

“The Dignity and Justice That Is Due to Us by Right of Our Birth”: Violence and Rights in the 1971 Attica Riot

Andrew B. Mamo*

INTRODUCTION

The hands on the clock stopped at 9:43 a.m. on September 13, 1971, when the electricity went out at the Attica Correctional Facility (“Attica”) in New York. State troopers were positioned on the rooftops of the prison’s A-Block and C-Block. A helicopter flew over the D-Yard, releasing gas on the gathered inmates and the hostages they held. The inmates hoped that the hostages’ lives would ensure their own, but this was not to be. As the inmates dropped to the ground with the hostages, the riflemen fired.¹

Attica was the scene of one of the most notorious prison riots in American history, in which thirty-nine people (twenty-nine inmates and ten hostages) were killed when Governor Nelson Rockefeller ordered the state police to retake the institution (four others — one guard and three inmates — had died during the uprising).² The bloody conflict has rightfully attracted attention. But the overt violence of the uprising and the retaking have diverted attention from a complex set of arguments made by prisoners regarding the everyday violence within the prison, situated within (and against) a framework of rights.

The events at Attica did not occur within a vacuum. The late 1960s and early 1970s were a period in which the use of rights language was expanding to even the most marginalized communities, stimulated by the legacy of the civil rights movement³ and by ties to both the nascent international human rights movement⁴ and to the growth of political movements like Black

* J.D. Candidate, Harvard Law School, 2014. My thanks to Tomiko Brown-Nagin and the members of the 2013 Legal History Workshop, and to the editors of the *Harvard Civil Rights-Civil Liberties Law Review* for constructive feedback and support.

¹ This account is taken from TOM WICKER, *A TIME TO DIE* 277–79 (1975).

² See *Inmates of the Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 15 (2d Cir. 1971).

³ See Stephen Tuck, “*We Are Taking Up Where the Movement of the 1960s Left Off*”: *The Proliferation and Power of African American Protest During the 1970s*, 43 J. CONTEMP. HIST. 637, 641 (2008).

⁴ For a recent study focusing on the 1970s as a formative moment in the creation of the international human rights movement, see generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010). Moyn argues that, while African American leaders from the late ’60s through the early ’70s contrasted the language of human rights against civil rights, these appeals to human rights were a dead end. See *id.* at 104–06. Nevertheless, the question of the origin of rights mattered within the prison, and the ties to human rights mattered within this space.

Power.⁵ This was also a moment in which popular faith in the expert administration of social institutions was turning to a more skeptical appraisal of the effects of institutions on the lived experience of individuals, suggesting some recognition of control and violence that transcended the physical.⁶ It is also essential for a twenty-first century reader to realize what this moment did *not* contain: the war on drugs had not yet been declared, nor was mass incarceration reshaping the meaning of prison.

This Note provides an intellectual history of the relationship between rights and violence in American prisons during the summer of 1971, focusing on the Attica riot. It does not attempt to recount the entire history of the riot, but is instead a narrower look at how the language of rights was mobilized and shaped by understandings of violence within the prison. Struggles for rights took various forms and operated on various levels, both inside and outside of the courts, led by both inmates and lawyers.⁷ This Note focuses on the methods available for inmates to speak, rather than on the substance of their complaints.

Several elements of the larger story of American prisons in the 1970s are well known: the demise of unionization as a form of organizing among inmate laborers;⁸ the replacement of reform-minded prison wardens with those eager to demonstrate being “tough on crime”;⁹ and the eventual narrowing of Eighth Amendment prison conditions jurisprudence after its initial expansion in this moment.¹⁰ This Note situates the various claims about violence and rights made by prisoners, directly and through legal counsel,

⁵ See BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON RIOTS, 1971–1986*, at 13 (1989). See generally WILLIAM VAN DEBERG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965–1975* (1992).

⁶ See the analysis of prisons as “total institutions” in ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4–6 (1961). Goffman summarized the social function of these institutions as follows: “Many total institutions, most of the time, seem to function merely as storage dumps for inmates, but . . . they usually present themselves to the public as rational organizations designed consciously . . . as effective machines for producing a few officially avowed and officially approved ends.” *Id.* at 74; see also USEEM & KIMBALL, *supra* note 5, at 15–16.

⁷ See generally Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1 (1993) (describing the many kinds of legal intervention in prisons).

⁸ See *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 125–36 (1977). For an analysis connecting labor organization to prison riots, see generally Paul R. Comeau, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFF. L. REV. 963 (1971).

⁹ See USEEM & KIMBALL, *supra* note 5, at 13–15; see also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 305–09 (1993).

¹⁰ See generally Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009). Legal remedies also narrowed. Owen Fiss describes a turn away from structural injunctions as remedies since 1974, spearheaded by Justice Rehnquist. Of the major exceptions to the skepticism toward these injunctions, he identifies a few key cases, including one following from the influential line of Arkansas prison cases: *Hutto v. Finney*, 437 U.S. 678 (1978). While the Arkansas prison litigation stands out as an exemplar, it was also highly unusual. See Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1992).

amidst the development of rights-consciousness through both the civil rights movement and its successor movements. After the courts had addressed overt instances of violence, such as physical brutality and inhumane conditions, the new challenge for inmates was to find the proper language with which to describe and respond to the background of violence: the arbitrary application of arbitrary rules, the pervasive feeling of dehumanization, and terror in the form of the latent possibility of overt violence. Could the courts protect prisoners from this background violence as they protect prisoners from overt brutality? Or was the problem that terror, dehumanization, and violence were inherent to modern incarceration?¹¹ If so, should recourse still be found in the courts by appealing to positive rights recognized by the state, or in the streets by appealing to human rights whose validity was independent of the state? The aim of the Note is to examine how the range of possibilities for theorizing and responding to prison violence that existed in the early 1970s was narrowed to a framework that recognized specific civil rights named by the state, obscuring deeper claims. It is a story of disillusionment.

The Attica prison movement was a moment of possibility for expanding rights that has since passed. The year 1971 represented the crossroads: the moment before prison litigation would grow sharply¹² and before mass incarceration would become a major social phenomenon.¹³ It stands in sharp contrast to our contemporary situation.¹⁴ The rhetorical and intellectual space for articulating claims about justice in prisons began to narrow in the early 1970s. Media attention to the spectacle of violence and revolt helped channel rights claims from the more capacious form invoked within the prisons by the inmates themselves to a limited set of claims prohibiting overt, physical conditions of cruelty and barbarism.

¹¹ Rebecca McLennan observes that by the mid-twentieth century, most northern prisons had shifted toward the modern disciplinary model of “privileges to be gained and lost through good or poor conduct . . . underwritten by new technologies of physical force.” REBECCA M. McLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, at 466 (2008).

¹² See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1578–87 (2003).

¹³ See BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 13 (2006). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

¹⁴ The confluence of these events suggests that prison litigation, by providing a floor for inhumane conditions, may have legitimated in some way the explosion of incarceration as a tool of social control. Consider David Rothman’s observation in his history of the prison: “[T]he legitimacy accorded the asylum lowered the standard of behavior considered sufficiently troublesome to justify confinement.” DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC*, at xlvi–xlvii (2002). Heather Schoenfeld makes a similar argument that prison conditions litigation in Florida encouraged the construction of new prisons and the expansion of incarceration by presupposing the legitimacy of confinement, even as it required more space and better treatment for prisoners. Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC’Y REV. 731, 735 (2010).

After analyzing the space of possibilities that existed for thinking about the violence of incarceration and the basis of rights, this Note suggests that these possibilities were narrowed due to the narrative pull of the riot.¹⁵ Part I situates American prisons within American society. While inmates were isolated behind bars, they maintained ties to wider social movements. This Part foregrounds prisoners' conversations about the role of law, lawyers, and legal argument in their burgeoning rights movements, in light of prisoners' strong desires to be heard outside the world of institutional confinement. Part II analyzes the space of possibilities for addressing the conditions of life within the prisons. It first describes the state of prison conditions litigation to ascertain the limits of what lawyer-driven, court-centric approaches could have achieved. It then turns to options that were less tied to the law: first, through the litigation of Martin Sostre, which used the courts as a site for radical opposition to the state; second, through the writings of prison theorists such as George Jackson and Eldridge Cleaver, who appealed to social movements and political mobilization; and third, through the negotiations and declarations of the Attica Liberation Faction. Part III walks through various outgrowths of the failed negotiations and rioting at Attica: the stream of litigation and narrowing of the prison reform movement. Are the inmates reliable narrators?¹⁶ Should a more skeptical approach be taken?¹⁷ Not necessarily. This Note amplifies the rights claims that inmates made in the early 1970s, pushing back against the deafening debates on the retaking of the prison, and against the notion that claims about rights and about justice could be heard only when spoken by lawyers.¹⁸

I. VIOLENCE AND THE LAW: BACKGROUND AND FOREGROUND

The response to Attica has tended to focus on the spectacle of violence — the acts of the rioters and the state's response to those acts. My aim is to distinguish the violent events of the summer of 1971 from the grievances that inmates wished to express and their claims about rights and justice. By foregrounding the violence of the riot, traditional narratives — even those

¹⁵ For an approach similar in spirit on this point, see RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 253 (2007).

¹⁶ See *Al-Jundi v. Mancusi*, 926 F.2d 235, 240 (2d Cir. 1991) (“[T]here is considerable irony in the argument of prison officials, who have in their custody scores of prisoners convicted on the testimony of disreputable criminals, that the testimony of criminals is incredible as a matter of law when it accuses them of unconstitutional conduct.”).

¹⁷ For example, San Quentin Associate Warden James Park said of George Jackson, “Jackson was a hoodlum. He was a sociopath, a very personable hoodlum. He didn’t give a shit about the revolution.” ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT* 157 (1994).

¹⁸ Malcolm M. Feeley and Edward L. Rubin note that “[t]hroughout the process [of prison conditions litigation], only minimal efforts were made to determine what was important to the prisoners themselves. The plaintiffs’ attorneys . . . tended to assume that they knew what was best for prisoners.” MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 377 (1998).

that are sympathetic to the inmates — condemn to the background the pre-existing violence within prisons in the course of their normal operations. This outcome is particularly perverse in the context of Attica, in which the inmates expressly sought the attention of the media and the public to air their grievances at a time when scholarly attention was already focused on background instances of violence.¹⁹ By focusing on the Attica takeover to the exclusion of inmate rights claims, even sympathetic outsiders inadvertently prevented inmates from obtaining the broader attention that they sought and normalized the ordinary conditions of confinement.²⁰ This Part situates prisons within American society and within American law in the early 1970s, providing important background on the possible means by which inmates could take action.

A. *The Geography of the Prison*

It is essential to understand the topology of the prison network in order to see the connections that linked American prisons across state lines, and the ties that bound the controlled spaces within prisons to those outside. One of the primary reasons for incarceration was to isolate and control inmates.²¹ This ambition could never be fully met, and the gaps between the ambition and the reality reveal something fundamental about the challenges facing prisoners in the 1970s. The connections among American prisons meant that developments in one prison would reverberate elsewhere: a manifesto drafted in the New York City jails was later modified by inmates in Folsom State Prison (“Folsom”), California, and then yet again in Attica.²² Inmates were also in dynamic relationships with outside social movements, including the ongoing civil rights movement, the Black Power and Chicano Power movements, and the antiwar movement.²³

¹⁹ As Henry Steele Commager observed in 1971, “[v]iolence is commonly, though not universally, equated with lawlessness; it is almost always physical in the ostentatious sense of inflicting bodily harm or physical damage at a particular moment. But violence, as we all know, is, or can be, something quite different from this.” Henry Steele Commager, *The History of American Violence: An Interpretation*, in *VIOLENCE: THE CRISIS OF AMERICAN CONFIDENCE* 5 (Hugh Davis Graham ed., 1971). He also observed that “[t]he elementary fact which glares at us from every chapter of our history and stares out at us from every page of our daily paper is that the major, the overwhelming, manifestations of violence in our history and society have been, and still are, official. In America violence is clad in the vestments of respectability and armored with the authority of the law.” *Id.* at 8. See also the literature on “total institutions”: GOFFMAN, *supra* note 6; and ROTHMAN, *supra* note 14.

