of fellowship and support.

Some of the work that religious groups are able to do is due to their increased protection and prevalence in prisons. Due to federal legislation, religious groups in prison enjoy strict scrutiny protection, unlike other kinds of groups. In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), which established a strict scrutiny standard for evaluating the validity of any law or regulation that substantially burdened religious exercise,<sup>293</sup> including claims by

288. See, e.g., PETER SCHARFF SMITH, SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM 21 (2019).

289. Mona Chalabi, *Are Prisoners Less Likely To Be Atheists?*, FIVETHIRTYEIGHT (Mar. 12, 2015, 6:07 AM), <https://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/> [<https://perma.cc/6D8B-WLE9>].

290. See, e.g., Aviva Orenstein, *Once We Were Slaves, Now We Are Free: Legal, Administrative, and Social Issues Raised by Passover Celebrations in Prison*, 41 PEPP. L. REV. 61 (2013).

291. See, e.g., Ustaz Fadhlullah Daud, *5 Benefits of Congregational Prayers in Islam*, MUSLIM.SG (Apr. 5, 2022), <https://www.muslim.sg/articles/5-benefits-of-congregational-prayers-in-islam> [<https://perma.cc/S659-7ZRM>].

292. Sowa, *supra* note 268, at 1621. The description of the Nation of Islam earlier in this section provides a history of religious groups in prison.

293. 42 U.S.C. § 2000bb(a)(5).

people in prison.<sup>294</sup> RFRA was struck down in *City of Boerne v. Flores* in 1997,<sup>295</sup> which held that RFRA exceeded Congress's Enforcement Clause authority as applied to state governments by prophylactically protecting religious rights rather than merely enforcing them.<sup>296</sup> Then, in 2000, Congress enacted The Religious Land Use and Institutionalized Persons Act (RLUIPA), which says that state action that imposes a "substantial burden" on an incarcerated person's "religious exercise" is unlawful unless prison officials can demonstrate that burdening religious exercise is the "least restrictive means" of achieving a "compelling government interest."<sup>297</sup>

Before RLUIPA, when applying the *Turner v. Safley* test for claims coming from prison, courts disqualified claims by holding that the prison did not deny all means of practicing the religion, without engaging with the claim that the prison had burdened a discrete aspect of religious exercise.<sup>298</sup> Moreover, RLUIPA rejects a compulsion requirement and protects those aspects of religious exercise that are motivated by, not compelled by, religious belief<sup>299</sup> and aspects that are not central to a system of religious belief.<sup>300</sup>

*Cutter v. Wilkinson* placed a limitation on RLUIPA's strict scrutiny standard by requiring lower courts to "appropriately" balance religious freedoms with deference to prisons' security interests,<sup>301</sup> but in *Holt v. Hobbs*, the Court appeared to apply strict scrutiny without balancing the prison's interests.<sup>302</sup>

As a result, religious worship was plucked out of the rational-basis-level protection of other constitutional rights and enjoys the more stringent strict scrutiny review.<sup>303</sup> And, religious groups gain benefits unavailable to other groups in prison due to the heightened constitutional protection they receive. For example, in

294. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 509 (2005) (describing legislative history of RFRA) (citing REP. NO. 103-111, reprinted in 1993 U.S.C.C.A.N. 1892, 1899).

295. 521 U.S. 507, 532 (1997).

296. RFRA continues to apply to the federal government, including the BOP. See, e.g., *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001). RFRA's compelling interest test imposes a stricter standard on the government than the Free Exercise Clause, which, under *O'lane v. Estate of Shabazz*, falls under the *Turner* test. 482 U.S. 342, 349 (1967).

297. 42 U.S.C. § 2000cc-1. Congress has directed courts to give "due deference" to prison officials while applying strict scrutiny under RLUIPA. For a discussion of this, see Sarah E. Vallely, *Criminals Are All the Same: Why Courts Need to Hold Prison Officials Accountable for Religious Discrimination under the Religious Land Use and Institutionalized Persons Act*, 30 HAMLIN L. REV. 191, 241 (2007).

298. See, e.g., *DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000).

299. See 42 U.S.C. § 2000cc-5(7) (2004) ("[R]eligious exercise' includes any exercise of religion, whether or not compelled by . . . a system of religious belief."). Some circuits have ignored this portion of the statute. See Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 528 (2005) (collecting cases).

300. See 42 U.S.C. § 2000cc-5(7) (2004) ("[R]eligious exercise' includes any exercise of religion, whether or not . . . central to[] a system of religious belief.").

301. 544 U.S. 709 (2005).

302. *Holt v. Hobbs*, 574 U.S. 352 (2015).

303. Still, RLUIPA operates within the strictures of the Prison Litigation Reform Act, which requires plaintiffs to exhaust administrative remedies before filing lawsuits. 42 U.S.C. § 2000cc-2(e).

Oregon, while religious groups regularly come into the prison for services, other community groups are invited only for special events.<sup>304</sup>

### B. Blurred Boundaries

Despite these categorizations, the boundaries blur. All of these groups interact with each other as well as with institutionally instigated organizations. Religious groups are political advocacy groups. Newspapers advertise the work of other organizations and opportunities to join organizations.<sup>305</sup> Sometimes officially recognized groups sponsor or form offshoots of other groups. For instance, the *Arthur Kill Alliance* newspaper sponsored a peer-to-peer AIDS-counseling group.<sup>306</sup>

The administrations also pit associations against each other and against institutionally led groups. To control the *San Quentin News* after it broke a story about bird droppings in a mess hall, the warden gave power of the newspaper over to the institutionally powered Men's Advisory Council.<sup>307</sup> The North Carolina Prisoners' Labor Union faced resistance from the Secretary of Corrections, David L. Jones, who believed that the institutionally backed North Carolina Inmate Grievance Commission ("IGC") could handle all grievances at an administrative level that the union would take up.<sup>308</sup> The incarcerated people rejected the IGC as a puppet of the state that would prevent them from accessing legal proceedings.<sup>309</sup>

Sometimes the distinction between groups is unclear. Prison administrations sometimes suspect members of using religious groups as a cover for unsanctioned activity.<sup>310</sup> Sometimes religious groups are also considered security threat groups.<sup>311</sup>

### C. Effects

The associative work that these groups do affects their members. Despite their various functions, the associations have much in common in terms of the democracy-enhancing, communitarian, and liberal effects.

#### 1. Democracy-Enhancing Effects

Associations in prison, as on the outside, build skills that aid in promoting democratic thinking and collaboration. These can include hard skills. Education

304. Michelle Inderbitzin, Trevor Walraven & James Anderson, *Leading by Example: Ways That Prisoners Give Back to Their Communities*, in *THE VOLUNTARY SECTOR IN PRISONS*, *supra* note 116, at 108.193

305. MORRIS, *supra* note 193, at 169 (describing how the *Vacavalley Star* of California was censored for asking readers to join the Prisoners' Union); TIBBS, *supra* note 131, at 120, 122 (describing the union movement using *Outlaw* to spread its news).

306. Laura Rogers, *The Arthur Kill Alliance: Prison Newspapers and Writing Education*, in *PRISON PEDAGOGIES 200* (Sherry Rankins-Robertson & Joe Lockard eds., 2018).

307. DRUMMOND, *supra* note 191, at 68.

308. TIBBS, *supra* note 131, at 144–45.

309. *Id.* at 145.

310. See, e.g., Alexandria Symonds, *Overlooked No More: Martin Sostre, Who Reformed American Prisons From His Cell*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/obituaries/martin-sostre-overlooked.html> [<https://perma.cc/BAM9-FXV9>].

311. See, e.g., Sowa, *supra* note 268, at 1608–26 (describing several district court cases applying RLUIPA to groups that are religious in nature but also identified as STGs or gangs by prison officials).

groups, like peer-led literacy groups, improve the basic reading, writing, and speaking abilities of members,<sup>312</sup> but many groups whose primary aims are not educational also improve the technical skills of their members. Newspaper staff gain computer skills.<sup>313</sup> PLA teaches members how to read and interpret the Freedom of Information Act and Senate resolutions.<sup>314</sup>

Working together in these groups also builds other skills less technical in nature. For editors primarily, and secondarily the readers, the newspaper cultivates skills that include seeking out and engaging with different points of view, engaging in research, and developing a sense of responsibility for the writing.<sup>315</sup> Members of PACT reported growth in areas such as decision-making,<sup>316</sup> leadership,<sup>317</sup> analysis,<sup>318</sup> critical thinking,<sup>319</sup> and communication.<sup>320</sup> From watching how elder members approached problems, members are more likely to seek advice or alternative perspectives.<sup>321</sup> The same management and leadership skills apply to prison gangs.<sup>322</sup> Gaining these skills also leads to personal growth, self-motivation,<sup>323</sup> introspection,<sup>324</sup> insights about oneself,<sup>325</sup> and new ways of thinking.<sup>326</sup>

Members also report gaining tangible benefits from participating in the associations. Some of these include gaining access to information about legal cases and legislative updates.<sup>327</sup> Members of gangs report that their membership creates opportunities for financial gain,<sup>328</sup> for access to goods,<sup>329</sup> to create jobs for fellow

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312. Arana-Bressler, *supra* note 123, at 59 (providing examples of Inmate Literacy Group, Reading & Writing Project, and Helping Inmates Read).

313. DRUMMOND, *supra* note 191 at 82.

314. Huber, *supra* note 171, at 135.

315. DRUMMOND, *supra* note 191, at 247.

316. Roberts, *supra* note 173, at 102, 118.

317. *Id.* at 102, 118; *see also* Michelle Inderbitzin, Joshua Cain & Trevor Walraven, *Learning and Practicing Citizenship and Democracy Behind Bars*, in *THE VOLUNTARY SECTOR IN PRISONS*, *supra* note 116, at 63 (describing prisoner-led clubs and coauthored with elected leaders of the Lifers' Unlimited Club at the Oregon State Penitentiary).

318. Huber, *supra* note 171, at 102, 118.

319. *Id.* at 106.

320. *Id.* at 103; *see also* Michelle Inderbitzin, Joshua Cain & Trevor Walraven, *Learning and Practicing Citizenship and Democracy Behind Bars*, in *THE VOLUNTARY SECTOR IN PRISONS*, *supra* note 116, at 63) (describing prisoner-led clubs and coauthored with elected leaders of the Lifers' Unlimited Club at the Oregon State Penitentiary).

321. Huber, *supra* note 171, at 113.

322. Notably, multiple incarcerated scholars have written about the positive effects of gangs. Inderbitzin et al., *supra* note 317, at 64 (demonstrating how two incarcerated lifers described gang leaders as gaining the managerial skills and using a family-orientated leadership style); *see also* Sanchez, *supra* note 278.

323. Huber, *supra* note 171, at 102.

324. *Id.* at 118.

325. *The Study Groups*, DREAMING FREEDOM PRACTICING ABOLITION (last visited Mar. 9, 2022), <https://abolitioniststudy.wordpress.com/about-the-study-groups/> [https://perma.cc/3TR8-CE36].

326. *Id.*

327. Huber, *supra* note 171, at 108.

328. Burman, *supra* note 147.

329. John Winterdyk & Rick Ruddell, *Managing Prison Gangs: Results from a Survey of U.S. Prison Systems*, 38 J. CRIM. JUST. 730, 733 tbl.1 (2010).



members,<sup>330</sup> and to provide mutual aid.<sup>331</sup> So too do gangs give access to disallowed items, such as alcohol, drugs, and weapons.

Moreover, every type of group has significant ties to people on the outside. These outside community members provide material resources, training, and social capital.<sup>332</sup> For some newspapers, professors establish the presses through a class or college activity. In the case of *San Quentin News*, outside advisors and sponsors play a large role in helping shape the paper, funding it, and sharing it among a wide readership on the internet and in print.<sup>333</sup> The North Carolina Prisoners' Labor Union had outside support, including from the North Carolina AFL-CIO and the national office in California.<sup>334</sup> Some long-lasting organizations have volunteers who work as external representatives or directors of the organization.<sup>335</sup> For covert groups like the Free Alabama Movement, outside partners are necessary to connecting the inside organizers with each other.<sup>336</sup> Gangs also have outside and inside components, whose movements influence each other. The relationship with people on the outside can be fraught. Some groups have had to limit their dependence on outside partners. The first iteration of the North Carolina Prisoners' Labor Union had its funds and membership cards stolen by an outside organizer.<sup>337</sup>

Some groups strengthened preexisting relationships with people on the outside—and thus increased all parties' political reach. PACT organized people in Green Haven to encourage their network on the outside to vote, lobby, or protest.<sup>338</sup> In the 1970s through the 1990s, PACT worked with other groups in the prison, such as the Green Haven branches of the NAACP, Hispanics United for Progress, veterans associations, Caribbean African United, and the Jaycees to organize a conference about legislative issues that brought in outside organizations, prison administrators, and legislators.<sup>339</sup>

## 2. Communitarian Effects

Many of the effects reported by members have to do with community. These effects are mutual across the types of groups. Members of PLA, for example, suggested the group provided social support they were unable to find in other settings.<sup>340</sup> One member reported that other members looked forward to his attendance.<sup>341</sup> Some members mentioned that other members relied on them for specific skills or information.<sup>342</sup> But many reported that the group valued every

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330. Seth Ferranti, *This Is What It's Like to Belong to a Prison Gang in the Deep South*, VICE (June 17, 2015, 7:30 AM), <https://www.vice.com/en/article/dp57zq/this-is-what-its-like-to-belong-to-a-prison-gang-in-the-deep-south-617> [<https://perma.cc/8MTV-UL49>].

331. Skarbek, *supra* note 255, at 104.

332. Arana-Bressler, *supra* note 123, at 78.

333. *See infra* Section II.B.

334. TIBBS, *supra* note 131, at 135-36.

335. Arana-Bressler, *supra* note 123, at 78.

336. *See e.g.*, Teehan, *supra* note 284.

337. *Id.*

338. Roberts, *supra* note 173, at 87.

339. *Id.*

340. Huber, *supra* note 171, at 111.

341. *Id.* at 112.

342. *Id.* at 112.

member “simply because every member is important.”<sup>343</sup> Gang members, too, report overcoming feelings of isolation<sup>344</sup> and feeling a sense of belonging<sup>345</sup> from being in the gang.

The groups also build mutual care. Peer educators discover that they can help others, which empowers them, gives them fulfillment,<sup>346</sup> and makes them feel a sense of “embeddedness” within a community.<sup>347</sup> One PLA member reported that he trusted all group members with respect to affairs related to the group.<sup>348</sup> Gang members report feeling that they are protected from violence.<sup>349</sup> A PLA member also mentioned that feeling that others would support him if he was physically attacked relieved stress, while others mentioned that knowing that others were in their situation decreased their stress.<sup>350</sup> The mutual care manifests in tangible support as well. When PLA members passed away, the board members organized group support for their families.<sup>351</sup>

Another side of mutual care is solidarity. When PLA decided to support a Senate resolution that would benefit only members with second-degree murder charges, some supported the resolution as a potential positive for those members, though it would not benefit them.<sup>352</sup>

Some of the sense of community crosses group boundaries. Self-advocacy groups, sporting and recreational groups, newspaper rooms, and gangs alike bring together people of different races, ages, personalities, convictions, time incarcerated, values, and religions.<sup>353</sup>

The communitarian effects of the associations are especially needed because incarceration disrupts preexisting community and relationships. Separated from their families, PLA members found that the organization filled certain familial roles. One PLA member described the association as “a living entity, almost like a parent.”<sup>354</sup> One member describes his own role in PLA as “like a parent.”<sup>355</sup> Most particularly, members of gangs and gang-like groups highlight that the organization stands in for family. One woman in a “pseudo-family,” what some term as the women’s equivalent of a gang, described wanting to do what she was unable to do

343. *Id.* at 102.

344. Meghan M. Mitchell, Chantal Fahmy, David C. Pyrooz & Scott H. Decker, *Criminal Crews, Codes, and Contexts: Differences and Similarities across the Code of the Street, Convict Code, Street Gangs, and Prison*, 38 *DEVIANT BEHAV.* 1197, 1209 (2017).

345. Winterdyk & Ruddell, *supra* note 329, at 733 tbl.1.

346. Grant J. Devilly, Laura Sorbello, Lynne Eccleston & Tony Ward, *Prison-Based Peer-Education Schemes*, 10 *AGGRESSION & VIOLENT BEHAV.* 219, 231 (2005).

347. *Id.* at 231.

348. Huber, *supra* note 171, at 88.

349. Dale Noll, *Building a New Identity: Race, Gangs, and Violence in California Prisons*, 66 *U. MIAMI L. REV.* 847, 862 (2012); Glass, *supra* note 243, at 23 (collecting sources); *see, e.g.*, Dennis Mintun, *My Gay Prison Gang Fights Neo-Nazis*, MARSHALL PROJECT (Sept. 6, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/09/06/my-gay-prison-gang-fights-neo-nazis> [<https://perma.cc/LS7F-QLWU>] (describing forming a protection group for LGBTQ individuals).

350. *Id.* at 116.

351. Huber, *supra* note 171, at 68.

352. *Id.*

353. *Id.* at 101; Kurisu, *supra* note 234, at 56; Jorgensen, *supra* note 103, at 39.

354. Huber, *supra* note 171, at 90.

355. *Id.* at 92.

with her own daughters with others' children who are in prison with her.<sup>356</sup> Another woman described "families" as giving her hope while she is away from her own family.<sup>357</sup>

At the same time, some group members highlight the special relationship of "associate" as distinct from family or friends. Many members of PLA indicated that while they did make some *friends* through the group, they made many new *associates* through PLA and had contact with more people than before they joined.<sup>358</sup>

### 3. Liberal Effects

Finally, some of the most profound effects of the groups are those that have to do with the importance of the freedom of the individual to choose their attachments, and how these attachments relate to identity. Associations work against the identity stripping aspects of incarceration.

Participants in associations describe the value of having something that works against the oppressive qualities of prison life. PLA participants described PLA as "therapeutic. . . something to look forward to," a source of "hope," "our support group," and "all we have."<sup>359</sup> Members in PLA also recounted that the group activities kept their minds off of topics that would have made them feel sad.<sup>360</sup> Study group participants identified benefits such as having purpose, having something to think about,<sup>361</sup> and breaking the monotony.<sup>362</sup> Newspaper editors also reported having an opportunity to make decisions in a life where most decisions are taken away.<sup>363</sup> Moreover, having such a project as a newspaper can allow people to gather without supervision.<sup>364</sup>

Some of the effects relate directly to identity. Belonging to an organization—and having a role within that organization and by extension in the prison—can contribute to identity building. Newspaper staffs reframe their identities as members of the press.<sup>365</sup> Gang members report gaining a sense of meaning, pride,<sup>366</sup> identity, and status.<sup>367</sup> One former gang member reports the difficulty of leaving the gang in order to leave solitary confinement. He explained, "I think destroying

356. Craig J. Forsyth & Rhonda D. Evans, *Reconsidering the Pseudo-Family/Gang Gender Distinction in Prison Research*, 18 J. POLICE & CRIM. PSYCH. 15, 19 (2003).

357. *Id.* at 20.

358. Huber, *supra* note 171, at 103.

359. *Id.* at 123, 124.

360. *Id.* at 114.

361. Jorgensen, *supra* note 103, at 50.

362. Caspersen, *supra* note 206, at 84.

363. MORRIS, *supra* note 193, at 18 ("[Wilbert Rideau described the daily routine:] You can become like an old knife that has grown rusty.").

364. Caspersen, *supra* note 206, at 84.

365. Eleanor Novek, *The Devil's Bargain: Censorship, Identity and the Promise of Empowerment in a Prison Newspaper*, 6 JOURNALISM 5, 6 (2005).

366. Seth Ferranti, *This Is What It's Like to Belong to a Prison Gang in the Deep South*, VICE (June 17, 2015, 2:30 PM), <https://www.vice.com/en/article/dp57zq/this-is-what-its-like-to-belong-to-a-prison-gang-in-the-deep-south-617> [<https://perma.cc/8MTV-UL49>].

367. Winterdyk & Ruddell, *supra* note 329, at 733 tbl.1.

myself, my gang alter ego, was [the hardest part of dropping out of the gang] . . . I was mourning my own death.”<sup>368</sup>

Of course, certain types of identity and status can be oppressive to others. Moreover, in prison, manifestations of liberty are complicated. With a limit to the supply of organizations and with exclusive memberships,<sup>369</sup> certain members enjoy status and material benefits to the detriment of non-members. Due to similar peculiarities of prison, related to scarcity of resources and of choice, institutional control, and power differences based on institutional backing, leaders of organizations can hold enormous power. Some editors, such as William “Old Wooden Ear” Sadler, edited both *The Angolite* and the *Angola Argus* and cofounded *This Is It*, a Tennessee prison newspaper.<sup>370</sup> Charismatic editors, such as Charles Chapin of the *Sing Sing Bulletin*, had an outsized role in shaping the paper.<sup>371</sup> Gang leaders in paramilitary organizations exercise immense control over their members, including controlling whether hundreds or thousands participate in hunger strikes.<sup>372</sup> In its briefing in *Jones*, North Carolina argued about “big wheel theory,” in which the union leader would organize “underlings to support him and enforce his demands.”<sup>373</sup> Incarcerated group leaders, too, caution against “over empowerment” of club leaders.<sup>374</sup>

Should incarcerated individuals have a right to choose how they associate despite these dangers? What obligations do prison administrators have to protect members from such coercion? Recall the questions mentioned in the Gangs Section. Similar themes apply across all organizations. The next part of the Article will explore some of the ways that states and prison systems attempt to protect people in prison from certain organizations or leaders, as well as the ways that prison administrations attempt to maintain control over the groups.

#### D. Regulations of Associations in Prison

As with other aspects of life in prison, organizations run by incarcerated people are heavily regulated. These regulations, in one sense, are attempts to prevent violence or coercion at the hands of unchecked group leaders. At the same time, they limit the life of groups that do beneficial and even needed work, oftentimes based on rigid ideas of rehabilitation or control. Without regulation, prisons might be run by powerful groups and leaders who may not operate with everyone’s interests in mind. With the current level of regulation, only certain groups are able to exist, and the leaders of those groups gain outsized power.

At the outset, around half of the states do not appear to contemplate organizations or formal groups at all,<sup>375</sup> other than disallowed groups like gangs or

368. Burman, *supra* note 147, at 208.

369. Roberts, *supra* note 173, at 62.

370. Mitchell, *supra* note 192, at 37, 45.

371. MORRIS, *supra* note 193, at 106.

372. *See infra* Part II.

373. TIBBS, *supra* note 131, at 171.

374. Inderbitzin et al., *supra* note 317, at 77.

375. These states include Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Maryland, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Louisiana, Utah, Vermont, Virginia, West Virginia, Wyoming. Spies v.

“security threat groups.”<sup>376</sup> In those states, incarcerated people still form informal groups under the auspices of an outside-sponsored program or congregate underground.<sup>377</sup>

For the states that do formally recognize groups, often called “inmate organizations,” the regulations restrict those sanctioned groups in three ways: they impose burdens on formation and continued existence, they restrict membership, and they control the group’s activities and finances.<sup>378</sup>

### 1. Burdens on Formation and Continued Existence

Prison systems that allow incarcerated individuals to form organizations require that requests for recognition of the proposed group be submitted to the prison administration.<sup>379</sup> Most require the application to include a constitution, bylaws, membership criteria, purpose of group with listed expected benefits,<sup>380</sup> and organization of an executive board.<sup>381</sup> In California, the name must reflect the group’s nature and interest, and changes in the bylaws must be approved.<sup>382</sup> In Ohio, individuals are explicitly not allowed to engage in unauthorized association, but in the select times when they must gather information in support of an

Voinovich, 173 F.3d 398, 405–06 (6th Cir. 1999) (describing prohibition on groups led by incarcerated people at North Central Correctional Institution in Marion, Ohio).

376. *Administrative Directive: Security Risk Groups (No. 6.14)*, CONN. DEP’T CORR. (3)(C), (3)(D), (13) (2013), <https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0614pdf.pdf> [<https://perma.cc/JR3Y-WVRT>].

377. See, e.g., Teehan, *supra* note 284.

378. These categories track Mazzone’s list of burdens: preventing formation, burdens on associations and individuals (such as disrupting meetings), burdens on popular sovereignty criteria (such as on fundraising, recruitment, dissemination of information, or social capital), and burdens on membership selection. Mazzone, *supra* note 23, at 759–61. These regulations also mimic non-profit organizations’ regulations.