²⁰ See, e.g., Assata Shakur, *July 4th Address*, in *IMPRISONED INTELLECTUALS: AMERICA’S POLITICAL PRISONERS WRITE ON LIFE, LIBERATION, AND REBELLION* 117, 119 (Joy James ed., 2003).

²¹ This justification is typically referred to as “incapacitation.” See, e.g., Kenneth R. Feinberg, *Selective Incapacitation and the Effort to Improve the Fairness of Existing Sentencing Practices*, 12 N.Y.U. REV. L. & SOC. CHANGE 53 (1983).

²² For more on this process, see *infra* section II.D.

²³ See generally CUMMINS, *supra* note 17.

There were two main types of connections among prisons and between prisons and the outside world: direct transfers of individuals, and the circulation of texts and ideas. Many inmates (such as Martin Sostre, described below) rotated in and out of prison, and were also transferred between facilities in a given state, either because of changing security classifications or because of specific incidents within a given prison.²⁴ Prison officials (including New York State's Commissioner Russell Oswald) also circulated within the network, often having careers in multiple prisons in multiple states.²⁵ Outsiders, including lawyers and activists, visited prisons, often crossing state lines.²⁶ The circulation of individuals established connections among carceral spaces and the outside.

Texts also circulated widely in prison, bringing ideas into the prison from the outside (and vice versa), and creating a shared culture within prisons — even if this culture had local variants. Malcolm X, George Jackson, and Angela Davis mattered in prisons across the country (and outside of prisons too);²⁷ across the country, inmates followed the results of litigation in Arkansas, New York, and California closely.²⁸ But local culture still mattered: for example, the Southern prisons were built on a plantation model,²⁹ and the prisons of New York and California ultimately housed the most radical prison populations.³⁰ Local realities meant that different strategies might be necessary in different states.

Inmates recognized that their interest in the wider society was not always reciprocated. The walls of the prison, permeable though they may have been, did keep out passive observers. The inmates knew that they had to speak loudly in order to be heard. For example, during the Attica riot, Herb Blyden, one of the leaders of the Attica inmates, addressed the other prisoners to explain how the takeover served a larger project of amplifying grievances:

Brothers! . . . The world is hearing us! The world is seeing our struggle! And here's the proof before your eyes! . . . Look at these men from all over this country coming here at our call, brothers,

²⁴ See *infra* section II.B.

²⁵ For Oswald's history, see RUSSELL G. OSWALD, *ATTICA: MY STORY* (1972).

²⁶ See generally, e.g., WILLIAM M. KUNSTLER, *MY LIFE AS A RADICAL LAWYER* (1994).

²⁷ In the two pages that the McKay Report devotes to this background, it sketches the experience of the "new kind of inmate" whose consciousness was shaped by riots, by social changes in inner cities, college campuses, and social movements, and whom "[t]he increasing militancy of the black liberation movement had touched . . . Names like Malcolm X, George Jackson, Eldridge Cleaver, Angela Davis had special meaning to him." *ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 106-08* (1972) [hereinafter *McKAY REPORT*].

²⁸ See generally *infra* Part II.

²⁹ See, e.g., DAVID M. OSHINSKY, "WORSE THAN SLAVERY": *PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 96* (1996). This description of a "plantation model" indicates that southern prisons remained shaped by the complex history of race, incarceration, and legacies of slavery.

³⁰ See USEEM & KIMBALL, *supra* note 5, at 23-24.

coming here to witness firsthand the struggle against racist oppression and brutalization. We got to show them so they can tell the world what goes on behind these walls!³¹

In spite of the prison walls, this marginalized world nevertheless remained connected to the rest of society. Inmates took advantage of all available avenues through which they could reach an outside audience in order to be heard. When possible, they tried to work with prison wardens and officials at state departments of corrections, either through formal grievance processes or through informal avenues of communication. But they also filed lawsuits in the courts, worked through the political process to implement change through the statehouses, wrote to the press, and contributed to social movements fighting for change in the streets through public activism and demonstration.

B. Prison as a Legal Space: The Roles of Law and of Politics

The relationship between inmates and lawyers was complex. The inmates tended to appreciate the need for lawyers who understood how courts worked and who could frame arguments in ways that would be legally cognizable. At the same time, many were skeptical that lawyers shared their interests — both in terms of the personal career ambitions of lawyers and in terms of their larger social agendas. The problems in American prisons could be described in legal terms or in political terms, or as some combination of the two. While a sharp distinction between the two may not be tenable, it still influenced how inmates perceived their situation.³²

Lawyers could play critical roles. Samuel Melville, the “Mad Bomber” and a member of the Weather Underground, wanted a lawsuit “to test [the prison’s] stupid brutal regulations,”³³ and sought court orders to get political reading material.³⁴ He listed some of the most important rights for inmates to secure. First came “*access to the media*. . . . We are left with nothing except riots to bring our plight before the public.”³⁵ Other important issues included: an overhaul of the parole system, an end to political censorship, higher wages, programming for rehabilitation, education, and easier access for visits from families, but, he concluded, “the list is endless.”³⁶

³¹ WICKER, *supra* note 1, at 50.

³² For a statement on the importance of maintaining this boundary in historical accounts, see Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641, 643 (2011).

³³ Letter from Sam Melville (Jan. 30 1971), in SAMUEL MELVILLE, LETTERS FROM ATTICA 133 (1972) [hereinafter LETTERS FROM ATTICA].

³⁴ Letter from Sam Melville (Apr. 17, 1971), in LETTERS FROM ATTICA, *supra* note 33, at 142–43.

³⁵ Letter from Sam Melville (May 7, 1971), in LETTERS FROM ATTICA, *supra* note 33, at 146.

³⁶ *Id.* at 147.

After outlining the important changes that could be brought through legal reform, Melville backed away from being personally involved because the lawsuit was “peripheral to [his] political education and potential.”³⁷ Melville suggested instead that the lawyers seek out other inmates who had been pursuing legal reform projects for longer, recognizing the multiplicity of approaches and the utility of multipronged action.³⁸ Three months later, in August 1971, he seemed more open to the possibility of continuing a lawsuit, though he questioned whether it could address the deeper issues:

Got t[he] letters & suit draft. It seems weak. T[he] only substantive point is censorship. We must somehow work into it t[he] basic terror that people live under in prison: t[he] provocative quality of a club suddenly striking a solid brick or steel surface just behind [yo]u, accompanied by a roar to lockin, forward march, etc.³⁹

This miasmatic *terror*, in Melville’s description, underlay the prison experience and contributed to the background of violence. Specific manifestations of overt violence were important, but in some sense epiphenomenal — violence constantly threatened to leap from the background into the foreground of prison life.

William Coons, a writer and a less politically engaged inmate at Attica, noted that the basic problem may have been less about laws than about human connection — and that the agitation within the prison was less about reform than about recognition:

What these men want is somebody to talk to them, some sign there are real human beings somewhere at the helm. You could pass a thousand new laws, it wouldn’t make any difference. They know that laws and rules and regulations are never any better than the people administering them. But you have to start somewhere . . .⁴⁰

Coons suggested that the nature of the institution was dehumanizing; legal reform could change the form of the prison superficially, but would not address the structural problems that prevented inmates and prison officials from relating to each other as fellow humans. Only to the extent that officials within the prison could be made to care about the human problems of the prison could meaningful change come about.

Inmate writers in California tended to be more skeptical of the potential for law to meaningfully improve prisons. John Clutchette, one of the

³⁷ *Id.* at 147–48. He appreciated that “correspondence with a lawyer certainly makes the pigs more wary of leaning on a man and for that of course i [sic] want you to keep in touch.” *Id.* at 148.

³⁸ *Id.* at 148.

³⁹ Letter from Sam Melville (Aug. 30, 1971), in *LETTERS FROM ATTICA*, *supra* note 33, at 171.

⁴⁰ WILLIAM R. COONS, *ATTICA DIARY* 214 (1972).

“Soledad Brothers,”⁴¹ noted the limitations of *reform* as a project within the prisons: “[I]t would be reactionary to our position here to support the ram-bunctious call for prison reform . . . You can even go as far as to call it a dirty word. . . . [Prison reform] means changing the frame on the wall — but not the picture itself.”⁴² Instead of working through the prison administration or state legislatures or the courts, Clutchette believed the only hope for reform lay “in the people’s endeavor to hear [inmates’] protest and support [their] cause.”⁴³

George Jackson, perhaps the most preeminent prison theorist, reflected on his experience at trial to suggest that most lawyers would be unable or unwilling to contribute to oppositional projects: “I talked to several black lawyers when I got this last case of pig killing hung on me. We started off agreeing, but they abandoned me the moment I attacked Anglo-Saxon law, capitalism and the Blues”⁴⁴ Even if the lawyers did not disagree with his positions, Jackson believed that they might be deterred by social or professional pressure.⁴⁵

Perhaps the clearest expression of this ambiguous relationship with lawyers was expressed by Angela Davis in the context of her criminal trial for participating in Jonathan Jackson’s takeover of a Marin County courthouse.⁴⁶ As she awaited trial, she described the tension between relying on a lawyer for her defense while challenging the legal system itself:

The court system in this country is increasingly becoming a powerful instrument of repression. . . . [W]e can’t expect justice from a repressive judicial system and I’m sure that an exclusively legalistic approach to my defense would be fatal. So what we have to do is to talk about placing the courts on trial.⁴⁷

⁴¹ The Soledad Brothers were three inmates (John Clutchette, Fleeta Drumgo, and George Jackson) at Soledad prison in California charged with the murder of John Mills, a guard. See CUMMINS, *supra* note 17, at 165.

⁴² Letter from John Clutchette, in *IF THEY COME IN THE MORNING: VOICES OF RESISTANCE* 136 (Angela Davis ed., 1971) [hereinafter *IF THEY COME IN THE MORNING*].

⁴³ *Id.* at 139. This dismissal of “reform” was not limited to the California prisons: Sam Melville also disparaged the term. See Letter from Sam Melville (Aug. 1971), in *LETTERS FROM ATTICA*, *supra* note 33, at 169.

⁴⁴ GEORGE L. JACKSON, *BLOOD IN MY EYE* 5 (1972).

⁴⁵ George L. Jackson, *From Dachau, Soledad Prison, California*, in *LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS* 216, 227 (Robert Lefcourt ed., 1971).

⁴⁶ Jonathan Jackson was the brother of George Jackson. For the context of the trial, see generally BETTINA APTHEKER, *THE MORNING BREAKS: THE TRIAL OF ANGELA DAVIS* (1975).

⁴⁷ Angela Davis, *Prison Interviews*, in *IF THEY COME IN THE MORNING*, *supra* note 42, at 177. As her attorney put it, “Blacks have come to view the P.D. as a worse enemy than the prosecutor.” Margaret Burnham, *Ruchell and Angela Want to Represent Themselves*, in *IF THEY COME IN THE MORNING*, *supra* note 42, at 211, 214–16. In New York, the Hughes Committee on plea bargaining found that many inmates felt victimized and that inmates felt that they were victims “of a mindless, undirected, and corrupt system of justice.” See MCKAY REPORT, *supra* note 27, at 31.