379. See, e.g., 28 C.F.R. § 551.31 (requiring a request for recognition of a proposed organization to the Warden, requiring a constitution, bylaws, and designated duties and responsibilities for officers); CAL. CODE REGS. tit. 15, § 3020(a); IOWA DEP’T CORR. POL’Y & PROC. OP-RA-02 § III(A)(1), [https://doc.iowa.gov/sites/default/files/op-ra-02\\_incarcerated\\_individual\\_organizations.pdf](https://doc.iowa.gov/sites/default/files/op-ra-02_incarcerated_individual_organizations.pdf) [<https://perma.cc/FYA6-HAL4>]; MICH. POLICY DIRECTIVE 05.03.100(K), [https://www.michigan.gov/documents/corrections/05\\_03\\_100\\_503671\\_7.pdf](https://www.michigan.gov/documents/corrections/05_03_100_503671_7.pdf) [<https://perma.cc/VFL5-9HT5>].

380. CAL. CODE REGS. tit. 15, § 3234; ME. POLICY No. 24.9 § VI(A)(4), <https://www.maine.gov/corrections/sites/maine.gov.corrections/files/inline-files/24%2009%20Prisoner%20Civic%20Groups.pdf> [<https://perma.cc/FR3N-53KB>]; MICH. POLICY No. DOC 5.5.2(A)(2), <https://cor.mt.gov/DataStatsContractsPoliciesProcedures/DataDocumentsandLinks/DOCPolicies/Chapter5/5.5.2-Inmate-Organizations.pdf> [<https://perma.cc/MY5H-ZLUK>]; NEB. POLICY No. 113.19 § I, [https://www.corrections.nebraska.gov/system/files/rules\\_reg\\_files/113.19\\_2022.pdf](https://www.corrections.nebraska.gov/system/files/rules_reg_files/113.19_2022.pdf) [<https://perma.cc/KJ6X-USGN>] (requiring a list including “method . . . to foster an attitude which benefits the community,” “manner . . . club will give back to the community,” goals, how members will grow, and how members will be held accountable to the club’s goals and expectations); N.J. ADMIN. CODE § 10A:12-2.2; OHIO ADMIN. CODE 5120-9-37(G).

381. ME. POLICY No. 24.9 § VI(B)(1), <https://www.maine.gov/corrections/sites/maine.gov.corrections/files/inline-files/24%2009%20Prisoner%20Civic%20Groups.pdf> [<https://perma.cc/NE9J-N725>].

382. OPERATIONS MANUAL, CAL. DEP’T CORR. & REHAB., ch. 10, art. III § 101030.4, [https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2021/05/DOM\\_2021\\_ADA.pdf](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2021/05/DOM_2021_ADA.pdf) [<https://perma.cc/VJ4Q-6MBK>]; Cal. Code Regs. tit. 15, § 3234.

application to form an organization, individuals are allowed to associate amongst each other.<sup>383</sup> The prison administrators are de facto empowered as the board of trustees of these organizations.<sup>384</sup>

The organizational constitution and bylaws can be binding. The policies tend to stipulate that the approval of the groups may be suspended for noncompliance with prison policy,<sup>385</sup> reasons of security, order, or discipline of the institution,<sup>386</sup> or failure to meet audit.<sup>387</sup> However, some administrators even suspend groups or sanction members for violating or exceeding their own bylaws.<sup>388</sup> In this way, the infrastructures of these organizations add to the byzantine rules systems of the prison and act as tripwires for sanctions.

Many prison systems specify that, to be approved, the organization must have purposes that are deemed by staff to be sufficiently beneficial or useful for perceived rehabilitation. Examples of phrasing of purpose requirements include “benevolent purposes,”<sup>389</sup> “educational, social, cultural and recreational” purposes,<sup>390</sup> promoting public service,<sup>391</sup> promoting self-improvement,<sup>392</sup> or promoting “the facility’s interest in safety and security.”<sup>393</sup> On the other hand, in Kansas, the group simply needs to occupy time.<sup>394</sup> In California, the regulation about purpose is blunt. A group is only permitted if it “provides a [unique] benefit to the participants justifying the use of state staff time, materials and facilities.”<sup>395</sup> In Iowa, groups are not to be used “as a vehicle to voice individual disenchantment or promote dissension/disharmony.”<sup>396</sup> These rules limit the range of organizations that can exist.

383. OHIO ADMIN. CODE 5120-9-37(E).

384. *Id.*

385. *See, e.g.*, 28 C.F.R. § 551.34(e).

386. *See, e.g., id.*; CAL. CODE REGS. Tit. 15, § 3235(a)(1); N.J. ADMIN. CODE § 10A:12-2.8.

387. MICH. POLICY No. DOC 5.5.2(A)(3), Policy No. DOC 5.5.2(A)(3)

388. CAL. CODE REGS. Tit. 15, § 3235(2); WIS. ADMIN. CODE DOC § 309.365(7).

389. 28 C.F.R. § 551.30 (permitting approved organizations in the Federal Bureau of Prisons for “social, civic, and benevolent purposes”).

390. CAL. CODE REGS. Tit. 15, § 3233; S.D. 1.5.F.4 § III, <https://doc.sd.gov/documents/InmateReligiousandCulturalActivities.pdf> [<https://perma.cc/JQ79-GNX3>] (only allowing cultural groups).

391. CONN. ADMIN. DIRECTIVE 10.5(6), <https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad1005pdf.pdf> [<https://perma.cc/LH6D-983R>].

392. Mass. 103 DOC 473.01, <https://www.mass.gov/doc/doc-473-inmate-self-improvement-groups/download> [<https://perma.cc/7L9T-5XBH>]; Inmate Self Help Groups, NEW MEXICO CD-107000, <https://www.cd.nm.gov/wp-content/uploads/2019/06/CD-107000.pdf> [<https://perma.cc/454S-FEHN>].

393. OR. ADMIN. R. 291-145-0015(3).

394. *Internal Management Policy and Procedure*, KAN. DEP’T CORR. § 10-108, <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-10/10-108d.pdf/view> [<https://perma.cc/R2BV-QFPN>].

395. OPERATIONS MANUAL, CAL. DEP’T CORR. & REHAB., ch. 10, art. III § 101030.5, <https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2023/05/2023-DOM.pdf> [<https://perma.cc/8NDD-E27Z>].

396. Policy and Procedures, IOWA DEP’T OF CORR., OP-RA-02 § III(B), [https://doc.iowa.gov/sites/default/files/op-ra-02\\_incarcerated\\_individual\\_organizations.pdf](https://doc.iowa.gov/sites/default/files/op-ra-02_incarcerated_individual_organizations.pdf) [<https://perma.cc/FYA6-HAL4>].

Some states do not specify that incarcerated people can form organizations, but merely allow for working together on “hobby craft activities,”<sup>397</sup> general recreational activities,<sup>398</sup> sports,<sup>399</sup> or musical bands.<sup>400</sup> However, in Massachusetts, South Carolina, and Michigan, no incarcerated individual is allowed to work in another’s approved hobby-craft.<sup>401</sup> These regulations do not contemplate longer-standing, organized groups, but rather allow ad hoc shared experiences.

## 2. Membership Restrictions

States also limit who may join these organizations.<sup>402</sup> Michigan and New Jersey allow only certain general population members to join organizations.<sup>403</sup> New York and Oregon limit the number of “inmate organizations” one person can join to three.<sup>404</sup>

Some states allow for groups to exist only with an outside sponsor.<sup>405</sup> States such as California allow groups to exist with an outside sponsor, but require specific approval to conduct the sponsoring organization’s activities.<sup>406</sup> In New York, until recent years, organizations needed to have an outside sponsor to be approved.<sup>407</sup> In these cases, prison administrations push a class model, in which outside “civilians”

397. See, e.g., IDAHO DEP’T CORR. POL’Y 608, <http://forms.idoc.idaho.gov/WebLink/0/edoc/273703/Hobby%20Craft%20Activities%20-%20POLICY.pdf> [<https://perma.cc/DB24-L3TA>].

398. IND. POL’Y & ADMIN. PROC. 01-03-105 § VIII(B), [https://www.in.gov/idoc/files/01-03-105\\_Recreation\\_8-1-2014.pdf](https://www.in.gov/idoc/files/01-03-105_Recreation_8-1-2014.pdf) [<https://perma.cc/X89M-923D>]; 501 KY. ADMIN. REGS. 7:130 § 3 (noting that recreation programs may include board games, arts and crafts, radio and television, or other activities designed to relieve idleness and boredom).

399. IDAHO DEP’T CORR. POL’Y 609.05.02.00 (allowing for competition between “inmate teams and outside teams” with permission); ILL. ADMIN. CODE tit. 20, § 701.260(c) (providing for exercise for one hour a day “unless the jail administrator determines that participation in such activity by a particular detainee or group is harmful or dangerous to the security or morale of the facility”); IND. POL’Y & ADMIN. PROC. 01-03-105 § VIII(A), [https://www.in.gov/idoc/files/01-03-105\\_Recreation\\_8-1-2014.pdf](https://www.in.gov/idoc/files/01-03-105_Recreation_8-1-2014.pdf) [<https://perma.cc/X89M-923D>] (allowing team sports and fitness group activities with registration); WY. POL’Y 5.300 § II(K)(3), <https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmvdvnxkb2N8Z3g6MzVmMjMyNzE3MGRlYzM1Ng> [<https://perma.cc/PNF8-LV4P>].

400. IND. POL’Y & ADMIN. PROC. 01-03-105 § XXV, [https://www.in.gov/idoc/files/01-03-105\\_Recreation\\_8-1-2014.pdf](https://www.in.gov/idoc/files/01-03-105_Recreation_8-1-2014.pdf) [<https://perma.cc/X89M-923D>].

401. MASS. 103 CMR 477.08(4); MICH. POLICY DIRECTIVE 05.03.102(B); S.C. PS-10.06 1.8, <https://doc.sc.gov/sites/doc/files/Documents/policy/PS-10-06.pdf> [<https://perma.cc/PU67-AL3P>].

402. See, e.g., Arana-Bressler, *supra* note 123, at 32.

403. MICH. POLICY DIRECTIVE 05.03.100(J), [https://www.michigan.gov/documents/corrections/05\\_03\\_100\\_503671\\_7.pdf](https://www.michigan.gov/documents/corrections/05_03_100_503671_7.pdf) [<https://perma.cc/HH84-85MR>]; N.J. Admin. Code § 10A:12-2.3.

404. N.Y. Directive No. 4760 § III(A)(4), <https://doccs.ny.gov/system/files/documents/2023/02/4035.pdf> [<https://perma.cc/6FXJ-67LT>]; OR. ADMIN. R. 291-145-0020(2).

405. See, e.g., CODE ARK. R. 004.03.1-832(C) (“[E]fforts shall be made to involve citizen groups from all communities with inmate groups—including minority self-help groups and other administration-sponsored activities . . . .”); GA. COMP. R. & REGS. 125-3-5-.08 (“[I]nmates may be allowed to participate in programs of volunteer service for nonprofit organizations in a manner which does not otherwise violate the Constitution of the State of Georgia.”); MICH. POLICY DIRECTIVE 05.03.100(I), [https://www.michigan.gov/documents/corrections/05\\_03\\_100\\_503671\\_7.pdf](https://www.michigan.gov/documents/corrections/05_03_100_503671_7.pdf) [<https://perma.cc/HH84-85MR>].

406. CAL. CODE REGS. tit. 15, § 3237 (a)–(b).

407. See Interview with Sean Kyler, *supra* note 249.

educate incarcerated participants, rather than allowing agential organizations centered around the goals of the incarcerated individuals. Moreover, these rules also limit the diversity of groups that can emerge based on interest, availability, and prison approval of outside partners.

### 3. Control Over Operation and Finances

Even after gaining approval to form and providing bylaws and a constitution, groups are required to be supervised by staff.<sup>408</sup> In some states, the staff member must attend all meetings.<sup>409</sup> This disrupts the ability for members to speak or form bonds freely. Moreover, the activities of the groups must be approved by the warden or other administrator.<sup>410</sup> For example, in the federal prisons and some states, even meetings require specific approval.<sup>411</sup> On top of that, states require groups to maintain accurate records of their activities, in some cases to be submitted monthly.<sup>412</sup>

Many regulations are meant to curb the power organizations can build. To that end, almost all states have rules controlling the organizations' money. Michigan prohibits organizations from collecting dues.<sup>413</sup> In some states, the regulations say that dues may only be collected if they are required by the sponsoring outside organization and collected by that organization. In some of those cases, the prison administration has to approve the rate and method of collection and none of the dues may be kept by the prison group.<sup>414</sup>

States are also careful to not allow the organizations to become businesses. Indiana and Pennsylvania explicitly prohibit incarcerated people from operating a business.<sup>415</sup> In New Jersey, the groups are not allowed any unapproved profit.<sup>416</sup> Nebraska disallows one club to have multiple business units.<sup>417</sup>

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408. 28 C.F.R. § 551.32 (requiring staff act as “Inmate Organization Manager”); CAL. CODE REGS. tit. 15, § 3234(d); IOWA DEP’T CORR. POL’Y & PROC. OP-RA-02 § III(A)(1), [https://doc.iowa.gov/sites/default/files/op-ra-02\\_incarcerated\\_individual\\_organizations.pdf](https://doc.iowa.gov/sites/default/files/op-ra-02_incarcerated_individual_organizations.pdf) (“All meetings and activities of an approved organization shall be supervised by designated staff.”).