While Davis understood that her attorney would function as her agent for the purposes of the trial, she did not want to cede control to a lawyer. But she also did not want to face trial without legal representation. She explained that she needed to actively participate in shaping her own defense while also maintaining access to an attorney; the fundamental tension that existed between Davis and her lawyer required that she be able to exercise her rights to counsel and to self-representation simultaneously. Giving up the right to an attorney would leave her unprepared for the rigors of trial, while giving up the right of self-representation would deny the political message of her trial and its opposition to the legal frame:

Rigorously speaking, neither is a *right*, if one must be renounced in order to exercise the other. Should I be penalized because I do not possess the legal knowledge, experience or expertise necessary to proceed entirely *pro se*? . . . [M]y limited knowledge of the law would be used as an excuse for denying me the opportunity to put on my best, most efficacious defense.⁴⁸

In Davis's view, trial was neither a strictly political matter nor a strictly legal matter — the categories blurred. As a result, legal representation was necessary but insufficient. The boundary between the legal and the political spheres was blurry in practice, but remained significant as an analytical tool.⁴⁹ Leaning too much on the law would be a mistake, but there were also dangers in refusing to speak its language.

II. ADDRESSING RIGHTS AND VIOLENCE THROUGH LAW

The inmates recognized a fundamental tension between programs aimed at legal reform and those striving for thorough reconstruction. This tension was both incredibly generative, creating a space for imaginative responses to the problem of incarceration, and unstable, as illustrated by the traumas of the summer of 1971.⁵⁰ This Part sketches the intellectual world of the prison, paying attention to key opportunities for action: large-scale civil rights or prison conditions lawsuits and accompanying structural injunctions; inmate-led civil rights lawsuits; political mobilization in a radical tone; and mobilization in a more cooperative tone. The available options spoke to the myriad ways of understanding incarceration at the time. I elaborate on the following distinctions in this Part: First, some approaches treated the issues in ordinary prison conditions as comparable to acts of

⁴⁸ Angela Davis, *Notes for Arguments in Court on the Issue of Self-Representation*, in *IF THEY COME IN THE MORNING*, *supra* note 42, at 237, 244–45.

⁴⁹ See Schmidt, *supra* note 32, at 643.

⁵⁰ On the relationship between jurigenerative processes of hermeneutics, jurispatic processes of legal decision, and violence, see Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1982) (“[T]he jurigenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion.”).

physical brutality that courts recognized as illegal. The major civil rights lawsuits, such as *Holt v. Sarver*,⁵¹ addressed prison conditions in this way — securing notable improvements, but also taking the form of incarceration for granted. Second, among the approaches that treated the violence of incarceration as more of a political matter, as a form of social control targeted against minorities and radicals, the question remained where this could be contested. Martin Sostre provides an example of how litigation in the courts could be a tool of political resistance rather than a way to correct an essentially defensible carceral system.⁵² Third, if the courts were not the right space, what was? Prison theorists sought to build upon political and social movements to bring about change — often with a lingering threat of violence.⁵³ These strategies could build upon each other, generally by pointing to the existence of more radical options as a means of compelling cooperation. The negotiations and declarations of grievances at Attica took an intermediate position, implicitly referencing prison theory while also pursuing more specific aims that could be described in the language of rights. The Attica movement therefore contained a richer, more complex perspective on both the problems facing inmates and on the ways to address them. Inmates had a very immediate relationship with the law; abstract rights mattered less than specific opportunities for action. The question of the origin of rights was not a theoretical matter of positivism or natural law; it related to the question of what options existed as a practical matter.⁵⁴

This Part describes the space of responses to the structural violence within the prison, following the above typology: (1) using the methods of civil rights litigation to correct inhumane conditions (with the example of the *Holt* cases); (2) using political tactics in the courtroom (with the example of the *Sostre* cases); (3) using political tactics as expressed through theory (with the examples of Eldridge Cleaver and George Jackson); and (4) using political tactics through negotiations and declarations of rights (at Attica).

A. *Prison Conditions and the Eighth Amendment: Law as Remedy*

Prisoners' rights cases came to particular prominence in the late 1960s and 1970s, after the early victories of the civil rights movement. Much of the early litigation came out of the South and addressed the toxic brew of race control, forced labor, and the changing politics of the region.⁵⁵

⁵¹ 300 F. Supp. 825 (E.D. Ark. 1969).

⁵² See *infra* section II.B.

⁵³ See CUMMINS, *supra* note 17, at 250–51. See generally JACKSON, *supra* note 44.

⁵⁴ See WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS 277, 278 (Edmund Jephcott trans., 1978). “[Both natural law and positive law agree that] just ends can be attained by justified means, justified means used for just ends. Natural law attempts, by the justness of the ends, to ‘justify’ the means, positive law to ‘guarantee’ the justness of the ends through the justification of the means.” *Id.*

⁵⁵ See, e.g., McLENNAN, *supra* note 11, at 9–10; OSHINSKY, *supra* note 29, at 241. However, as Margo Schlanger notes, the early cases were not only from the South. See Margo

The foundation for much prisoners' rights litigation was the Eighth Amendment, which has gradually been read to encompass more than strictly physical punishments.⁵⁶ In the years leading up to the Attica riots, the Eighth Amendment was coming to protect against both direct abuse by prison officials and unconstitutionally punitive conditions of incarceration.⁵⁷ The expansion of the law to cover inhumane conditions was a judicial recognition that cruelty could exist on an environmental level, as well as through specific acts. But there were limits.

The scope of prison conditions doctrine was defined through a series of cases in Arkansas.⁵⁸ *Holt v. Sarver*⁵⁹ ("*Holt I*"), the first case in this series, attacked the system of close confinement within Cummins Farm at the Arkansas State Penitentiary. The time was ripe for prison reform: Robert Sarver, the reform-minded Commissioner of Corrections, was generally considered to have been assisting the plaintiffs in preparing their case against the state.⁶⁰ Judge Jesse Smith Henley in the Eastern District of Arkansas appointed two lawyers to represent the litigants: Philip Kaplan, a northern

Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2029 (1999). The significance of the southern cases was revealed later, as their broad scope and continued judicial supervision was affirmed; most inmates in 1971 would likely have been focused on litigation in their own states. Among civil rights lawyers, the importance of the southern cases would have been more apparent, and as those civil rights lawyers led these large cases, the focus on *Holt v. Sarver* is justified.

⁵⁶ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Weems v. United States*, 217 U.S. 349, 373 (1910) ("In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be."). For more background, see generally Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969), which claims that there is a shift in the meaning of "cruel and unusual" in the transition from English law to American law. While claiming the mantle of "original meaning," Granucci's article is better read as indicative of the uncertain ground for interpreting the Eighth Amendment in these years.

⁵⁷ The recognition that prison conditions could be unconstitutionally punitive and the recognition that physical acts could be unconstitutionally punitive for their mental consequences came almost simultaneously. In *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967), the mental suffering of solitary confinement did not ground a finding of unconstitutionality; rather, such forms of mental suffering were additional consequences of "subhuman conditions" such as exposure to the elements. See 387 F.2d at 526. In *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), physical brutality in the form of whippings was unconstitutional in part due to psychological factors such as the generation of hatred and degradation. See 404 F.2d at 579 (Blackmun, J.).

⁵⁸ In Arkansas, *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965), opened the window for prison litigation, but lawsuits were also occurring in other states. See FRIEDMAN, *supra* note 9, at 313–14. This section focuses on the *Holt* cases, but does not aim to provide an overview of this entire legal movement.

⁵⁹ 300 F. Supp. 825 (E.D. Ark. 1969).

⁶⁰ See FEELEY & RUBIN, *supra* note 18, at 61. Note, however, that the response by prison officials to prison conditions litigation may be fundamentally different from their responses to prisoners' rights litigation. Prison conditions litigation can result in prisons securing more resources within the bureaucratic contests of the state, while prisoners' rights cases can result in a loss of autonomy for prison officials. See Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 469 (2004); see also Schoenfeld, *supra* note 14, at 760. For a contemporary instance of prison conditions reform being supported by the cor-

civil rights litigator; and Jack Holt, a conservative prosecutor and local Arkansan.⁶¹ The Judge ultimately found that the system of close confinement violated the Eighth Amendment.⁶² The jailhouse lawyers had launched the process, but Judge Henley, Commissioner Sarver, and the plaintiffs' attorneys would dictate the agenda of reform.⁶³

Holt I revealed some of the problems facing the Arkansas prison system, but its successor case addressed the question of appropriate remedies. The key opinion in shaping this doctrine was *Holt v. Sarver*⁶⁴ ("*Holt II*") in 1970, "the first time that convicts have attacked an entire penitentiary system in any court, either State or federal."⁶⁵ The court reasoned that prison conditions had to be viewed in their totality as that was how the inmates experienced those conditions:

One cannot consider separately a trusty system, a system in which men are confined together in large numbers in open barracks, bad conditions in the isolation cells, or an absence of a meaningful program of rehabilitation. All of those things exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates regardless of their status.⁶⁶

Rather than addressing specific conditions piecemeal, Judge Henley challenged the entirety of the state prison system's operations as contrary to the Eighth Amendment and subjected it to judicial supervision. Furthermore, the state could not dodge the requirement of humane treatment by shifting this obligation to the legislature.⁶⁷ The Eighth Circuit upheld Judge Henley's supervision of the system as long as was "necessary to provide reasonable

rectional officers who share in those conditions, see Lance Lowrey, *In Texas, Inmates and Officers Swelter*, N.Y. TIMES, Nov. 22, 2013, at A29.

⁶¹ See FEELEY & RUBIN, *supra* note 18, at 61.

⁶² *Holt I*, 300 F. Supp. at 833 ("[The situation of confinement in Arkansas] is mentally and emotionally traumatic as well as physically uncomfortable. It is hazardous to health. It is degrading and debasing; it offends modern sensibilities, and, in the Court's estimation, amounts to cruel and unusual punishment."). Note that Judge Henley based this finding on both mental and physical trauma, without distinguishing between the two. This built upon and extended the legal developments in *Wright* and *Jackson*. See *supra* note 57 and accompanying text.

⁶³ Feeley and Rubin note the irony that one of the lead attorneys shared the surname of the named plaintiff, Lawrence Holt: "[G]iven the extent to which the plaintiffs' attorneys controlled the litigation, it was an appropriate coincidence that the case and one of its attorneys were homonymous." FEELEY & RUBIN, *supra* note 18, at 61.

⁶⁴ 309 F. Supp. 362 (E.D. Ark. 1970).

⁶⁵ *Id.* at 365. However, it is somewhat disingenuous to say that this comprehensive attack was at the urging of the convicts; Henley and Sarver were also urging this move. See FEELEY & RUBIN, *supra* note 18, at 62.

⁶⁶ *Holt II*, 309 F. Supp. at 373.