409. OHIO ADMIN. CODE 5120-9-37(L).

410. 28 C.F.R. § 551.34(a) (requiring an officer to submit a written request for approval of an “activity”).

411. 28 C.F.R. § 551.34(a); *see also* MICH. POL’Y DIRECTIVE 05.03.100(M); Nev. AR 801.04(4), [https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative\\_Regulations/AR%20800%20-%20No%20Changes.pdf](https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20800%20-%20No%20Changes.pdf) [<https://perma.cc/PTB3-8HWX>]; WIS. ADMIN. CODE DOC § 309.365(3).

412. *See, e.g.*, 28 C.F.R. § 551.34(d); N.J. ADMIN. CODE § 10A:12-2.6 (requiring monthly reports); PA. POL’Y STATEMENT 7.8.1§ 7(B), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/07.08.01%20Inmate%20Recreational%20and%20Therapeutic%20Activities%20Policy%20and%20Procedures.pdf> [<https://perma.cc/8GCQ-EXEJ>].

413. MICH. POL’Y DIRECTIVE 05.03.100(J).

414. *See* 28 C.F.R. § 551.33 (disallowing payment of dues for an individual who lacks funds); OR. ADMIN. R. 291-145-0020(6).

415. IND. POL’Y & ADMIN. PROC. 02-01-116 § II, [https://www.in.gov/idoc/files/02-01-116\\_Offender\\_Business\\_Activities\\_5-16-06.pdf](https://www.in.gov/idoc/files/02-01-116_Offender_Business_Activities_5-16-06.pdf) [<https://perma.cc/YSW5-GJHK>]; MD. DIV. CORR. DIRECTIVE DOC.200.0004.05 (A), <https://itcd.dpscs.state.md.us/PIA/ShowFile.aspx?fileID=1142> [<https://perma.cc/4D22-KHFQ>]; PA. POL’Y STATEMENT 7.8.1§ 7(I).

416. N.J. ADMIN. CODE § 10A:12-2.4.

417. NEB. POL’Y No. 113.19 § I, [https://www.corrections.nebraska.gov/system/files/rules\\_reg\\_files/113.19\\_2021.pdf](https://www.corrections.nebraska.gov/system/files/rules_reg_files/113.19_2021.pdf) [<https://perma.cc/KJ6X-USGN>].



The regulations, generally, also require the groups to be responsible for their own supplies. In Ohio, groups must remain solvent.<sup>418</sup> Certain rules designate that groups must pay for their own postage.<sup>419</sup> At any group event, food is key. Several states specify how food is to be served: Kentucky and Nebraska require that food must be bought from an approved vendor,<sup>420</sup> and Maine allows “doughnuts or other food items” to be requested at the group’s expense.<sup>421</sup>

Relatedly, fundraising is heavily regulated. Some prisons allow fundraising with approval by the Warden.<sup>422</sup> California allows groups to conduct three fundraising campaigns a year<sup>423</sup> and has a procedure for disbursing the funds of a disbanded group.<sup>424</sup> New York enumerates a list of reasons one can donate to an organization and prohibits one organization from donating to another.<sup>425</sup> Ohio specifies that the fundraisers cannot compete with the prison commissary.<sup>426</sup> In Michigan, funds can only be solicited and received from the sponsoring organization and the Prisoner Benefit Fund.<sup>427</sup> In Massachusetts, donations cannot be made to an in-prison group on behalf of someone else.<sup>428</sup> Some states do not allow groups to fundraise at all.<sup>429</sup>

Underlying is a sense of unease with what organizations could do with funds, the supply of which prisons have kept low. The tight regulation of funds may be meant to prevent groups or their leaders gaining coercive power. At the same time, often groups need money for basic supplies, such as ink and paper for newsletters. Moreover, groups often fundraise for charitable causes, including to support their home communities.<sup>430</sup> For example, the Sing Sing prison group Voices From

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418. OHIO ADMIN. CODE 5120-5-07(C).

419. 28 C.F.R. § 540.21(c) (2020); KAN. ADMIN. REGS. 44-12-601(f)(4) (1980).

420. KY. CORR. POL’Y & PROC., No. 11.1 § II(D)(1) (2018), <https://corrections.ky.gov/About/cpp/Documents/11/ CPP%2011.1.pdf> [<https://perma.cc/6WN4-2SNB>] (specifying that groups may hold special functions, but the group needs to provide food at no cost to the prison system); NEB. POL’Y No. 113.19 § XIV (1993), [https://www.corrections.nebraska.gov/system/files/rules\\_reg\\_files/113.19\\_2021.pdf](https://www.corrections.nebraska.gov/system/files/rules_reg_files/113.19_2021.pdf) [<https://perma.cc/KJ6X-USGN>].

421. ME. POL’Y No. 24.9 § VI(C)(6) (2009), <https://www.maine.gov/corrections/sites/maine.gov/corrections/files/inline-files/24%2009%20Prisoner%20Civic%20Groups.pdf> [<https://perma.cc/NE9J-N725>].

422. IOWA DEP’T CORR. POL’Y & PROC. OP-RA-02 § III(C) (2021), [https://doc.iowa.gov/sites/default/files/pi-601\\_commissary\\_for\\_offenders.pdf](https://doc.iowa.gov/sites/default/files/pi-601_commissary_for_offenders.pdf); MICH. ADMIN. CODE R 791.6639(3) [<https://perma.cc/FYA6-HAL4>].

423. CAL. CODE REGS. tit. 15, § 3240(a).

424. *Id.* at § 3234(f).

425. N.Y. DIRECTIVE No. 4761 § VI(A), (C) (2017), <https://doccs.ny.gov/system/files/documents/2022/12/4761.pdf> [<https://perma.cc/4CEM-6HZA>].

426. OHIO ADMIN. CODE 5120-5-07(B) (2014), <https://codes.ohio.gov/ohio-administrative-code/rule-5120-5-07> [<https://perma.cc/76Q2-HHKJ>].

427. MICH. POL’Y DIRECTIVE 05.03.100(P) (2015), [https://www.michigan.gov/documents/corrections/05\\_03\\_100\\_503671\\_7.pdf](https://www.michigan.gov/documents/corrections/05_03_100_503671_7.pdf) [<https://perma.cc/HH84-85MR>].

428. 103 MASS. CODE REGS. 405.15.

429. *See, e.g.*, 28 C.F.R. § 551.34(a) (disallowing “fund-raising projects”).

430. For example, the Association for Community Teamwork bought and distributed holiday toys to children with incarcerated parents. *Powell v. Goord*, 34 A.D.3d 876, 876–77 (2006).

Within in New York raised roughly \$8,000 to conduct a gun buy-back in Brooklyn.<sup>431</sup> Some groups conduct fundraising for political campaigns.<sup>432</sup>

#### 4. *Forbidden Activities*

Even when organizations are allowed, concerted political activity is generally not. In most states, being involved in a “riot,”<sup>433</sup> work stoppage,<sup>434</sup> hunger strike,<sup>435</sup> disturbance,<sup>436</sup> demonstration,<sup>437</sup> or disruption are infractions or penal offenses.<sup>438</sup> Nevada makes it a violation to be a part of a “subversive group.”<sup>439</sup> North Dakota and Ohio do not allow unauthorized groups of two or more people to gather; in New York, the number is six.<sup>440</sup> Washington forbids two or more people “to engage in regimented exercise, which includes doing calisthenics together while instructions are shouted, shouting instructions for another group of offenders to follow, or reciting cadences.”<sup>441</sup>

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431. John J. Lennon, *A Prison Journalist's Q&A with a Justice Advocate*, HARV. L. REC. (Oct. 12, 2017), <http://hlrecord.org/a-prison-journalists-qa-with-a-justice-advocate/> [<https://perma.cc/DL3X-XQ4S>].

432. *See, e.g.*, Appellate Brief, at 19, *Mass. Prisoners Ass'n Pol. Action Comm. v. Acting Governor*, 435 Mass. 811 (2002) (No. 2000-P-1359), 2001 WL 34920047.

433. ALA. DEP'T CORR., MALE INMATE HANDBOOK 48 (2017), <http://www.doc.state.al.us/docs/PublicMaleInmateHandbook.pdf> [<https://perma.cc/UVX7-M363>]; CAL. CODE REGS. tit. 15, § 3005(d)(3); 103 MASS. CODE REGS. 430.24 1-13 (2019).

434. ALA. DEP'T CORR., *supra* note 423, at 48 (2017) (“ENCOURAGING OR CAUSING OTHERS TO STOP WORK – Self-explanatory” is listed as a High Level violation); ALASKA ADMIN. CODE tit. 22, § 05.400(c)(10) (1999) (work stoppage participation constitutes a high-moderate disciplinary infraction); N.C. POLICY Ch. B § .0301(j) (2021), <https://www.ncdps.gov/documents/files/divisions/dac/prisons/b-0300-offender-conduct-rules/download> [<https://perma.cc/3GR8-9EJE>].

435. ALASKA ADMIN. CODE tit. 22, § 05.400(c)(21) (1999) (“encouraging others to engage in a food strike” constitutes a high-moderate disciplinary infraction).

436. IOWA DEP'T CORR. INCARCERATED INDIVIDUAL RULEBOOK 18, [https://doc.iowa.gov/sites/default/files/incarcerated\\_individual\\_rulebook.pdf](https://doc.iowa.gov/sites/default/files/incarcerated_individual_rulebook.pdf) [<https://perma.cc/DVB8-LYJ2>]; WIS. ADMIN. CODE DOC § 303.2.

437. R.I. 11.01 DOC, Attachment 1 p. 7 (2007), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/07.08.01%20Inmate%20Recreational%20and%20Therapeutic%20Activities%20Policy%20and%20Procedures.pdf> [<https://perma.cc/FYD5-XLUP>].

438. Rioting and “advocating or creating facility disruption” are penal offenses in Colorado. *See* COLO. ADMIN. REG. 150-01 §§ IV(D)(9), IV(E)(14) (2021), [https://drive.google.com/file/d/1eeeTAHS\\_Wz7i5mdD\\_ZYoyoOHnLIm4-XD/view?usp=share\\_link](https://drive.google.com/file/d/1eeeTAHS_Wz7i5mdD_ZYoyoOHnLIm4-XD/view?usp=share_link) [<https://perma.cc/3SXL-PB7Q>].

439. NEV. AR 800.01(1) (2014), [https://doc.nv.gov/uploadedFiles/docnv.gov/content/About/Administrative\\_Regulations/AR%20800%20-%20No%20Changes.pdf](https://doc.nv.gov/uploadedFiles/docnv.gov/content/About/Administrative_Regulations/AR%20800%20-%20No%20Changes.pdf) [<https://perma.cc/PTB3-8HWX>].

440. N.D. DEP'T CORR., NORTH DAKOTA FACILITY HANDBOOK, 17 (2021), [https://www.docr.nd.gov/sites/www/files/documents/friends\\_family/Facility\\_Handbook.pdf](https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility_Handbook.pdf) [<https://perma.cc/4YEN-DQCV>]; OHIO ADMIN. CODE 5120-9-37(A) (2020).

441. WASH. DEP'T CORR. 540.105 at 4 (1998), <https://www.doc.wa.gov/information/policies/default.aspx?show=500> [<https://perma.cc/73A6-ZK64>].

Security threat groups are forbidden, as is possession of items related to them.<sup>442</sup> Proxies are used to assess whether a group is a gang.<sup>443</sup> Intramural sports teams are reviewed for gang affiliation and “racial balance” in Colorado.<sup>444</sup>

### 5. *In Lieu of Organizations*

Certain prison systems make no mention of whether forming a group or organization is allowed at all, though individuals may request an activity or event.<sup>445</sup> Some prison systems have regulations that allow socialization within a tier or housing unit.<sup>446</sup> Others merely guarantee access to day rooms of a certain size where group activities can take place.<sup>447</sup> Some prison systems specify that people are not allowed to communicate outside of their own cellblock or housing area.<sup>448</sup>

Some regulations discuss initiatives led by prison staff. In Georgia, the prison librarian, a civilian staff member, “shall” provide services that “stimulate interest in the use of the library,” like “poetry clubs, trivia contests, book discussion groups, [and] film groups.”<sup>449</sup> Hawaii allows support groups to be led by incarcerated workers: its policy says, “[i]nmates may be used” to staff groups but are “not substitutes for regular program or health staff.”<sup>450</sup>

### 6. *Regulations of Religion*

Regulations of religious groups are less strict than regulations of other “inmate organizations,” and some of the language of religious group regulations tracks the language of RLUIPA.<sup>451</sup> For example, Arizona, Connecticut, Iowa, and South Carolina do not appear to contemplate organizations formed by incarcerated people but do allow for people to apply to start religious groups or gather for religious

442. ALA. DEP’T CORR. *supra* note 423, at 50.

443. *See, e.g.,* Sowa, *supra* note 268, at 1602.