⁶⁷ *Id.* at 385. "Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionality does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States." *Id.* Sharon Dolovich describes this as the state's "carceral burden." See Dolovich, *supra* note 10, at 891.

assurance that incarceration therein will not constitute cruel and inhuman punishment violative of the Eighth Amendment.”⁶⁸ In an opinion three years later, Judge Henley recognized that conditions had substantially improved, at least on the books; he noted, however, that inhumane conditions arising from mismanagement still could be constitutionally suspect.⁶⁹ By that time, Sarver had been replaced as Commissioner of Corrections by Terrell Don Hutto, another reformist commissioner who had worked in the California prison system.⁷⁰

Judicial supervision of the Arkansas prisons led to fitful progress, eventually sputtering out at the end of the decade. The most glaring abuses were corrected, but as more deep-seated problems became apparent, it became more difficult to justify the court’s continued oversight of the prisons in the terms that had been established in the earlier cases. For example, while Commissioner Hutto “unquestionably” condemned abuse of inmates following *Holt II*, correctional officers could still give disproportionate punishments, such as subjecting elderly inmates to the same labor conditions as younger, stronger inmates.⁷¹ The Court of Appeals for the Eighth Circuit affirmed the district court’s involvement, citing the “monumental” problems “in a newly developed area of constitutional law.”⁷² This judicial supervision was necessary even given the active cooperation of Commissioner Hutto because, as the court found, “mere words are no solution.”⁷³ Nonetheless, judicial supervision ended in 1982, following a controversy over other forms of corruption in prison management.⁷⁴

The Arkansas cases took place in the context of a Jim Crow justice system that was responding to larger social developments in the wake of the civil rights movement. Advocates of prisoners’ rights throughout the South connected their work to the expansion of rights for African Americans generally.⁷⁵ This wave of prison litigation explicitly used the language of *rights*, which had been crucial in the fights for equality during the previous decades. Even the most ambitious prison litigation, such as *Holt II* and its progeny, was ultimately based in violations of individual rights rather than the social terms that some critics preferred.⁷⁶

⁶⁸ See *Holt v. Sarver*, 442 F.2d 304, 309 (8th Cir. 1971). The court also invoked the language of *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), as limiting the discretion of judges to review abusive prison practices, but found that Henley had met this standard. *Holt*, 442 F.2d at 308–09.

⁶⁹ See *Holt v. Hutto (Holt III)*, 363 F. Supp. 194, 202 (E.D. Ark. 1973).

⁷⁰ FEELEY & RUBIN, *supra* note 18, at 66.

⁷¹ *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 206 (8th Cir. 1974).

⁷² *Id.* at 214–15.

⁷³ *Id.* at 206.

⁷⁴ See FEELEY & RUBIN, *supra* note 18, at 74–78.

⁷⁵ See, e.g., LARRY YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 4–5 (1989); see also OSHINSKY, *supra* note 29, at 241–48.

⁷⁶ See Schoenfeld, *supra* note 14, at 757 (“Given the historical context, litigating these issues meant translating them into a problem of constitutional ‘rights’ . . . However, the

Prisoners' rights cases suggested the possibility of preventing both targeted abuse imposed by correctional officers and pervasive inhumane conditions created by policy and mismanagement. By grounding the legal harm of inhumane conditions in a violation of individual rights, Judge Henley had tried to decouple prison conditions from political decisions in state legislatures. This move to distinguish law from political decisionmaking would sidestep the conservative local politics in the South.⁷⁷ But this limited rights to those specifically mandated by the Constitution and those preventing barbarous physical harm, not feelings of terror or dehumanization.

B. *Martin Sostre, Jailhouse Lawyer: Litigation as Political Resistance*

Martin Sostre, one of the preeminent jailhouse lawyers of the time, explored the limits of litigation during the 1960s and early 1970s, offering a sharp contrast to the model of civil rights litigation in the Arkansas cases.⁷⁸ In prison, Sostre had converted to Islam before finding it an inadequate movement with which to mobilize the black community.⁷⁹ At Attica, he began to study law.⁸⁰ Sostre did not believe that law would adequately vindicate rights; rather, lawsuits were a vehicle for resistance.⁸¹ He sought to use law to force the state to acknowledge the distance between its acts and its constitutional aspirations.⁸²

Sostre had a complex relationship to the law. He operated the Afro-Asian Bookstore in Buffalo, a center for local radical politics, and believed strongly in freedom of thought and freedom of expression — largely as a way of fostering a political awareness outside the channels of the mainstream press.⁸³ While he perceived his trial for drug possession to be a “frame-up,” his approach was to use the tools of the law against the state:

I am setting the example of total rebellion, even in the courtroom, against the oppression, frame-up and kangarooism against me and my militant brothers all over the country. I am telling all the mili-

‘rights’ framing of prison litigation limited the ideation of the problem to the ‘immediate dangerous conditions’ instead of, for example, the overuse of incarceration for low-level offenses.”).

⁷⁷ Feeley and Rubin note that the legal project was to impose national standards on state prison systems. See FEELEY & RUBIN, *supra* note 18, at 162.

⁷⁸ See, e.g., KRISTA M. RALSTON & RICHARD D. RALSTON, *THE JAIL HOUSE ADVOCACY OF MARTIN SOSTRE: LEGAL AND MENTAL IMPLICATIONS OF PRO SE PRISONER LITIGATION* 17 (1995); see also *Introductory Note to Martin Sostre, The New Prisoner*, 4 N.C. CENT. L. REV. 242, 242 (1972).

⁷⁹ MARTIN SOSTRE, *LETTERS FROM PRISON* 4 (1968).

⁸⁰ *Id.*

⁸¹ See Warren L. Schaich & Diane S. Hope, *The Prison Letters of Martin Sostre: Documents of Resistance*, 7 J. BLACK STUD. 281, 286 (1977).

⁸² Useem and Kimball offer a typology of responses to incarceration: Rationalism, Constitutionalism, Rehabilitationism, and Revolutionism. While too rigid to be of much use, it may be helpful to think of Sostre as combining the “Constitutionalism” and “Revolutionism” aspects of this typology. See USEEM & KIMBALL, *supra* note 5, at 205–07.

⁸³ SOSTRE, *supra* note 79, at 29.

tants: "Look brothers, what I am doing to the oppressor. If I can do it by myself, practically alone *and already in this man's jail*, imagine what 30 or 40 organized militant brothers can do on the outside if they should defy white authority!"⁸⁴

Revealing the state's own manipulations of the law made visible how law was being distorted: Sostre "found this to be the most effective method of fighting the oppressor. By challenging every unlawful act you force him to commit other overt acts in order to cover up his original crime."⁸⁵ Indeed, it was the duty of the citizen to expose the tensions and contradictions within the law in order to undermine its efficacy as a tool of control: "Law means authority. Once [the oppressor] accomplishes this, he has it made. He can control and rule the oppressed with their cooperation!"⁸⁶

Sostre filed several lawsuits from prison, achieving some success and securing his reputation as a leading jailhouse lawyer. His first successful litigation, in 1961, protected religious freedoms for Muslims in prison.⁸⁷ Sostre's 1970 victory in *Sostre v. Rockefeller*⁸⁸ was noteworthy for expanding the right of inmates to communicate with legal counsel,⁸⁹ and for finding that punishment by over a year of administrative segregation for political associations and the possession of political literature violated the First⁹⁰ and Eighth Amendments.⁹¹ Judge Constance Baker Motley observed that Sostre was "unquestionably, a black militant who persist[ed] in writing and expressing his militant and radical ideas in prison."⁹² However, she noted:

[O]ne function [of our prison system] is to try to rehabilitate the lawbreaker by convincing him of the validity of our legal system. There is little chance that such an objective will be achieved if prisoners are entrusted to those who likewise break the law by denying prisoners their basic constitutional rights.⁹³

The tension between the rule of law and radical politics meant that prisons had to scrupulously obey the law; this is what Sostre would try to use against them.

⁸⁴ *Id.* at 55.

⁸⁵ *Id.* at 65.

⁸⁶ *Id.* at 56.

⁸⁷ See *Pierce v. LaVallee*, 293 F.2d 233, 236 (2d Cir. 1961).

⁸⁸ 312 F. Supp. 863 (S.D.N.Y. 1970).

⁸⁹ *Id.* at 874.

⁹⁰ *Id.* at 876. Against those who argue that law reviews are irrelevant, it bears mentioning that one book that got him in trouble was an issue of the Harvard Law Review. See *id.* at 869.

⁹¹ *Id.* at 871. Judge Motley relied on the reasoning in *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967), on the consequences of prolonged solitary confinement. For that reasoning, see *supra* note 57.

⁹² *Rockefeller*, 312 F. Supp. at 869-70.

⁹³ *Id.* at 876.

But his victory was short-lived. Sitting en banc, the Second Circuit deferred to prison administrators in their decisions to employ segregative punishment.⁹⁴ In determining that Sostre's confinement was not cruel and unusual, the court looked to his diet, opportunities to maintain minimal personal hygiene and participation in therapy, access to some books, and the possibility of communication with other inmates in segregation.⁹⁵ Collectively, the court found, these opportunities rendered the confinement acceptable.⁹⁶ In contrast to these discrete indicia of treatment, Judge Wilfred Feinberg, in dissent, pointed to a telling anecdote: the day after Judge Motley ordered Sostre's release from segregation, he was disciplined for having dust on his cell bars and prevented from participating in a July 4th celebration.⁹⁷ From Judge Feinberg's perspective, counting the privileges afforded Sostre missed something fundamental about the process of targeting him for punishment.

Sostre's lawsuits were not always effective, and the outcomes were often mixed. In addition to the Second Circuit's quick modification of Judge Motley's order in *Sostre v. Rockefeller*,⁹⁸ the outcome in 1971's *Sostre v. Otis*⁹⁹ was highly ambiguous. *Sostre v. Otis* acknowledged the need for some censorship within prisons while upholding a right to read freely "provided no substantial danger of disruption is presented" — the determination of which was precisely what had been at issue in *Rockefeller*.¹⁰⁰

But Sostre's writings reveal the importance of litigation not only as a means of effecting change, but also as a means of self-preservation.¹⁰¹ Sostre's letters from the late 1960s are telling as a window into how litigation could be used to pursue radical, oppositional goals rather than a program of prison reform. Even as other critics of incarceration (described in the next section) remained wary of civil rights litigation, Sostre was determined to show how these techniques could be used to constrain prison officials and expose the political purposes for which the state used the law.¹⁰² However, the wisdom of Sostre's decision to fight through the courts would be tested by New York State's response to the Attica inmates.

⁹⁴ See *Sostre v. McGinnis*, 442 F.2d 178, 191 (2d Cir. 1971).

⁹⁵ *Id.* at 193–94.

⁹⁶ *Id.*

⁹⁷ *Id.* at 207.

⁹⁸ As Samuel Melville noted to his lawyer, "If you're intimate with the Appeals' decision of the Sostre case you know that really we lost (potentially) much more than we gained." LETTERS FROM ATTICA, *supra* note 33, at 144.

⁹⁹ 330 F. Supp. 941 (S.D.N.Y. 1971).

¹⁰⁰ *Id.* at 945.

¹⁰¹ See RALSTON & RALSTON, *supra* note 78, at 35–38; see also Schaich & Hope, *supra* note 81.

¹⁰² As he noted in a letter to his lawyer, Joan Franklin, "I will challenge this [obstruction of mail] under the Civil Rights Act inasmuch as the reason for the obstruction was to conceal acts of racism and racial oppression being perpetrated upon me and our people." SOSTRE, *supra* note 79, at 74.

C. Political Prisoners: Connecting Theory and Action

The previous sections have examined legal responses to incarceration. However, prison theorists during the 1960s and early 1970s provided alternative analyses of the problems facing inmates and the proper responses. Rather than describing the problems facing inmates in terms of constitutional rights, they did so in terms of race and class analyses; rather than working through the courts, they wrote for the public in order to advocate for social change. Many of these prison theorists lived in California, but their influence was felt widely both inside and outside of prisons.¹⁰³ Elements of the New Left and of the counterculture were deeply sympathetic to the claims made by these inmates, and they responded eagerly to these works and to the claims of prisoners generally as pointing to something deeply and structurally wrong with contemporary American society.¹⁰⁴ The narrative of inmate as outlaw and as liberator provided one of the crucial interpretive frames for understanding Attica, and one vocabulary for expressing inmate demands.