444. COLO. DEP’T CORR. Admin. Reg. 1000-01 § IV (E)(3) (2021).

445. *See, e.g.,* ARIZ. DEP’T CORR. REHABILITATION & REENTRY, Department Order 906 2.4 – Inmate Recreation/Arts and Crafts (2022) <https://corrections.az.gov/sites/default/files/documents/policies/900/0906.pdf> [<https://perma.cc/K5AU-7S9X>] (requiring request via “Inmate Letter” form); COLO. DEP’T CORR. Admin. Reg. 1000-01 § IV (E)(3) (2021).

446. *See, e.g.,* ARIZ. DEP’T CORR. REHABILITATION & REENTRY, Department Order 704 6.4.7 – Inmate Regulations (2022), [https://corrections.az.gov/sites/default/files/documents/policies/700/0704-alignment\\_08-02-23.pdf](https://corrections.az.gov/sites/default/files/documents/policies/700/0704-alignment_08-02-23.pdf) [<https://perma.cc/LD8N-6K75>].

447. *See, e.g.,* 6 COLO. CODE REGS. § 1010-13:8.0 8.8 (1992) (“Day rooms shall provide a minimum of 35 square feet of space per inmate for the maximum number of inmates who use the dayroom at one time, and no day room shall encompass less than 100 square feet of space (exclusive of lavatories, showers and toilets).”).

448. LA. DEP’T PUB. SAFETY & CORR., DISCIPLINARY RULES & PROCEDURES FOR ADULT OFFENDERS 21 (2008), <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> [<https://perma.cc/4439-TDTQ>].

449. GA. DEP’T CORR. POL’Y No. 501.01 IV(H)(2)(a) (2002), <https://public.powerdms.com/GADOC/documents/207042> [<https://perma.cc/D65M-EV4J>].

450. HAW. DEP’T PUB. SAFETY COR.010.1C.06 4.0(4) (1998), <https://dps.hawaii.gov/wp-content/uploads/2012/10/COR.10.1C.06.pdf> [<https://perma.cc/KE5M-S6VR>].

451. Any infringement upon the opportunity to pursue one’s faith must further some compelling interest and must be the least restrictive means of furthering that interest. *See, e.g.,* IOWA ADMIN. CODE r. 201-50.18(356,356A) (2021). Maine’s regulations specify that people have a “constitutional right to practice their religion either individually or as a group.” 03-201 CODE ME. R. § VII, ch. 10, subs. 24.3.

activity in an organized fashion.<sup>452</sup> In Nevada and Oregon, prisons are to take “reasonable” steps to meet the needs of approved faith groups,<sup>453</sup> but there is no such language about reasonable steps for non-religious groups.<sup>454</sup>

### E. Discussion of Regulations

#### 1. Burdens on Formation

Prison administrations attempt to prevent groups from forming that might engage in collective actions, vie for power, or act as “fronts” for gangs. In some states, this means that no groups initiated by incarcerated people can officially be recognized. In states that do allow organizations to exist, the limitations on which and how many groups can form lead to existing groups becoming mega-groups that house subgroups and projects to address the multitude of needs in the prison. As of at least 2005, Pennsylvania’s Department of Corrections allowed only one group run by incarcerated people to continue to exist in several prisons, and that group was the PLA.<sup>455</sup> The cessation of other groups is one reason PLA expanded its programming.

The limits on which and how many groups can form has a perverse effect on limiting the power of “big wheels” or over-empowered leaders. A smaller number of organizations would mean each has a wider mandate and more power. When existing groups are the only ones that are chartered, the same leaders and members then create subgroups or projects to address additional issues.

The state’s regulation of associations causes other burdens to manifest. The need for state approval influences the contents of the projects of the groups. For example, Prisoners for Social Advancement attempted to show the “worthiness” of the program by highlighting its service to outside communities.<sup>456</sup>

452. ARIZ. DEP’T CORR., Dep’t Order 904 at 4.5 (2021), <https://corrections.az.gov/sites/default/files/documents/policies/900/0904.pdf> [<https://perma.cc/6GQY-KEZT>]; CONN. DEP’T CORR., ADMIN. DIRECTIVE 10.8 at 3(C) (2020), <https://portal.ct.gov/-/media/DOC/Pdf/Ad/AD10/AD1008.pdf> [<https://perma.cc/TXN2-P2PF>]; CONN. DEP’T CORR., ADMIN. DIRECTIVE 6.14 AT 3(C) (2013), <https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0614pdf.pdf> [<https://perma.cc/CEF8-3WK3>]; IND. DEP’T CORR., MANUAL POL’Y & PROC.: RELIGIOUS SERV., 01-03-101 § XIII (2020), <https://www.in.gov/idoc/files/01-03-101-Religious-Services-9-1-2020.pdf> [<https://perma.cc/3RUV-GMNL>]; IND. DEP’T CORR., MANUAL POL’Y & PROC.: DEV. & DELIVERY RECREATIONAL SERV. 01-03-105 § VIII(B) (2014), [https://www.in.gov/idoc/files/01-03-105\\_Recreation\\_8-1-2014.pdf](https://www.in.gov/idoc/files/01-03-105_Recreation_8-1-2014.pdf) [<https://perma.cc/3RUV-GMNL>]; KAN. ADMIN. REGS. 44-7-113(b); S.C. DEP’T CORR., INMATE RELIGION, PS-10.05 at 3.4.1, <https://www.doc.sc.gov/sites/doc/files/Documents/policy/PS-10-05.pdf> [<https://perma.cc/4B4Q-D52R>].

453. NEV. DEP’T CORR., ADMIN. REG. 810.02(4) (2016), [https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative\\_Regulations/AR%20810%20Religious%20Faith%20Group%20Activities%20and%20Programs%20Final%2011-15-16.pdf](https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20810%20Religious%20Faith%20Group%20Activities%20and%20Programs%20Final%2011-15-16.pdf) [<https://perma.cc/VPH2-CU8D>]; OR. ADMIN. R. 291-143-0080(1) (2017).

454. NEV. DEP’T CORR., ADMIN. REG. 800.01(3) (2014), [https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative\\_Regulations/AR%20800%20-%20No%20Changes.pdf](https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20800%20-%20No%20Changes.pdf) [<https://perma.cc/EN4Z-QACW>]; Or. Admin. R. 291-145-0015(3) (1992).

455. Huber, *supra* note 171, at 9.

456. Arana-Bressler, *supra* note 123, at 124.

## 2. Burdens on Membership

Limiting who can belong to certain groups, or to groups at all, is one way prison officials attempt to control the influence of potentially coercive or harmful leaders or members. Some administrators believe that without oversight, the leaders or members would become “corrupt or ineffective.”<sup>457</sup> By placing these leaders in solitary confinement and allowing only certain people in general population to take part in groups, they attempt to remove the leaders from their positions of power.

Ironically, the same measures that attempt to keep potentially coercive leaders out of power are those that empower other leaders to outsized positions. Limiting the number of organizations one can join limits the number of organizations that can be officially sanctioned. That again leads to the same organizations, and their leaders, running multiple programs and projects, rather than allowing a larger number of smaller organizations to proliferate.

To contain leaders, prison staff regularly transfer them or take retaliatory measures. In one year, three board members of PLA were transferred, frustrating bonds with remaining members, who then could no longer contact them due to rules against communicating with people incarcerated at other prisons.<sup>458</sup> Moreover, being a member of PLA made individuals targets of staff suspicions. Some members experienced shakedowns and cell searches they felt was due to their membership in PLA.<sup>459</sup> Members described participation as putting them on the “institutional radar” and reported that the group’s activities saw resistance from staff.<sup>460</sup> In response to the frequent transfers of leaders, some organizations have created a “bump-up” mechanism to automatically replace leaders.<sup>461</sup>

## 3. Control of Operations

Much of the control over operations of groups is not unique to the organizations but rather is true about life in prison generally. Scheduling, time, and space all require permission for groups just as they would for individuals.<sup>462</sup> Events can take months or years to be approved.<sup>463</sup> For PLA, the ability for the group to function depended on discretionary staff supervision and approval, and staff did not need to cite specific reasons for disapproval.<sup>464</sup> When PLA requested permission to hold legislative and member meetings monthly, the prison administration often denied permission.<sup>465</sup> Denials for programming happened frequently as well.<sup>466</sup> Regulations also frustrate program implementation, including the component of restorative justice practices that involve communicating with

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457. *Id.* at 127.

458. Huber, *supra* note 171, at 84, 105.

459. *Id.* at 121.

460. *Id.*

461. Arana-Bressler, *supra* note 123, at 82 (providing examples of Inmate Literacy Group, Reading & Writing Project, and Helping Inmates Read).

462. *Id.* at 104.

463. Inderbitzin et al., *supra* note 116, at 90.

464. Huber, *supra* note 171, at 83 (“We can be told no because of a breach of security.”).

465. *Id.* at 34.

466. *Id.* at 83.

victims' families.<sup>467</sup> Sometimes officers preemptively forecasted denials, citing staff shortages.<sup>468</sup> Some members felt that the administration denied proposals as displays of control; others felt the cause was apathy.<sup>469</sup>

The supervision and permission requirements result in censoring effects. For newspapers, censorship comes in multiple forms, including self-imposed censorship to avoid transgressing the expectations of supporters and readers; direct censorship of content by prison officials; and regulative censorship, or financial and time constraints on ability to publish.<sup>470</sup> In response to regulative censorship, writers and editors practice self-censorship when conducting a cost-benefit analysis about stories that negatively reflect on the administrators or staff, who could shut down the paper.<sup>471</sup> Due to censorship, newspapers often have had to refrain from their most basic function: reporting on happenings within the prison itself. For example, at the *Insight*, a newspaper at the Clara Barton women's prison, stories critical of the national criminal justice system, about drug abuse, or about domestic violence were allowed to run, but criticism of the prison itself was censored.<sup>472</sup> For recreational groups, such as novel-writing groups, members reported the best they could hope for was for the staff to take a hands-off approach.<sup>473</sup> Sometimes the censorship is not from the administration but from the environment of the prison. John J. Lennon writes about discussing his ideas for an article in *Sports Illustrated* about sports gambling at Sing Sing with a "shot caller" before submitting it for publication.<sup>474</sup>

Less directly, other organizations face a type of censorship from the surveillance of their operations. Even when staff does not supervise meetings, the meeting minutes allow all that happens to be reported to the administration.<sup>475</sup> The scrutiny by the state of the activities of the groups, as well as the possibility of being shut down, produces self-censorship when groups select their members, leaders, and activities.<sup>476</sup>

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467. *Id.* at 75.

468. *Id.* at 136.

469. *Id.* at 82.

470. *Id.* at 141; Kirstin Fawcett, *A Colorful History of The Prison Mirror, America's Oldest Continuously Operated Prison Newspaper*, MENTAL FLOSS (Jan. 2, 2018), <https://www.mentalfloss.com/article/502636/colorful-history-prison-mirror-americas-oldest-continuously-operated-prison-newspaper> [<https://perma.cc/XTS4-DAN2>] (censoring on issues about victims' rights); MORRIS, *supra* note 193, at 14 (describing fear of retaliation from subjects of reporting).

471. MORRIS, *supra* note 193, at 176 ("I found myself writing for the censor."); DRUMMOND, *supra* note 191, at 67; *see, e.g.*, Caspersen, *supra* note 206, at 88.

472. Novek, *supra* note 214, at 291.

473. Jason Kahler, *National Novel Writing Month Behind Bars: A Road Map for NaNoWriMo at FCI-Elkton*, 6 J. PRISON EDUC. & REENTRY 233, 240 (2020).

474. John J. Lennon, *The Vibrant (and Still Illegal) Sports Gambling Scene That Exists Behind Bars*, SPORTS ILLUSTRATED (Jan. 24, 2020), <https://www.si.com/betting/2020/01/24/sports-gambling-scene-sing-sing-correctional-facility> [<https://perma.cc/SA3G-JW2S>].