The arguments of radical prison theorists linked domestic social problems to those overseas — a connection also made within more mainstream elements of the left as the postwar liberal consensus began to break down. Even Governor Nelson Rockefeller came close to seeing the Attica riot as part of a global liberation movement.¹⁰⁵ One of the crucial political dynamics was the growing disjunction between a centrist liberalism and the left, and prison issues were firmly within this rift.¹⁰⁶ The liberal legal response to incarceration was to demand that incarceration conform to certain minimum standards,¹⁰⁷ in contrast to the radical approach that challenged the legitimacy of incarceration wholesale, and that viewed incarceration as an outgrowth of urban poverty and the isolation of the ghetto.¹⁰⁸

These radical political writings from the prison were intended to mobilize outside forces. Eldridge Cleaver, an inmate at Folsom and San Quentin State Prison (“San Quentin”) who later became a leader in the Black Panthers, effectively capitalized on the romance of the outlaw in building an audience for his memoir, *Soul on Ice*, among both inmates and young, middle-class, white leftists.¹⁰⁹ He described the process of his radicalization in

¹⁰³ See MCKAY REPORT, *supra* note 27, at 106–08.

¹⁰⁴ See generally CUMMINS, *supra* note 17, at 128–50.

¹⁰⁵ See MCKAY REPORT, *supra* note 27, at 318–19.

¹⁰⁶ Maxwell Geismar noted in his introduction to Eldridge Cleaver’s *Soul on Ice*: “Here Cleaver unites the militant black resistance movement in the United States with the currents of world revolution in a way which may come as a shock to many white Americans of liberal persuasion and spiritual good-will.” Maxwell Geismar, *Introduction* to ELDRIDGE CLEAVER, *SOUL ON ICE*, at xiii (1968).

¹⁰⁷ See, e.g., *supra* section II.A (analyzing the *Holt* cases).

¹⁰⁸ See, e.g., ELDRIDGE CLEAVER, *SOUL ON ICE* (1968).

¹⁰⁹ But *Soul on Ice* was not universally admired. Johnny Spain, a member of the Black Panthers and one of the San Quentin Six, said: “It was one of the books that if you were a prisoner that had political consciousness you had to read. And I thought it was one of the most

prison, noting that he entered prison a month after the seminal civil rights victory in *Brown v. Board of Education*,¹¹⁰ yet totally unaware of the existence or the meaning of the decision.¹¹¹ To Cleaver, the debates regarding civil rights missed the basic point:

All respect we may have had for politicians, preachers, lawyers, governors, Presidents, senators, congressmen was utterly destroyed as we watched them temporizing and compromising over right and wrong, over legality and illegality, over constitutionality and unconstitutionality. We knew that in the end what they were clashing over was us, what to do with the blacks, and whether or not to start treating us as human beings. I despised all of them.¹¹²

Cleaver asked why he had been incarcerated for violating the law while those who defied desegregation orders remained in power.¹¹³

While Cleaver's writings had wide appeal, the major theorist of the prison was George Jackson.¹¹⁴ Jackson's letters were partly intended to inform the public about the experience of prison and partly to place them on notice. One letter began:

[This message's] intent is to make it impossible for you to claim ignorance later on, after the war, when the world sits down to judge you, Amerikan society, Anglo-Saxon law. "We didn't know those things were going on," will not save you from the condemnation of history and the world's people.¹¹⁵

Both Jackson and Cleaver decoupled incarceration from moral blameworthiness. They positioned themselves variously as prisoners of war or as political prisoners. In an environment of poverty and racism, crimes were either amoral¹¹⁶ or symptomatic of a deeper victimization.¹¹⁷ Jackson made the point even more forcefully: "When the peasant revolts, the student demonstrates, the slum dweller riots, the robber robs, he is reacting to a feeling

disgusting books I had ever read . . . I didn't particularly care about the constant implication that women had a place. . . . I didn't appreciate that." See CUMMINS, *supra* note 17, at 109.

¹¹⁰ 347 U.S. 483 (1954).

¹¹¹ CLEAVER, *supra* note 108, at 3.

¹¹² *Id.* at 4.

¹¹³ *Id.*

¹¹⁴ See generally Lee Bernstein, *The Age of Jackson: George Jackson and the Culture of American Prisons in the 1970s*, 30 J. AM. CULTURE 310 (2007). For a narrative of the events in Soledad, see MIN S. YEE, *THE MELANCHOLY HISTORY OF SOLEDAD PRISON* (1973).

¹¹⁵ Jackson, *supra* note 45, at 216.

¹¹⁶ See CLEAVER, *supra* note 108, at 58 ("Negro convicts, basically, rather than see themselves as criminals and perpetrators of misdeeds, look upon themselves as prisoners of war, the victims of a vicious, dog-eat-dog social system that is so heinous as to cancel out their own malefactions: in the jungle there is no right or wrong.").

¹¹⁷ See *id.* "Rather than owing and paying a debt to society, Negro prisoners feel that they are being abused, that their imprisonment is simply another form of the oppression which they have known all their lives. Negro inmates feel that they are being robbed, that it is 'society' that owes them, that should be paying them, a debt." *Id.*

of insecurity, an atavistic throwback to the territorial imperative, a *reaction* to the fact that he has lost control of the circumstances surrounding his life.”¹¹⁸ Jackson’s framework not only explained the causes of crime in terms of hopelessness, but also provided an explanation of riot and violence as a reaction against hopelessness and lack of opportunity: “Prisoners must be reached and made to understand that they are victims of social injustice. This is my task working from within.”¹¹⁹

If incarceration was not about blameworthiness, then what was it about? It was about social order and stigma, about economics and property, and about warehousing the poor. Inmates should be seen as political prisoners: “The ultimate expression of law is not order — it’s prison. There are hundreds upon hundreds of prisons, and thousands upon thousands of laws, yet there is no social order, no social peace.”¹²⁰ As Jackson put it, the function of law within a society was to “protect[] the culture’s ideology.”¹²¹

Even some nonradicals agreed that incarceration fulfilled a particular social need at their expense. William Coons, the writer incarcerated in Attica, noted that society needed criminals in order to project an image of control; the brutality of the prison reflected the recognition that this control remained tenuous at best.¹²² Prisons and criminality defined respectability and hierarchy by fixing the label of criminality on the deviant.¹²³ Coons, an educated, white writer,¹²⁴ in prison for possession of LSD, may have been particularly attuned to this aspect of incarceration; drug laws had transformed what could have been seen as a bohemian lifestyle into a criminal one.¹²⁵

But as a matter of politics, incarceration was not only about the ghetto and domestic social order — it had global implications. The prison movement dovetailed with the antiwar movement. Cleaver connected the struggle for freedom among African Americans to those in the Third World; freedom at home was impossible without freedom abroad.¹²⁶ He urged a shift from the language of “civil rights” to one of “human rights” understood universally.¹²⁷ Such rights should be understood not as protections offered by the state, but as a natural consequence of one’s humanity.

¹¹⁸ GEORGE L. JACKSON, SOLEDAD BROTHER 179 (1970).

¹¹⁹ JACKSON, *supra* note 44, at 108.

¹²⁰ *Id.* at 99–100.

¹²¹ JACKSON, *supra* note 45, at 227.

¹²² COONS, *supra* note 40, at 106.

¹²³ *See id.* at 175.

¹²⁴ *Id.* at 189.

¹²⁵ *See id.* at 9.

¹²⁶ *See* CLEAVER, *supra* note 108, at 115. “[T]he link between America’s undercover support of colonialism abroad and the bondage of the Negro at home becomes increasingly clearer. Those who are primarily concerned with improving the Negro’s condition recognize, as do proponents of the liquidation of America’s neo-colonial network, that their fight is one and the same. They see the key contradiction of our time.” *Id.*

¹²⁷ *Id.* at 126.

The allure of Third World liberation movements persisted into the Attica riot. L.D. Barkley, a young, black inmate who rose to prominence during the occupation, presented the inmates' first set of demands. It was addressed "to the People of America," and demanded amnesty, federal jurisdiction over the matter, the reconstruction of the prison under inmate supervision, and safe transportation "to a non-imperialistic country."¹²⁸ But the references to nonimperialist countries did not always have much purchase. Another inmate pushed back: "The silent majority out here . . . ain't sayin' shit. . . . I stands on my own, and I ain't concerned about Algeria, Africa, or anywhere else."¹²⁹

Prison theorists offered sophisticated readings of rights, recognizing both their promise and the tenuous basis on which they rested. The determination of rights through either natural or positive law bore upon the options that inmates had to protect them: If they were based in human nature, then resistance against the state could be justified in order to vindicate them.¹³⁰ If they came from the state, then they would need to be vindicated through the legal and political process. It was important to look beyond the United States in order to understand the content of human rights. To this effect, Martin Sostre cited the Universal Declaration of Human Rights and the war crimes tribunal at Nuremberg as providing a higher law than American constitutionalism.¹³¹

If this was all a matter of politics for these theorists, could law be used defensively, as Sostre had tried to do? No, because for them the violence of incarceration was not about specific, identifiable harms. It was about *terror* and *dehumanization*. The problem was structural, based in the hierarchy that was built into the idea of the modern prison. The role of terror was pervasive and made the prison a fundamentally unjust place. As Jackson explained to his lawyer:

The picture that I have painted of Soledad's general population facility may have made it sound not too bad at all. That mistaken impression would result from the absence in my description of one more very important feature of the main line — terrorism. A frightening, petrifying diffusion of violence and intimidation is emitted from the offices of the warden and captain. How else could a small group of armed men be expected to hold and rule another much larger group except through *fear*?¹³²

¹²⁸ WICKER, *supra* note 1, at 27–29. The "Five Demands" are reprinted in *id.* at 315–16.

¹²⁹ *Id.* at 95 ("This evoked considerable applause.").

¹³⁰ See BENJAMIN, *supra* note 54, at 282 ("[E]ven conduct involving the exercise of a right can nevertheless, under certain circumstances, be described as violent. More specifically, such conduct, when active, may be called violent if it exercises a right in order to overthrow the legal system that has conferred it.").

¹³¹ See MARTIN SOSTRE DEF. COMM., MARTIN SOSTRE IN COURT 49 (1969).

¹³² JACKSON, *supra* note 118, at 22.

The problem was built into the structure of the prison and the power granted to prison administrators. He asked his lawyer: “[H]ave you ever considered what type of man is capable of handling absolute power. I mean how many would not abuse it? Is there any way of isolating or classifying generally who can be trusted with a gun and *absolute* discretion as to who he will kill?”¹³³ The problem existed on the level of specific grants of discretion as well as on the more general plane of the structure of the institution and its role in society.

Terror was marked by the *absence* of overt violence and by the continuous *presence* of its possibility. As Jackson described it, “[t]error becomes an absolute necessity . . . [;] a misstep across this line could bring the blow that kills. Even if no one dies the fact of being shot at for so small an indiscretion has a permanent effect on all who witness it.”¹³⁴ This was the same theme that Melville had sounded in diagnosing the limitations of the lawsuits.¹³⁵

Along with the atmosphere of terror, the inmates also described how incarceration made them feel less than fully human. Not only were they locked up, but they were denied the possibility of autonomy and self-determination.¹³⁶ Lewis Moore, an inmate at Soledad, had described the sense of being treated as an animal in similar terms:

[A]n inmate is no different then [sic] them [prison officials], only in the sense that he has broken a law. He still has feelings, and he’s still a human being. And until the big wheels in Sacramento and the personnel inside the prisons start practicing rehabilitation, and stop practicing zoology, then they can expect continuous chaos and trouble between inmates and officials.¹³⁷

An inmate at Attica described the feeling of not being treated like a man: “Manhood at Attica is intimidated 24 hours a day, 365 days a year.”¹³⁸ Tom Wicker, a reporter invited to Attica as an observer at the behest of the inmates, summarized the basic problem in similar terms:

Was there a more degrading and degenerative act one person could inflict upon another? One could kill, but death has more dignity than some kinds of life. One could mutilate, but only the ephemeral body, which could heal itself. A human being could withstand

¹³³ *Id.* at 24.

¹³⁴ Letter from George L. Jackson (Jan. 1971), in *MAXIMUM SECURITY: LETTERS FROM CALIFORNIA’S PRISONS* 64 (Eve Pell ed., 1972) [hereinafter *MAXIMUM SECURITY*].

¹³⁵ See Melville, *supra* note 39, at 171.

¹³⁶ Gresham Sykes had earlier identified a similar phenomenon, through which an inmate becomes “a semi-human object, an organism with a number.” GRESHAM SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 6* (1958).

¹³⁷ Jackson, *supra* note 134, at 72.

¹³⁸ MCKAY REPORT, *supra* note 27, at 119.

physical brutality, or try to. But to cage a person designated him as less than human, less than a part of mankind¹³⁹

While Coons had described the inhumanity of the institution in terms of the lack of genuine human concern by the administration, these inmates described it in terms of the basic denial of human dignity.¹⁴⁰

But these experiences of terror, dehumanization, and brutalization provided an atmosphere in which inmates could understand their political situation. Jackson explained that the prison was important for training the revolutionary mind: “No other experience, no other social phenomenon, can equal the traumatic effect of imprisonment, the total loss of all liberty. Any further downward movement takes one out of this existence.”¹⁴¹ The extreme nature of the punishment was due to the politicized nature of modern incarceration.

Many inmates became politicized through these experiences in the prison. At Folsom, an inmate identified as “Comrade Robert” described the intellectual environment: “Political awareness pervades the very air here. Political dialectics are the common topics of conversation, replacing pimping, robbing, and hustling as the main interest. Frantz Fanon, Mao Tse-Tung, Regis Debray, Che and Marx have replaced Louis La’mour [sic], Max Brand.”¹⁴² These works, among others, were also discussed in Attica, where the inmates had created spaces to discuss theory and social movements.¹⁴³ Five hundred inmates participated in inmate-led cell-study courses (African American history, Spanish, Hebrew, and sociology), which met weekly.¹⁴⁴ The sociology class in particular was a known focal point for discussing political theory and possibilities for action.¹⁴⁵ Inmates in American prisons discussed political and social theory, and also contributed to a vibrant strand of this literature. Theory provided a foundation for a more thorough critique of the system of incarceration than did legal reform. But what actions

¹³⁹ WICKER, *supra* note 1, at 59.

¹⁴⁰ The concept of “dignity” has recently drawn significant attention from academics, particularly as it relates to the basis for human rights. For an entry point into this expanding body of literature, see generally GEORGE KATEB, *HUMAN DIGNITY* (2011); MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012); and JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012).

¹⁴¹ Jackson, *supra* note 45, at 217–18.

¹⁴² Letter from “Comrade Robert,” in *MAXIMUM SECURITY*, *supra* note 134, at 223.

¹⁴³ Sam Melville noted the growing politicization of the inmates over the summer: “I can’t tell [yo]u what a change has come over t[he] brothers in Attica. So much more awareness & growing consciousness of themselves as potential revolutionaries. Reading, questioning, rapping all t[he] time. Still bigotry & racism, black, white & brown, but [yo]u can feel it beginning to crumble in t[he] knowledge so many are gaining that we must built solidarity against our common oppressor — t[he] system of exploitation of each other & alienation from each other.” Letter from Sam Melville (Aug. 1971), in *LETTERS FROM ATTICA*, *supra* note 33, at 168–69.

¹⁴⁴ MCKAY REPORT, *supra* note 27, at 42.

¹⁴⁵ See *id.* at 124. Melville described the weekly meetings of the sociology class as “inter-block strategy sessions.” Letter from Sam Melville to Bill (Aug. 30, 1971), in *LETTERS FROM ATTICA*, *supra* note 33, at 171.

should follow from this critique? Theorists such as Jackson and Cleaver were ambivalent. Perhaps a change in consciousness would suffice. But could this occur without a revolution?

D. The Manifesto: Rights Against a Background of Theory and Violence

Sostre's method of opposition through the courts and Jackson's critique of incarceration in American society were divergent responses to the changing social conditions of the prison. The inmates of Attica drew on both the radical and legalistic strands in their negotiations with the New York State Department of Corrections and in their public manifesto. In the summer of 1971, a group of inmates submitted a list of grievances to Commissioner Oswald that became known as the Manifesto of Demands ("the Manifesto").¹⁴⁶ The Manifesto's demands were strikingly moderate,¹⁴⁷ but negotiations emphasized the complex position of the Commissioner, caught between conflicting demands of inmates and guards.¹⁴⁸ In order to strengthen their position, the inmates sought publicity outside the prison walls. The process of writing the Manifesto spoke to both the existence of obvious, easily definable problems, and to the difficulty of capturing all the problems in explicit terms.

The Attica Manifesto was delivered to Oswald on July 2, 1971. It tackled several dimensions of the crisis in incarceration. The Manifesto described the traditional concerns of civil rights, but it also highlighted architectural features that implicated individual dignity. For instance, the inmates complained about the difficulty of maintaining family connections: western New York State was a long way from New York City, particularly for families without independent means of transportation, money to spend on travel, or the ability to take time off from work. The trip from New York could cost over \$100, including twenty hours of transit, all for visiting conditions that felt degrading.¹⁴⁹ One inmate remarked, "I didn't have my children visit me. If they want to see an animal, they can go to the zoo."¹⁵⁰ While inmates may have had formal visitation rights, they were often difficult or impossible to exercise.

The Manifesto had been a long time in the making. Parts of it had been drafted more than a year earlier, during the riots in the New York City deten-

¹⁴⁶ The Manifesto is reprinted in *LETTERS FROM ATTICA*, *supra* note 33, at 175–81.

¹⁴⁷ See Norval Morris & Gordon Hawkins, *Attica Revisited: The Prospect for Prison Reform*, 14 *ARIZ. L. REV.* 747, 756 (1972) ("The tragedy of Attica where 43 men died, a death toll surpassed only once before in the history of American prison riots, is that the issue in that confrontation was really only the simple request that we implement unkept promises over a century old.").

¹⁴⁸ See Oswald's response to the Attica Liberation Front in *MCKAY REPORT*, *supra* note 27, at 137–38 ("[N]o change can be accomplished without the constructive and receptive attitude of administration, staff, employees and, of course, inmates.").

¹⁴⁹ *MCKAY REPORT*, *supra* note 27, at 61–62.

¹⁵⁰ *Id.* at 62.

tion centers. On August 10, 1970, frustrated inmates in the Manhattan House of Detention for Men (“the Tombs”) demanded that their grievances — denial of preliminary hearings, excessive bail, trial delays of over a year, brutality, insults to visitors, inedible food, and more — be aired on television.¹⁵¹ The next day, the inmates hung a banner with a message from “The People,” reading: “All we want is to be treated like human beens [sic].”¹⁵² Mayor John Lindsay asked for the inmates to be transferred to the state prison system.¹⁵³ This transfer had the unintended effect of sending several inmates, including Herbert Blyden¹⁵⁴ and Samuel Melville,¹⁵⁵ to Attica, where they would contribute to its Manifesto.¹⁵⁶ According to Melville, riots were the only way to attract the attention of the national media.¹⁵⁷

Those early demands had then been taken up by inmates at Folsom in California, before being reworked yet again in the Attica Manifesto. In November 1970, the inmates at Folsom in California issued a list of demands in response to a similar set of long-standing frustrations.¹⁵⁸ As with the Tombs riot, the Folsom riot amplified its influence by reaching outside the prison. Its demands were supported by groups representing labor, the legal profession, doctors, and ex-convicts.¹⁵⁹ A letter from a Folsom inmate during the riot explained its aims:

We feel that although we are in prison, we should not be denied all rights and privileges of citizens. We feel that the conditions of prison life have been ignored too long. We call for all people who are concerned about the welfare and conditions of prisoners throughout the state, people who are concerned about the escalating violence perpetrated upon inmates in prison, who care about what the American doctrine stands for, to raise these issues.¹⁶⁰

¹⁵¹ HERMAN BADILLO & MILTON HAYNES, *A BILL OF NO RIGHTS: ATTICA AND THE AMERICAN PRISON SYSTEM* 13–14 (1972).

¹⁵² *Id.* at 15.

¹⁵³ *Id.*

¹⁵⁴ BADILLO & HAYNES, *supra* note 151, at 29.

¹⁵⁵ John Cohen, *Introduction* to *LETTERS FROM ATTICA*, *supra* note 33, at 57.

¹⁵⁶ William Kunstler, *Foreword* to *LETTERS FROM ATTICA*, *supra* note 33, at viii.

¹⁵⁷ *Id.* at 146. Gresham Sykes had made the same point in 1958. See SYKES, *supra* note 136, at 8. “At certain times, as in the case of riots, the inmates can capture the attention of the public; and indeed disturbances within the walls must often be viewed as highly dramatic efforts to communicate with the outside world, efforts in which confined criminals pass over the heads of their captors to appeal to a new audience.” *Id.*

¹⁵⁸ A Folsom inmate, Thomas K. Clark, described Folsom as “a place where *legal* injustice nourishes a monster in the depths of man so terrible that America’s favorite monster, Mr. Frankenstein, is reduced to the status of a gentle soul by comparison!” Letter from Thomas K. Clark, in *MAXIMUM SECURITY*, *supra* note 134, at 35. See *id.* at 201–10 for letters from the strike itself.

¹⁵⁹ Huey P. Newton, *Prison, Where is Thy Victory?*, in *IF THEY COME IN THE MORNING*, *supra* note 42, at 50, 55.

¹⁶⁰ *Id.* at 56.

The Folsom manifesto presented its demands in universal terms. Unlike its companion manifestos, it directly emphasized its connections to international liberation movements.¹⁶¹ Commenting on the riot, Huey Newton explained that the “single greatest achievement of their collective resistance has been the growing unity of Black, Brown and White prisoners” in the face of racial division that had been encouraged by the institution.¹⁶²

On the heels of Folsom, drafts of grievances and demands circulated at Attica through the spring of 1971.¹⁶³ An early letter dated May 12, 1971 demanded “a new prison doctor, a baseball diamond in the yard, more than one shower a week, better food, and higher pay for working in the prison metal shop.”¹⁶⁴ William Coons, who was not involved in this process, described the prisoners as divided:

Half would go for some action in the near future if somebody strong enough persuaded them; the other half still believe relief may yet come through the courts and legislators, via writs and appeals and letters to congressmen and the governor. Relative sanity seems on the latter side, but there’s no monopoly. Anywhere. If anything, it’s lacking just where it’s needed most — at the top.¹⁶⁵

On August 21st, George Jackson was shot and killed at San Quentin, under circumstances that led many observers to suspect political motives.¹⁶⁶ The next day, a guard at Attica observed that many inmates were wearing

¹⁶¹ “We demand that all condemned prisoners, avowed revolutionaries and prisoners of war be granted political asylum in the countries under the Free World Revolutionary Solidarity Pact, such as Algeria, Russia, Cuba, Latin America, North Korea, North Vietnam, etc., and that prisoners confined for political reasons in this country, until they can be exchanged for prisoners of war held by America, be treated in accord with the 1954 Geneva Convention” *Id.* at 61. “We demand that such celebrated and prominent political prisoners . . . be given political asylum outside this country as the outrageous slandering of the mass media has made it impossible either for a fair trial or for a safe term to be served in case of conviction, as the forces of reactions and repressions will be forever submitting them to threats of cruel and unusual punishment and death wherever they are confined and throughout the length of their confinement.” *Id.* The manifesto is reprinted in *id.* at 57–63.