475. *See, e.g.*, Arana-Bressler, *supra* note 123, at 62.

476. *Id.* at 63.

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Prison regulations, rules, and the discretionary exercise of both allow prison staff to exert great control over organizations in prison. By limiting the ability of new organizations to form and making it difficult for organizations to survive, the state paradoxically empowers a few mega-organizations, such as the political advocacy groups that host education, litigation, lobbying, and direct services subgroups. Luckily, these organizations grow to take on additional issues based on the needs of their members and communities. However, there are several downsides to allowing such groups to grow. Limiting the ability of associations to form and exist exacerbates the problem of group leaders gaining outsized power to set the agenda of the groups or to coerce members.

Key sources of coercion and control are those disallowed groups. Stricter regulations of groups that are approved do not stamp out the underground groups: concerns about gangs and other such disallowed groups must be addressed through measures outside of the regulations that govern approved “inmate organizations.”

The regulations also impact the benefits that can be gained from the groups. Limiting the number and types of groups that can exist restricts the ability of some individuals to find the groups that best fit them, or any groups at all. Those individuals should have opportunities to experience the myriad effects of associations. The prison systems’ limits on the types of groups that can exist stifles certain groups with purposes outside of rehabilitation or growth.

The inconsistent permissions for the groups to meet for events and banquets also taxes the positive impacts of the groups that go beyond their official missions or regular work. Moral and political philosopher Sam Fleischacker stresses the importance of “insignificant communities” with “low-level” ends, like pub-drinking, which allow for the kind of sociability that promotes openness.<sup>477</sup> And the low-level component within groups with multiple purposes is important. Take, for instance, the Friendly Societies of the early Industrial Revolution in Britain.<sup>478</sup> Structured as small local groups governed by equal participation, these societies pooled funds for health and life insurance and funeral expenses, but they also held regular meetings at a public house to discuss business, collect funds, and share beer over a “convivial meal.”<sup>479</sup> The societies took on functions of religious communities, such as providing scientific and literary lectures and sending out a newsletter to all members.<sup>480</sup> The members also tried to encourage certain virtues in each other by imposing fines for offenses against “Intemperance, Animosity, and Profaneness.”<sup>481</sup> Fleischacker argues that the beers and convivial meals were at least as important as the practical benefits of insurance.<sup>482</sup> The focus on formally chartered, explicitly rehabilitative groups prevents groups that might allow for this

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477. Sam Fleischacker, *Insignificant Communities*, in FREEDOM OF ASSOCIATION 273, 293 (Amy Gutmann ed., 1998).

478. *Id.* at 300.

479. *Id.* at 300, 302.

480. *Id.* at 302.

481. *Id.* (internal citation omitted).

482. *See id.* at 301.

kind of low-stakes comradery to form amongst people who might not be members of exclusive politically oriented groups. Moreover, limited the meeting times of all groups also disrupts this kind of community building.

### III. FREEDOM OF ASSOCIATION IN PRISON

This Part examines prison law controlling association. As made evident in *Jones v. North Carolina Prisoners' Labor Union*,<sup>483</sup> assumptions about incarcerated people and prison life, perhaps animated by real instances of violence, provide a backdrop for a lack of constitutional protections of association in prison. Doctrinally, though incarcerated people are rights-bearers in the United States, the deferential test of *Turner v. Safley* undercuts that status by allowing concerns about prison administration to trump rights protections.<sup>484</sup>

Despite the Supreme Court's pledge in 1974 that there is no "iron curtain" between the Constitution and prisons,<sup>485</sup> people in prison do not enjoy the full panoply of rights of those in the free world. In fact, people in prisons have not always held the status of right-bearers. In 1763, Italian philosopher, economist, and Enlightenment thinker Cesare Beccaria wrote in *On Crimes and Punishments* of banishment in response to crime: "[T]he citizen dies, the man only remains; and with respect to a political body, the death of the citizen should have the same consequences with the death of the man."<sup>486</sup>

With the development of penitentiaries and ensuing reforms, the reforms were not based on rights entitlements of the confined.<sup>487</sup> The United States Constitution of 1789 also did not specify the rights of incarcerated people, other than Eighth Amendment prohibitions on "excessive fines" and "cruel and unusual punishments."<sup>488</sup> The Thirteenth and Fourteenth Amendments contained explicit carve-outs for convicted people. The Thirteenth Amendment abolished slavery and involuntary service "except as a punishment for crime whereof the party shall have been duly convicted,"<sup>489</sup> and the Fourteenth Amendment protected the right to vote for male citizens except those who had "participat[ed] in rebellion, or other crime."<sup>490</sup> The state of civil death appeared in American case law in 1871. In *Ruffin v. Commonwealth*, the Virginia court wrote:

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. He is *civilitur mortuus*; and his estate, if he has any, is administered like that of a dead man.

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483. 433 U.S. 119, 122 (1977).

484. *Turner v. Safley*, 482 U.S. 78, 2553 (1987).

485. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

486. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (Graeme R. Newman & Pietro Marongiu, eds. & trans., Transaction Publishers 5th ed. 2009) (1764).

487. Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 667 (2020).

488. U.S. CONST. amend. VIII.

489. *Id.* amend. XIII, § 1.

490. *Id.* amend. XIV, § 2.



The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen.<sup>491</sup>

What was included in those “rights. . . such as the law in its benignity accords them?” In the decades before the 1960s, federal courts refrained from intervening in the administration of prisons, in what came to be known as the “Hands-Off” doctrine.<sup>492</sup> In the 1960s, social movements, including the Black Power and organized labor movements, erupted inside and outside of prisons, causing federal courts to take up questions of the rights of incarcerated people. For instance, in 1962 the Supreme Court concluded in *Robinson v. California* that the prohibition against cruel and unusual punishments applied to the states, in addition to the federal government,<sup>493</sup> and in 1964 the Court established in *Cooper v. Pate* that Section 1983 civil rights actions could be brought against state prison officials.<sup>494</sup>

In the 1970s and 1980s, the Supreme Court addressed associational rights and other First Amendment rights of people in prison. In 1987, in *Turner v. Safley*, the Court established a deferential test for evaluating prison regulations in constitutional rights challenges. Of the cases leading up to *Turner*, *Jones v. North Carolina Prisoners’ Labor Union* addressed freedom of association most explicitly, sounding the death knell for labor unions and providing little protection for associations more broadly.

#### *A. Jones v. North Carolina Prisoners’ Labor Union*

*Jones* was one in a line of cases building the theory that would be concretized in *Turner*: that judges must defer to the judgments of prison administrators about how to run prisons, even when regulations abridge constitutional rights of people in prison. In 1977, the *Jones* Court upheld the North Carolina Department of Correction’s regulations that prohibited Union members from soliciting others in the prison to join the Union and barred bulk mailings of Union publications.<sup>495</sup> The Court emphasized that the key inquiry was whether the prison administrators’ beliefs, that the Union would cause friction and disorder in the prison, were reasonable, not whether the prison administrators could show their beliefs would likely come to fruition.<sup>496</sup>

The Supreme Court admonished the district court for “g[etting] off on the wrong foot . . . by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.”<sup>497</sup> The district court had concluded that there was “no consensus” among experts, including those who ran the prison systems of

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491. 62 Va. 790, 796 (1871).

492. See Resnik, *supra* note 487, at 669; Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1175 (1997).

493. 370 U.S. 660 (1962).

494. 378 U.S. 546 (1964).

495. *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 121 (1977). The challenge also included a regulation and prohibited meetings, but the Supreme Court did not consider those issues.

496. *Id.*

497. *Id.* at 125.

other states, as to whether a union is a good for penology.<sup>498</sup> The district court wrote that it was “left with no firm conviction that an association of inmates is necessarily good or bad,”<sup>499</sup> though it was “unable to perceive why it is necessary or essential to security and order” to bar solicitation of union membership since “[t]his is not a case of riot” and “[t]here is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions.”<sup>500</sup> The district court did acknowledge that the “sincere[]” beliefs of the defendant prison administrators were that the Union could create “work stoppages,” “mutinies,” “riots,” and “chaos.”<sup>501</sup> The Supreme Court determined that the district court, without showing that the administrators’ beliefs were unreasonable, erred in requiring more evidence of the administrators.<sup>502</sup>

### 1. Outside Organizations and Racial Fears

On its face, the *Jones* Supreme Court decision features the idea that individuals could be members of a union insofar as they believed themselves to be members but could not solicit anyone else to be a member. As the three-judge district court wrote, “To permit an inmate to join a union and forbid his inviting others to join borders on the irrational.”<sup>503</sup> However, the Supreme Court disagreed with the district court’s reading of the state’s starting point. It wrote that the state “never acquiesced in, or permitted, group activity of the Union in the nature of a functioning organization of inmates within the prison.”<sup>504</sup> As the state’s attorney clarified in oral argument, what the state meant by allowing “membership” was that individuals in prison could correspond with the outside office of the North Carolina Prisoners’ Labor Union (NCPLU) and, since no dues were owed, could consider themselves members of the outside organization.<sup>505</sup> The state claimed it gave no permission for any inside group to form.<sup>506</sup>

Having individuals connect with an outside organization promoted the idea that people on the outside could act as positive influences and stimulate the rehabilitation of the incarcerated people. In its amicus brief, the Department of Justice warned that once started, the Union would end up being controlled by “the inmates themselves” instead of “responsible outside advocates of non-violent prison reform.”<sup>507</sup>

This fear of “the inmates themselves” being in control stemmed from two related anxieties. First, the state’s position, and the Court’s ultimate decision, are animated by the idea that incarcerated people are prone to violence. “[P]rison life,

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498. *Id.* at 123 (citing *N.C. Prisoners’ Lab. Union v. Jones*, 409 F. Supp. 937, 942–43 (E.D.N.C. 1976)).

499. *Id.* (citing *Jones*, 409 F. Supp. at 942–43).

500. *Id.* at 124 (citing *Jones*, 409 F. Supp. at 944).

501. *Id.* at 127 (citing *Jones*, 409 F. Supp. at 942–43).

502. *Id.* at 127–28 (quoting *Jones*, 409 F. Supp. at 942–43).

503. *N.C. Prisoners’ Lab. Union v. Jones*, 409 F. Supp. 937, 943 (E.D.N.C. 1976).

504. *Jones*, 433 U.S. at 129.

505. Transcript of the Oral Argument at 12, *Jones*, 433 U.S. 119 (No. 75-1874).

506. *Id.*

507. Brief for the United States as Amicus Curiae Supporting Appellants at 21, *Jones*, 433 U.S. 119 (No. 75-1874).

and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration,” the Court wrote.<sup>508</sup> It came to this conclusion despite that the three-judge district court’s findings were that “there is not on scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions,”<sup>509</sup> and the district court suggested that the administrators could stop further solicitation of members and even “put down the Union and its adherents to whatever extent may be necessary to restore and protect security and order” if the union did threaten concerted action.<sup>510</sup>

The Department of Justice’s amicus brief argued that the people behave “with greater emotion and fewer inhibitions when acting as a group”<sup>511</sup> and implied that the leadership of the Union would be prone to violence, noting that they would likely be those with longer sentences for crimes of violence.<sup>512</sup> Without options to engage in strikes, the Department of Justice wrote, the “only concerted action available” would be “coordinated disobedience, violent or otherwise, of prison rules.”<sup>513</sup> And this unrest could be state-wide, with a formal organizational structure linking all of the incarcerated in the state’s prisons.<sup>514</sup>

In 1977, collective actions in prisons were often in the news. The justices asked during oral argument whether the Union was part of a national group, referring to riots in California and New York.<sup>515</sup> Uprisings and strikes coursed through American prisons and jails in the 1970s. In addition to those mentioned in oral argument, in 1970, 1,500 people at Rikers Island and 2,100 of 2,400 people at Folsom prison went on strike.<sup>516</sup> The Attica uprising, and ensuing bloodbath, followed in 1971.<sup>517</sup> During oral argument, the state’s attorney discussed several riots, including the “horrible riot” in 1968 in North Carolina, the riots at Walpole, which he attributed to the National Prisoners Reform Association, asking “must we await a catastrophic incident. . . . Must men be killed and injured, must property be burned?”<sup>518</sup>

The anxieties about violence were inextricably tied to racial anxieties. The first prison union in California, the United Prisoner Union, engaged with and put forward the strategies and ideas of the Black Power movement.<sup>519</sup> Andrea Armstrong argues that while the NCPLU focused on class rather than race

508. *Jones*, 433 U.S. at 132.

509. *N.C. Prisoners’ Lab. Union v. Jones*, 409 F. Supp. 937, 944 (E.D.N.C. 1976).

510. *Id.*

511. Brief for the United States as Amicus Curiae Supporting Appellants, at 8, *Jones*, 433 U.S. 119 (No. 75-1874).

512. *Id.*

513. *Id.* at 20.

514. *Id.* at 19.

515. Transcript of Oral Argument at 31, 45, *Jones*, 433 U.S. 119 (No. 75-1874).

516. ANDREA C. ARMSTRONG, RACIAL ORIGINS OF DOCTRINES LIMITING PRISONER PROTEST SPEECH, 60 HOW. L.J. 221, 250-51 (2016).

517. ARTHUR LIMAN, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972).

518. Oral Argument, at 8–9, *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119 (1977) (No. 75-1874)..

519. See Armstrong, *supra* note 516, at 253.

exploitation, Justice Stewart's questioning during oral argument revealed his inference that NCPLU's work would lead to racial violence.<sup>520</sup> A line of questioning addressed whether the Ku Klux Klan could operate in the prison, given the likelihood of future violence.<sup>521</sup>

A related anxiety stemmed from a political stance against empowerment of people in prison. The state and the Department of Justice, which submitted an amicus brief in support of the state, asserted that the prison authorities had to exert absolute control in order to reform the authority-bucking and self-pitying dispositions of the incarcerated people. According to the Department of Justice's amicus brief, rehabilitation depended on impressing upon the incarcerated that "rules imposed by others must be obeyed."<sup>522</sup> It argued that formal bargaining between the officials and union would "create the impression of equality in the prison power structure," which could "lead to an erosion of the concept of societal control and authority."<sup>523</sup> The Department of Justice asserted that the Union would institutionalize "already harmful norms" of incarcerated people, who had a "natural tendency to avoid guilt and to blame others for his plight."<sup>524</sup> Specifically, the Department of Justice described the assertion of rights by incarcerated people as antithetical to the goals of incarceration. The Union, it described, would have the "sole purpose" of "defense of prisoners [sic] 'rights' against the alleged depredations of insensitive prison authorities."<sup>525</sup>

In its opinion, the Court distinguished the Union from other organizations, including the Jaycees and Alcoholics Anonymous, which it described as having rehabilitative purposes. It cited that the Jaycees had the objective of the "productive association (of inmates) with stable community representatives."<sup>526</sup>

The *Jones* Court further reaffirmed the idea from *Pell v. Proconier* that "central to all other corrections goals is the institutional consideration of internal security."<sup>527</sup> The *Jones* decision and its briefings and argument also reveal the Justices' fears about violence and concerted action that would overtake the prison. These fears, inflamed by racism and assumptions about the character of incarcerated people—as well as based real instances of violence, gang-related, racial, or otherwise, persist today and animate the prisons' policies. Just as the public responds to fear of violence with incarceration, prison administrators today employ the same logic in containing and isolating people out of fear. In the regulations and rules examined in Part II, catch-all phrases protecting security and order are pervasive.

520. *Id.* at 256.

521. Oral Argument, at 43–45, *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119 (1977) (No. 75-1874) (citing N.C. GEN. STATE § 95-98).

522. Brief for the United States as Amicus Curiae, at 24, *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119 (1977) (No. 75-1874).

523. *Id.* at 23–24.

524. *Id.* at 25–26.

525. *Id.* at 26.

526. *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 134, n.10 (1977).

527. *Id.* at 132 (citing *Pell v. Proconier*, 417 U.S. 817, 823 (1974) (internal quotation marks omitted)).

The importance of groups being connected with “outside sponsors” has also continued.<sup>528</sup> Many of the burdens on the operations or formation of the groups are based on requirements that the groups be led by responsible citizens from the outside. While it is not clear extent to which *Jones* or others contributed to this continuity in approach of prison administration, the cases at least have allowed for such an approach to continue.

## 2. *Impact of Jones on Rights*

Beyond signaling the end of labor unions in prisons, *Jones* also furthered the Court’s curtailment of the rights-bearing status of incarcerated people. The *Jones* Court reaffirmed the principle from the 1974 case *Pell v. Procunier* that “[an] inmate does not retain those First Amendment rights that are ‘inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.’”<sup>529</sup> The Court could instead have simply applied the usual constitutional framework to prisons. In his dissent in *Jones*, Justice Marshall expounded on the dangers of the majority’s “wholesale abandonment of traditional principles of First Amendment analysis.”<sup>530</sup> The restriction of First Amendment rights for individuals in and out of prison alike, Marshall reasoned, should only be justified by a “substantial government interest” and a showing that the state’s means are not unnecessarily restrictive of personal freedoms.<sup>531</sup> The result of the test may differ for those in prison, such that expressive conduct protected on the outside may not be protected in prison, Marshall explained, but the test itself should be the same regardless of who asserts the right.<sup>532</sup> Marshall noted that there were no other First Amendment cases he was aware of that employed rational basis review.<sup>533</sup>

Moreover, the Marshall dissent points out the irrationality of treating prison administration so differently from the administration of other institutions. Running a prison is complex and difficult, he acknowledges, but so too is running “a school or a city.”<sup>534</sup> As in cases with other institutional actors, but especially with prison staff, courts need to serve as a check on their actions that implicate the constitutionally protected interests of the people in their charge. Marshall points out that, by nature of having the task of running prisons, prison officials “err on the side of too little freedom.”<sup>535</sup> The incentive structures of their jobs make it so: they may receive no public criticism or institutional disapproval for repressing the constitutional rights of people in prison, but they would be censured for disorder.<sup>536</sup> Prison officials also are not trained to prioritize protecting constitutional rights. They resist changes that are in the public interest, simply because they believe it will

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528. See *infra* Part II.

529. *Jones*, 433 U.S. at 129 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (emphasis added).

530. *Id.* at 141 (Marshall, J., dissenting).

531. *Id.* at 140 (Marshall, J., dissenting).

532. *Id.* (Marshall, J., dissenting).

533. *Id.* at 141 (Marshall, J., dissenting).

534. *Id.* at 141 (Marshall, J., dissenting).

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

536. *Id.* (Marshall, J., dissenting).

make their jobs harder.<sup>537</sup> Under the majority's mode of analysis, Marshall cautioned, incarcerated people would be "eventually stripped of all constitutional rights, and would retain only those privileges that prison officials, in their 'informed discretion,' deigned to recognize."<sup>538</sup> The sorry outcome would be that incarcerated people "would be left with a right of access to the courts, . . . but no substantive rights to assert once they get there."<sup>539</sup>

### B. *Turner v. Safley*

*Jones* was one case of four that built the scaffolding for *Turner v. Safley*. In 1987, the Supreme Court decided *Turner v. Safley*,<sup>540</sup> the case that created the prison-specific test for constitutional rights analysis. In *Turner*, the Court determined the constitutionality of Missouri Division of Corrections regulations that prevented correspondence between people incarcerated at different prisons and required the superintendent's permission to marry while incarcerated.<sup>541</sup> The Court held that instead of strict scrutiny analysis, a "lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules."<sup>542</sup>

Again referencing "the increasingly urgent problems of prison administration and reform,"<sup>543</sup> the Court in *Turner* reviewed and extracted principles from the recent four cases that ruled on constitutional rights in prison: *Pell v. Procunier*,<sup>544</sup> *Jones v. North Carolina Prisoners' Union*,<sup>545</sup> *Bell v. Wolfish*,<sup>546</sup> and *Block v. Rutherford*.<sup>547</sup> The Court fashioned a rule: the prison regulation, while burdening fundamental rights, only had to be "reasonably related" to legitimate penological objects to pass muster, while if it was an "exaggerated response," it would not.<sup>548</sup>

The Court set out four factors for determining the reasonableness of the regulation: first, whether there is a "valid, rational connection" between the

537. See RACHEL BARKOW, PRISONERS OF POLITICS 69 (2019).

538. *Jones*, 433 U.S. at 147 (Marshall, J., dissenting).

539. *Id.* at 147 (Marshall, J., dissenting).

540. 482 U.S. 78 (1987).

541. *Id.* at 81. The regulation relating to correspondence allowed only correspondence between immediate family members incarcerated at different prisons and allowed only correspondence concerning legal matters between non-family members. Other correspondence required that staff deem it "in the best interest of the parties involved," which meant, in practice, that correspondence with non-family incarcerated individuals was not permitted. *Id.* at 82 (internal quotation marks and citation omitted). The marriage regulation permitted marriage only with the prison superintendent's permission, which the regulation provided should be given only when there were "compelling reasons to do so." *Id.* (internal quotation marks and citation omitted). Prison officials' testimony revealed that only a pregnancy or the birth of a child was considered a compelling reason.

542. *Id.* at 81.

543. *Id.* at 84. The Court in *Procunier v. Martinez*, 416 U.S. 396, 404 (1974), wrote that the responsibilities of prison administrators were "maintaining internal order and discipline, . . . securing their institutions against unauthorized access or escape, and . . . rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." It described effective discharge of these duties as being riddled with "Herculean obstacles . . . too apparent to warrant explication." *Id.*

544. *Turner*, 482 U.S. at 86 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

545. *Id.* (citing *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119 (1977)).

546. *Id.* at 87 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

547. *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 589, 586 (1984)).

548. *Id.*

regulation and the legitimate and neutral government interest; second, whether there are “alternative means of exercising that right” that remain available; third, the “impact” that “accommodation” of the asserted right would have on prison officers, other incarcerated people, and the “allocation of prison resources generally;” fourth, whether there exist “ready alternatives.”<sup>549</sup>

Applying these factors, the Court upheld the regulation barring correspondence and struck down the marriage restriction.<sup>550</sup> The marriage restriction was the only regulation that the Supreme Court has found failed to satisfy the reasonable relationship standard.

*Turner* deference applies not only to First Amendment challenges of prison regulations but also to constitutional claims broadly,<sup>551</sup> though it has not been applied to the Eighth Amendment,<sup>552</sup> procedural due process,<sup>553</sup> equal protection,<sup>554</sup> or the Fifth Amendment.<sup>555</sup> However, it is meant to be the default standard, which replaces the usual rights-based analysis with a uniform analysis based on the incarcerated status of the person asserting the right.<sup>556</sup>

Instead of applying the usual fundamental rights analysis, *Turner’s* “transsubstantive”<sup>557</sup> test requires deference on all constitutional claims. It replaces the scrutiny due for association claims with the unprotective rational basis test. Instead of grappling with unique issues that arise for associations that exist in prison, *Jones* followed the prison administrators’ intuitions about administration and allowed administrators to decide what groups to allow and in what fashion, with security and order as priority.

David Shapiro has written about the leniency of the *Turner* deference, cataloguing more than eight thousand cases at the time of the publication of his

549. *Id.* at 89–90. The Court specifies that this is “not a ‘least restrictive alternative’ test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” *Id.* at 90.

550. *Id.* at 91.

551. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343 (1996) (access to courts); *Shaw v. Murphy*, 532 U.S. 223 (2001) (legal assistance from other incarcerated individuals); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (receipt of subscription publications); *Overton v. Bazzetta*, 539 U.S. 126 (2003) (visitation); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1515 (2012) (mandatory strip-searches upon entering a jail’s general population); *Washington v. Harper*, 494 U.S. 210 (1990) (involuntary administration of antipsychotic drugs without judicial hearing); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (religious services). After the Religious Land Use and Institutionalized Persons Act of 2000 passed, the Court adopted a compelling government interest standard for Establishment Clause cases. *See* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc); *Cutter v. Wilkinson*, 544 U.S. 709, 723 & n.11 (2005) (rejecting the use of the *Turner* test for the compelling government interest test indicated by the RLUIPA).

552. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002); *Hudson v. McMillian*, 503 U.S. 1 (1992).

553. *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

554. *Johnson v. California*, 543 U.S. 499 (2005).

555. *McKune v. Lile*, 536 U.S. 24 (2002).

556. *See* a discussion of this default standard in “The Incoherence of Prison Law.” Driver & Kaufman, *supra* note 127. Professor David Shapiro has documented over 8,000 references to *Turner* in case law. David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 975 (2016).

557. *See* Driver & Kaufman, *supra* note 127.

article in 2010.<sup>558</sup> The *Turner* standard was meant to balance constitutional protections with judicial restraint in the face of prison officials' professional knowledge, but in practice, prison administrators "act as if unconstrained by judicial review," which has resulted in some arbitrary and, as Shapiro describes, "nonsensical" rules.<sup>559</sup> For example, in *Singer v. Raemisch*, the Seventh Circuit upheld a regulation that prohibited the fantasy role-playing game *Dungeons and Dragons* because the prison-employed gang specialist suggested that "co-operative games can mimic the organization of gangs and lead to the actual development thereof."<sup>560</sup> Even while prison officials must undertake their responsibility to protect people from gang violence and coercion, this rule is the type Justice Marshall warned that over-prioritizes security at the detriment of constitutional rights.