¹⁶² *Id.* at 53. This sentiment was also expressed, curiously, by Russell Oswald, Commissioner of the New York Department of Corrections, in explaining how the cross-racial organizing was not an instance of Black Power or of the growing political consciousness of the Puerto Rican community. See OSWALD, *supra* note 25, at 18. Bettina Aptheker describes it in slightly different terms, as an expression of the “growing awareness of the *class* nature of the prison system.” Bettina Aptheker, *The Social Function of the Prisons in the United States, in IF THEY COME IN THE MORNING*, *supra* note 42, at 39, 47. Davis recognized the importance of the racial unity among prisoners without denying that there was a racial tilt to patterns of incarceration. See Angela Davis, *Political Prisoners, Prisons, and Black Liberation, in IF THEY COME IN THE MORNING*, *supra* note 42, at 19, 29–30.

¹⁶³ See COONS, *supra* note 40, at 214 (“Lists of demands have been circulating around the block, seeking general inmate approval. Sam [Melville] probably did some, but he’s not the only one.”).

¹⁶⁴ See BADILLO & HAYNES, *supra* note 151, at 27.

¹⁶⁵ COONS, *supra* note 40, at 232.

¹⁶⁶ See Sirène Harb, *Introduction* to Michel Foucault et al., *The Masked Assassination, in WARFARE IN THE AMERICAN HOMELAND: POLICING AND PRISON IN A PENAL DEMOCRACY* 138 (Joy James ed., Sirène Harb trans., 2007).

black in a show of solidarity,¹⁶⁷ organized in part by inmate Samuel Melville.¹⁶⁸ The tension in the prison grew thicker; violence seemed increasingly likely to break out.¹⁶⁹

The Attica Liberation Front formed in June 1971, comprised of five inmates (Donald Noble, Frank Lott, Herbert X. Blyden, Carl Jones-El, and Peter Butler) who would represent the other inmates in negotiations. They were not the only ones organizing the inmates at Attica: Samuel Melville and his “Attica Anti-Depression League” weighed in on the drafting of the Attica Manifesto and tried to establish unity among the various prison factions, divided along the lines of race and religion as well as politics.¹⁷⁰ While supportive of the Manifesto, Melville remained skeptical of what it could accomplish, describing it as “hazy & unspecific.”¹⁷¹ Other inmates, including L.D. Barkley, would also assume leadership positions during the takeover.¹⁷²

The preamble of the Attica Manifesto, first, framed the social context of the writing: it emphasized that this document was a multiracial, religious, and class statement that did not represent any one segment of the prison.¹⁷³ The preamble further stated that the inmates had been motivated by their perception that the state had “restructured the institutions which were designed to socially correct men into the fascist concentration camps of modern America.”¹⁷⁴ The problem was not incarceration per se, but rather the warehousing of inmates. The preamble relied on structural arguments about the use of violence and political imprisonment: the design of prisons made them inherently abusive.

The preamble also characterized the social position of the inmates: due to their “posture as prisoners and branded characters as alleged criminals,” they were treated “as domesticated animals selected to do [prison officials’] bidding in slave labor and furnished as a personal whipping dog for their sadistic, psychopathic hate.”¹⁷⁵ The central grievance dealt not with particular harms, but with the general social framing that positioned the inmates as less than fully human.

¹⁶⁷ BADILLO & HAYNES, *supra* note 151, at 30.

¹⁶⁸ William Kunstler, *Foreword* to LETTERS FROM ATTICA, *supra* note 33, at viii.

¹⁶⁹ While a fight that grew out of a football game contributed to the intensification of tensions, inmates and guards alike described the atmosphere as having been tense even before the game. MCKAY REPORT, *supra* note 27, at 141–46.

¹⁷⁰ For example, the Attica guards noticed that the Black Panthers and the Nation of Islam, which often differed in their responses to incarceration, reached a truce brokered by the Young Lords, a Puerto Rican group. See MCKAY REPORT, *supra* note 27, at 138–39; see also MELVILLE, *supra* note 33, at 169.

¹⁷¹ Letter from Sam Melville to Sister Harriet (Aug. 1971), in LETTERS FROM ATTICA, *supra* note 33, at 166.

¹⁷² See WICKER, *supra* note 1, at 27.

¹⁷³ Attica Manifesto, *reprinted* in LETTERS FROM ATTICA, *supra* note 33, at 175 (originally in all caps).

¹⁷⁴ *Id.* (originally in all caps).

¹⁷⁵ *Id.* (originally in all caps).

The Manifesto also contained an expression of hope. It was addressed to “the sincere people of society” and was presented as a way of showing them that “the prison system . . . is without question the authoratative [sic] fangs of a coward in power.”¹⁷⁶ In the words of the Manifesto, the modern prison was constructed in the name of the people, but without their knowledge.¹⁷⁷ One of the Manifesto’s goals, therefore, would be to teach the public “how their tax dollars are being spent to deny [the inmates] justice, equality and dignity.”¹⁷⁸ The inmates named the malefactors: the Governor of New York, the New York State Department of Corrections, the State Legislature, the State Parole Board, and both state and federal courts.¹⁷⁹

The preamble acknowledged that the inmates of Attica had been sentenced “for the purpose of correcting what has been deemed as social errors in behavior. Errors which . . . classified [prisoners] as socially unacceptable until programmed with new values and more thorough understanding as to [their] value and responsibilities as members of the outside community.”¹⁸⁰ And yet Attica failed on its own terms: “[Prisoners were] treated for [their] hostilities by . . . program administrators with their hostility as a medication.”¹⁸¹ Specifically, the inmates’ efforts to get beyond violence were met with the experience of being “victimized by the exploitation and the denial of the celebrated due process of law.”¹⁸² In their attempt to “assemble in dissent as provided under this nations [sic] United States Constitution, [they were] in turn murdered, brutalized and framed on various criminal charges because [they sought] the rights and privileges of all American people.”¹⁸³ Echoing the story of Martin Sostre,¹⁸⁴ the Manifesto described how “efforts to intellectually expand in keeping with the outside world” were met with censorship, and that inmates were “punitively offended to isolation status when [they] insist[ed] on [their] human rights to the wisdom of awareness.”¹⁸⁵

The Manifesto’s twenty-seven demands were written in far more legalistic terms, drawing upon specific rights. They fall under a few standard headings: rights related to prison discipline; the availability of legal representation; better work conditions and pay; better living conditions; and structural changes to the administration of prisons.

The Manifesto’s demands most familiar in the context of prison litigation include those regarding discipline: an end to punitive segregation for

¹⁷⁶ *Id.* (originally in all caps).

¹⁷⁷ *Id.* at 181.

¹⁷⁸ *Id.* (originally in all caps).

¹⁷⁹ *Id.* at 176.

¹⁸⁰ *Id.* (originally in all caps).

¹⁸¹ *Id.* (originally in all caps).

¹⁸² *Id.* at 177 (originally in all caps).

¹⁸³ *Id.* (originally in all caps).

¹⁸⁴ See MARTIN SOSTRE, *An Appeal to the Students*, in LETTERS FROM PRISON 29 (1969).

¹⁸⁵ Attica Manifesto, reprinted in LETTERS FROM ATTICA, *supra* note 33, at 177 (originally in all caps).

political beliefs; an end to political and racial persecution, including access to political literature; an end to physical brutality; an end to discrimination in parole for minorities; and a demand for the searches of cells to be conducted in the presence of the inmate.¹⁸⁶ This set of demands accords with the type of legal protections that could be won through the courts.

Other demands involved access to legal representation, both in parole hearings, and generally as a bridge between inmates and prison administration.¹⁸⁷ Lawyers had a role to play in protecting prisoners' rights, as these demands indicated.

A large set of demands spoke to labor conditions, which had long been important to prison officials for providing a source of cheap labor and for playing a moral role in rehabilitation. The inmates demanded an end to compelled labor,¹⁸⁸ availability of outside employers, unionization, higher wages as a way to support their families, compliance with minimum wage laws, meeting state workplace safety standards, insurance for work-related accidents, and vocational training programs.¹⁸⁹ Prison labor was a complex issue, but it was at the heart of their listed grievances.

Another set of demands spoke to living conditions within the prison: improved medical care, improved visiting conditions and facilities, an end to unsanitary food conditions, and better food.¹⁹⁰ The prison was a home for the inmates, and, accordingly, they sought better conditions.

A final set of demands asked for structural changes to the prison administration: prosecutions for violent correctional officers; an end to racial agitation by administration officials; counselors for members of racial minorities; a popularly elected parole board; an end to basing parole decisions on the underlying felony; a board of overseers "nominated by a psychological or psychiatric association, by the state bar association or by the civil liberties union, and by groups of concerned, involved laymen"; an accounting of the inmate recreation fund and an inmate committee to participate in prison governance; and consistent rules across prisons.¹⁹¹

The Manifesto concluded with a ringing statement:

We are firm in our resolve and we demand, as human beings, the dignity and justice that is due to us by right of our birth. We do not know how the present system of brutality and dehumanization and injustices has been allowed to be perpetrated in this day of

¹⁸⁶ *Id.* at 177–81 (Prisoner Demands Nos. 4, 6, 12, 22, 23).

¹⁸⁷ *Id.* at 177, 179 (Prisoner Demands Nos. 1, 13).

¹⁸⁸ "[T]heir labor power is being exploited in order for the state to increase its economic power and to continue to expand its correctional industries (which are million-dollar complexes), yet do not develop working skills acceptable for employment in the outside society, and which do not pay the prisoner more than an average of forty cents a day." *Id.* at 178.

¹⁸⁹ *Id.* at 177–79 (Prisoner Demands Nos. 5, 7, 8, 9, 11, 14, 15, 16).

¹⁹⁰ *Id.* at 177–81 (Prisoner Demands Nos. 2, 3, 25, 26).

¹⁹¹ *Id.* (Prisoner Demands Nos. 10, 17, 18, 19, 20, 21, 24, 27).

enlightenment, but we are the living proof of its existence and we cannot allow it to continue.¹⁹²

The process of writing manifestos was a way of simultaneously speaking the language of rights and recognizing the violence inherent in the prison. It also allowed for direct negotiation between the prisoners and the institution, rather than requiring mediation through the courts. In the context of the other riots that had occurred in New York State within the previous year, the Attica inmates' explicit appeal to a desire for peaceful decisionmaking hinted at the possibility of violence if negotiations failed.¹⁹³

E. The Generative Space of Responses to Incarceration

This Part has argued that the intellectual space of the prison in 1971 encompassed diverse perspectives for thinking about the meaning of incarceration, competing vocabularies for how to speak about the harms experienced by the incarcerated, and several strategies for bringing about change within the prison. Attica was not unique in containing such a rich set of discussions; this was part of the prison environment of the early 1970s. The authors of the Manifesto integrated these strands to speak to a broad set of harms using the language of rights, critiques of rights, and of politics. The position of the authors must be understood against the background of lawsuits, violence, and political change within a polarized society.

The coexistence of multiple strategies — prison conditions litigation, civil rights litigation, political and theoretical argumentation, and direct negotiation with prison officials — created a space in which experimentation was possible. The combination of strategies reinforced the effectiveness of each, even as they suggested limits to any one method. The outcomes of the *Holt* and *Sostre* cases suggested that there was only so much that litigation could achieve. Certain claims were more easily cognizable to the courts than others, and prison officials still received substantial deference within administrative law.¹⁹⁴ But even the most vocal critics of incarceration were in dialogue with attorneys, and the language of both civil rights and human rights remained powerful. Critics (including prison intellectuals such as George Jackson and Eldridge Cleaver, as well as other inmate leaders such as Sam Melville) advocated the recognition of the *experience* of incarceration — something that transcended discrete, identifiable rights violations to create a totalizing atmosphere of control, terror, and dehumanization.¹⁹⁵

¹⁹² *Id.* at 181.