Another problem with *Turner* deference is that it empowers prison staff to act on racial assumptions. Narratives of the danger and violence of people of color, particularly Black people, run rampant.<sup>561</sup> They hold no less power in prisons than outside. A standard based on protecting "security" gives rein to actions based on racialized fears.

However, the security threat is overestimated. Religious groups are protected at the level of strict scrutiny under RLUIPA, and, before that, in the Federal Bureau of Prisons, "without compromising prison security."<sup>562</sup> Despite their differences, religious groups are similar to non-religious groups in key ways relating to security. Religious groups could act as fronts for disallowed and illegal groups. Religious leaders could gain outsized power and manipulate the members. But given that they have enjoyed strict scrutiny analysis, they offer a blueprint for how other associations can be as stringently protected.

#### IV. WAYS FORWARD

*Turner* replaces the usual strict scrutiny First Amendment analysis with deferential reasonableness review because the right-seeker is incarcerated. As a result, what should be a constitutional analysis of the particular right to associate is transformed to a question about prison administration.<sup>563</sup> Prisons become a black box that the ordinary protections of fundamental rights cannot penetrate.<sup>564</sup> Courts should abandon *Turner* to provide the strength of protection appropriate to the right of association, and more broadly because *Turner's* flattening of the rights landscape based on the incarcerated status of the right-holder is fundamentally flawed.

558. See Shapiro, *supra* note 556.

559. *Id.* at 977.

560. *Singer v. Raemisch*, 593 F.3d 529, 535 (7th Cir. 2010).

561. See Lindsey Webb, *True Crime and Danger Narratives: Reflections on Stories of Violence, Race, and (In)Justice*, 24 J. GENDER RACE & JUST. 131 (2021).

562. *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (citing Brief for United States as Respondent Supporting Petitioners 24).

563. For a broader discussion of *Turner's* indiscriminate application across all circumstances of constitutional rights analysis in prisons, see Driver & Kaufman, *supra* note 127.

564. This attribute is not unique to prisons. The courts also defer to other institutions, like schools and the military. See, e.g., Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999). *Turner* cannot be solely blamed, since economic and procedural barriers also serve to make it difficult for incarcerated people to bring civil litigation. See, e.g., Shapiro, *supra* note 556, at 979.



There is some hope that cases like *Johnson v. California*, which applies the strict scrutiny review to racial classifications in prison, will chip away at *Turner*'s reach.<sup>565</sup> However, since *Turner* itself dealt with First Amendment violations, it remains unlikely that freedom of association in particular would not fall under *Turner*. Indeed, *Turner* dealt with marriage, a form of intimate association.

However, *Johnson* introduced the idea of whether claims can be consistent with "proper prison administration."<sup>566</sup> Seeing as the Court has not espoused a coherent theory of incarceration,<sup>567</sup> there could be a way forward through a new understanding of proper prison administration as including the freedom of association.

Doctrinal change is unlikely given current realities in federal courts. However, continuing to push on the doctrinal front is important because of how much incarcerated people depend on litigation as a tool for change and source of power. Disenfranchised and without popular representation, they rely on the courts, despite all of the ways in which their litigation is limited.<sup>568</sup>

Expanded protection for association through congressional action much like RLUIPA would be beneficial, at least to change some written policy and provide groups with a viable claim. However, RLUIPA was passed by strange bedfellows brought together uniquely by religion. Association rights may not have the same level of political support.

As a stopgap measure, unions as a subset of associations should gain more protections, in spite of *Jones*. The National Labor Relations Act,<sup>569</sup> the National Labor Relations Board and Federal Service Labor-Management Relations Statute should recognize incarcerated workers as employees with rights to engage in collective action.<sup>570</sup>

Moreover, a new cadre of prison administrators who are dedicated to promoting associations in prisons should take leadership positions in prison systems. Like "progressive prosecutors,"<sup>571</sup> these progressive administrators could affect substantial change on the ground through an association-friendly approach. For example, even without changes to administrative codes, department handbooks, and directives, leadership could instruct staff to approve more organization applications, minimize staff attendance of group activities, and approve more events and initiatives.

Setting aside a rights framework, there are instrumental reasons for why allowing people to associate in prisons is beneficial. Insofar as association is

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565. *Johnson v. California*, 543 U.S. 499 (2005).

566. *Id.* at 500.

567. *See, e.g.*, Driver and Kaufman, *supra* note 127, at 564.

568. The Prison Litigation Reform Act, for example, bars much litigation.

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

570. *See* Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 956 (2016).

571. *See, e.g.*, Daniel Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, GUARDIAN (Jul. 23, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> [<https://perma.cc/6XH4-8NY7>].

intrinsically important to human life, allowing people to associate would make prison administration easier and reentry smoother—expanded sociality results in people being calmer, safer, occupied, and educated. Prisons abroad offer examples of well-regulated systems that allow for more freedom of association. Prisons in the Netherlands, for example, emphasize resocialization through association.<sup>572</sup>

Replacing key personnel, especially in the paramilitary organizations of prisons, can create immediate change and provide examples for sister systems. For example, executive director of Colorado's prison system Rick Raemisch has been a leader in decreasing the use of solitary confinement.<sup>573</sup> If individual leaders make association easier, the associations can then empower their members, creating a positive feedback loop. It is nevertheless crucial that constitutional protections check prison administrators, however progressive they may seem.<sup>574</sup> After all, that is the purpose of the courts.

Of course, the power of administrators is dramatically constrained by legislative and executive support and budgetary realities.<sup>575</sup> The ability of more groups to function within the space and financial constraints of prisons would be supported by decarceration. Moreover, some of the needs that the associations form to address are endemic to prisons: lack of safety, quality and responsive education, legal counsel, and access to information. Rather than relying on informal organizations to relieve these burdens, the system that creates these needs should be dramatically reshaped so as not to create these lacks. For example, if prisons were severely depopulated and basic needs of incarcerated people were met, safety might become less of an issue, gang membership might become less desirable, and the regulations governing organizations in prison may not need to overburden organizations in an attempt to thwart gangs. Moreover, if the conditions and orientation of prison were radically changed, administrations may well have less reason to fear collective actions. Ultimately, the kind of associative life that we try to protect as a fundamental right and the needs that are attempted to be met by associations in prison cannot be fulfilled within prisons as we know them. A society that truly values fundamental rights would choose the rights over the prisons when the two are incompatible.

#### *A. Limits of the Current Associational Jurisprudence*

Studying associations in prison can teach lessons about association more broadly. There are several main strands of critiques of *Roberts* and its progeny. First,

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572. See, e.g., RAM SUBRAMANIAN & ALISON SHAMES, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 7 (2013), <https://www.vera.org/downloads/publications/european-american-prison-report-v3.pdf> [<https://perma.cc/R42U-UGUV>].

573. See, e.g., Kirk Mitchell, *Colorado's Prisons' Chief Wins National Innovation Award Created in Honor Of Predecessor*, DENVER POST (Nov. 14, 2017, 11:03 AM), <https://www.denverpost.com/2017/11/14/colorado-prisons-chief-wins-national-award/> [<https://perma.cc/Q5LC-CZRG>].

574. See, e.g., Elizabeth Alexander, *New Prison Administrators and the Court: New Directions in Prison Law*, 56 TEX. L. REV. 963, 1007 (1978).

575. See, e.g., Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 839 (1990).

legal scholar Jason Mazzone argues that it is misguided to make the key determination be whether the association's views are compatible with the consequences of the regulation.<sup>576</sup> This nature of this inquiry collapses the right of association with that of free speech—and simply makes the inquiry about the expressive content, rather than about the association itself.

Second, and relatedly, the current associational analysis treats associations as instruments for speech. Ashutosh Bhagwat writes that *Roberts* and its progeny exemplify a turn in the Supreme Court's associational jurisprudence, away from locating association with First Amendment expressive rights as a way to strengthen the right to associate and towards protecting the right to associate only as a means of expression.<sup>577</sup> In making association instrumental to speech, Mazzone suggests the Court has missed a chance to build a jurisprudence responsive to associations and their features. The inquiry could be about problems of regulation of groups or their membership in particular, like “undermining bonds of solidarity. . . or altering the conditions for openness and candor among the members.”<sup>578</sup> Political theorist George Kateb argues that no fundamental right ought to be thought of primarily as an instrument, since instruments may be replaced by another means to bring about the end.<sup>579</sup>

Third, legal scholars defining the right as “expressive” excludes many groups that promote democracy self-governance but are not expressive.<sup>580</sup> The term “expressive” does fail to capture all those associations that also contribute to democratic self-governance. To go further, this Article argues that focusing on associations that contribute to democratic self-governance is too limiting too. The right to association ought to be protected for its own sake—for their communitarian and liberal effects as well.

All of these critiques essentially argue that the right to associate is important in myriad ways and that it is not protected enough in all the ways that it should be. But why so? It is not that the Supreme Court fails to grasp the intrinsic value of the

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576. Mazzone, *supra* note 26, at 678. For example, in *Dale*, Dale sued claiming that the Boy Scouts had violated the New Jersey Law Against Discrimination by expelling him because he is gay. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 645 (2000). The Court focused on whether the Boy Scouts had a viewpoint about sexual orientation and whether Dale's presence would burden the group's desire to not “promote homosexuality as a legitimate form of behavior.” *Id.* at 6551.

577. Bhagwat, *supra* note 34, at 988.

578. Mazzone, *supra* note 26, at 679.

579. George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 37 (Amy Gutmann ed., 1998).

580. *See, e.g.*, Mazzone, *supra* note 26, at 647; Bhagwat, *supra* note 37, at 992. Tabatha Abu El-Haj suggests that it is the social relationships developed in associations that is central to political participation, friends and social contacts are avenues and motivators for individuals to engage politically, and that the category of expressive association would fail to include some of the groups that effectuate political participation. Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 58 (2014) (“[Associations] promote democratic accountability.”) John Inazu provides examples of groups crucial to significant political movements that would not enjoy the heightened protection under the right of association because they are not expressive: gay social clubs, suffragist gatherings organized around social events, even clubs and events among the leaders of the Harlem Renaissance. *See* John Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 532 n.246 (2014).

right. Justice Brennan supplies an account of the intrinsic value of relationships in *Roberts v. United States Jaycees*: “Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”<sup>581</sup>

Rather, the way that associational jurisprudence has developed is based on the cases that have come before it. The Supreme Court cases that have arisen, outside of prisons, deal with narrow issues that are adjacent to issues of free speech: the right of individuals to associate with certain groups without impunity and the right for groups to not associate with certain individuals. They do not deal with regulations that prevent associations from forming or existing at all; those problems intersect with the law in the unique context of institutions like prison. Because the very existence of associations is not endangered on the outside, the jurisprudence that has developed on the outside has not had to protect basic aspects of association. Questions such as whether groups are regulated so as to limit their bonds of solidarity is not a problem that tends to arise in most contexts. These basic aspects of association tend to have to do with their communitarian and liberal functions.

But fundamental rights need the most protection in extreme contexts. The problems faced by associations in prisons, as described in Part II, show that the right to associate should be protected because of the intrinsic importance of association outside of its instrumental value for speech, expression, or even self-governance. If the jurisprudence reorients its focus to protect associations as associations, rather than as expressive entities, it will start to grapple with the unique characteristics of associations. First Amendment jurisprudence may develop to protect association not as an instrumental way to further speech but rather as an intrinsic right.<sup>582</sup>

#### CONCLUSION

While the right to associate is under protected in prisons, incarcerated individuals assert this right nevertheless. In doing so, they provide a window into the salience and necessity of association. Recognizing and reflecting on the value of association can challenge assumptions about incarceration and build toward a new theory of criminal administration.

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581. *Jaycees*, 468 U.S. 609, 609 (1984).

582. Arguments for rights confinement advance the view that stretching a right beyond a core may end up weakening protection of the right, while arguments for rights expansion intuitively hypothesize that increasing the scope of rights protection would simply allow an expanded class to benefit from the right. See John Inazu’s article discussing the ideas of rights confinement and rights expansion and their respective merits. John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485 (2014). Inazu proposes that for the right of association, expanding the coverage would lessen manipulation of the current bifurcated doctrinal test. Inazu proposes that for the right of association, expanding the coverage would lessen manipulation of the current bifurcated doctrinal test.