¹⁹³ The Attica Liberation Faction exchanged several letters with Oswald through July and August, gradually becoming more insistent, but noting that they would “continue to strive for prison reform in a democratic manner.” See MCKAY REPORT, *supra* note 27, at 134–36.

¹⁹⁴ See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (describing the “generous scope of discretion accorded prison authorities”).

¹⁹⁵ See, e.g., MELVILLE, *supra* note 33, at 171; see also *supra* section II.C.

Negotiations between prisoners and officials continued even during the Attica riot. At that time, the inmates produced a list of “Fifteen Practical Proposals” including a minimum wage for prison labor, political and religious freedoms, recreational facilities, healthy food, and educational opportunities.¹⁹⁶ Eventually the inmates and Oswald agreed on twenty-eight points.¹⁹⁷ However, negotiations ultimately broke down on the question of amnesty and reprisals, and the state police took back the prison.

III. LAW AND VIOLENCE IN THE RESTORATION OF ORDER: RESPONSES TO THE RIOT

The discussion of prison issues narrowed dramatically after the riot. In part, this is an understandable response to the violent events that led to the forty-three deaths at Attica.¹⁹⁸ The twin events of the riot and the shooting of George Jackson in the summer of 1971 focused attention on overt violence.¹⁹⁹ The problem to be overcome was brutality and abuse; the everyday experience of the prison was normalized.

Attica became a powerful symbol of prison injustice — shorthand for the connection between incarceration and violence. But was the problem of Attica one of violence-as-brutality, or was this violence an outgrowth of systemic problems? The aftermath of Attica would reveal the difficulty of arguing the more expansive theories of rights. How did the advocates of the legal strategies in Part II respond to the violent retaking of Attica?

A. *The McKay Report and the Restoration of the Prison*

The McKay Report, the official report produced by the State of New York, provides a comprehensive narrative of the riot.²⁰⁰ It is thorough, and remains one of the best sources for information about the events of September 1971. But it has a particular narrative arc, which emphasizes the failures of the prison leading to the uprising and the failures of the state in responding to it, ultimately ending with the restoration of order and the ordinary operations of the prison.²⁰¹ The McKay Report advocated reform as a way to return to normalcy.²⁰²

¹⁹⁶ WICKER, *supra* note 1, at 27–29. The “Fifteen Practical Proposals” are reprinted in *id.* at 317.

¹⁹⁷ These are reprinted in OSWALD, *supra* note 25, at 118–22.

¹⁹⁸ See *Inmates of the Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 15 (2d Cir. 1971).

¹⁹⁹ The Attica riot, after all, is what created the McKay Commission. MCKAY REPORT, *supra* note 27, at xi. On Jackson’s shooting, the *Groupe d’Information sur les Prisons*, with which Michel Foucault was affiliated, felt the need to push back against narratives that focused solely on the shooting to the exclusion of the basic concerns. See Foucault et al., *supra* note 166, at 138.

²⁰⁰ See generally MCKAY REPORT, *supra* note 27.

²⁰¹ See *id.* at 106–13.

²⁰² See *id.* at xx–xxi.

There is also a more cynical view of what a return to normalcy meant: “After the ‘disturbance,’ the Attica convicts were stripped naked in the yard and made to crawl, with faces to the ground, back to their cells and thus relegated back ‘in place’ as objects in the ‘order of things.’”²⁰³ Given the long history of failures in incarceration, was the question of normal versus aberrant behavior in Attica merely one of degrees of violence and degradation allowed by prison officials? In the wake of such a traumatic moment, reform of the prison was inevitable — but would this reform produce anything meaningful?²⁰⁴ In an earlier moment, John Clutchette in California had suggested that prison reform was reactionary because it would perpetuate systemic problems under the veneer of change; would events at Attica prove him right?²⁰⁵ Within a year of the takeover, it seemed that the cynical view was correct: the decision to fire a popular nurse led to a four-day strike by nine hundred inmates at Attica, culminating in the declaration of a state of emergency.²⁰⁶ The McKay Report concluded its description of this event on a somber note: “Thus, the cycle of misunderstanding, protest, and reaction continues, and confrontation remains the only language in which the inmates feel they can call attention to the system.”²⁰⁷

This was not the first time that structural problems had become apparent in American prisons, nor was it the first time that reformers found a way to restore the viability of the prisons.²⁰⁸ There had been several waves of crisis and reform in prisons, and each time a wave of prison reformers had cleaned up the excesses of the carceral system with new theories of incarceration.²⁰⁹ Reforms could be framed in moral terms, or in scientific terms, or in pragmatic terms, and reformers could occupy various social strata. How-

²⁰³ Robert P. Weiss, *The Order of Attica*, 18 SOC. JUST. 35, 45 (1991). Even the McKay Report concluded on this somber note: “The underlying tension between the inmates’ demands for recognition as humans and their captivity behind stone walls and iron bars had surfaced once again.” MCKAY REPORT, *supra* note 27, at 470.

²⁰⁴ See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 235 (1977). “The prison should not be seen as an inert institution, shaken at intervals by reform movements. The ‘theory of the prison’ was its constant set of operational instructions rather than its incidental criticism — one of its conditions of functioning. The prison has always formed part of an active field in which projects, improvements, experiments, theoretical statements, personal evidence and investigations have proliferated.” *Id.*

²⁰⁵ See Clutchette, *supra* note 42, at 136. This accords with Reva Siegel’s concept of “preservation through transformation.” See Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996).

²⁰⁶ MCKAY REPORT, *supra* note 27, at 470.

²⁰⁷ *Id.*

²⁰⁸ For reform in Jacksonian America, see ROTHMAN, *supra* note 14, at 93–94. Rothman describes how the state of incarceration deteriorated to a purely custodial function by the 1860s, with a concentration of immigrants and other marginal groups. See *id.* at 240–54.

²⁰⁹ See, e.g., MCLENNAN, *supra* note 11, at 418 (for penal reform at the end of the Progressive Era).

ever, the system has proven durable, and it bears the marks of prior reform movements.²¹⁰

In the years immediately following the riot, its consequences for reform were difficult to discern. A reporter at Green Haven Correctional Facility in New York observed that “[j]ust as in Christianity there is B.C. and A.D., in New York State penology there is B.A. and A.A. — Before Attica and After Attica.”²¹¹ But other observers questioned how much actually changed.²¹² The return to normalcy at Attica seemed to mean a return to the state of affairs that had led to the inmate grievances in the first place. The inmates’ attempt to bring about peaceful change by naming grievances, publicizing them, and working with a reform-minded commissioner had failed.

B. *The Law Responds with Lawlessness*

The McKay Report exemplified the official response to the Attica riot, sensitive to both the civil rights of inmates and to the state’s administration of the prison. But the inmates tended to be more skeptical of the possibilities of legal reform in the wake of the riot. Despite this skepticism, the courts remained available venues for inmates to file civil claims.

Martin Sostre, New York’s preeminent jailhouse lawyer, saw the riot at Attica as a repudiation of his hard-fought legal victories and as further evidence that the legal system was inadequate to protect the rights of minorities. In his analysis of the rebellion, he walked point-by-point through the Manifesto, identifying which of his lawsuits ought to have secured each right.²¹³ The state’s failure to provide the inmates of Attica with these rights demonstrated to him the futility of seeking recourse in the law.²¹⁴ Instead, “[t]he reality of what must be done has been made manifest through the process of elimination of ‘legal’ remedies. No longer shall we waste time and suffer prolonged needless punishment and injustices litigating civil rights cases in [the state’s] oppressive courts as we did in the 1950’s and 60’s.”²¹⁵ Sostre’s method of radical civil rights litigation combined the vindication of limited but tangible rights with a strategy of thorough resistance in order to reveal the fundamental contradictions within the state’s denial of those rights. Oc-

²¹⁰ See Morris & Hawkins, *supra* note 147, at 752 (“For the penitentiary system of today is not a purely fortuitous development. It is an American invention for which we can justly claim the credit and must also bear the blame.”).

²¹¹ SUSAN SHEEHAN, A PRISON AND A PRISONER 131 (1978).

²¹² Fred Ferretti, *Attica is Termed as Bad as Before 1971 Rebellion*, N.Y. TIMES, July 21, 1976, at NJ69.

²¹³ Sostre, *The New Prisoner*, *supra* note 78, at 247–48.

²¹⁴ See *id.* at 252–53 (“The Attica Rebellion was the result of recognition, after decades of painful exhaustion of all peaceful means of obtaining redress, of the impossibility of obtaining justice within the ‘legal’ framework of an oppressive racist society which was founded on the most heinous injustices: murder, robbery, slavery.”).

²¹⁵ *Id.* at 253.

cupying the middle ground between gradualist civil rights lawsuits and direct political action, he was driven toward more radical solutions.

Whatever their views on law, the law remained interested in the inmates. Immunity from prosecution had been one of the major sticking points in the negotiations during the riot. Jerry Rosenberg, a jailhouse lawyer in Attica and one of the leaders during the riot, publicly tore up the order immunizing the inmates from punishment within the institution precisely because it failed to contain a provision immunizing them from prosecution.²¹⁶ True to Rosenberg's fears, New York State initiated criminal prosecutions against sixty-two Attica inmates for their roles in the riot, though ultimately Governor Hugh Carey stopped the prosecutions of seven inmates, whom he pardoned, and commuted the sentence of one convicted inmate.²¹⁷ In this instance, political pressure succeeded in preventing what the operations of the law condoned.

This political pressure was related to the state's botched investigation of its own actions during the retaking of the prison — an investigation that led nowhere.²¹⁸ Malcolm Bell, a lawyer who joined the state's investigative committee as an assistant to the Attica prosecutor, found that the state covered up the ultimate decision not to proceed with prosecutions.²¹⁹ Some or all of the records of this investigation have remained under seal since 1975, though in the last year, Eric Schneiderman, the Attorney General of New York, has pressed for their public release.²²⁰

The state's legal response to its own actions was compromised, but the inmates also filed lawsuits of their own, challenging both the retaking of the prison and the reprisals by prison officers. The inmates secured an injunction against retaliation. The Second Circuit recognized that the inmates were "at the mercy of their keepers, many of whom, on the testimony below, have already subjected inmates to barbarous abuse and mistreatment."²²¹ As the court noted, the injunction came after retaliatory acts had already occurred.

²¹⁶ WICKER, *supra* note 1, at 39.

²¹⁷ The one commutation was for John Hill, convicted for the murder of guard Bill Quinn and sentenced to twenty years to life. See WILLIAM M. KUNSTLER, *MY LIFE AS A RADICAL LAWYER* 228–31 (1994); see also Sam Roberts, *Rockefeller on the Attica Raid, From Boastful to Subdued*, N.Y. TIMES, Sept. 12, 2011, at A24.

²¹⁸ As Tom Wicker summarized it, "Not only did the State Police, the supposed upholders of the law, kill thirty-nine people in an orgy of wanton shooting, the State of New York then allowed the same police to play the pivotal role in investigating their own behavior — with the predictable results of missing, manufactured, and destroyed evidence, botched or superficial interrogations (or none at all, in some cases), and manifest official perjury." Tom Wicker, *Foreword to MALCOLM BELL, THE TURKEY SHOOT: TRACKING THE ATTICA COVER-UP*, at viii (1985).

²¹⁹ BELL, *supra* note 218, at 2.

²²⁰ See Thomas Kaplan, *Decades Later, State Seeks Release of Report on Attica Uprising*, N.Y. TIMES, Apr. 20, 2013, at A21.

²²¹ See *Inmates of the Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 23–24 (2d Cir. 1971).

When confronted with specific acts of brutality, the court easily found evidence of wrongdoing and acted to stop it.²²²

Civil suits continued for decades. While analysis of the riot has tended to focus on Rockefeller's decision to send the state police to retake the prison,²²³ the court collapsed the question of Rockefeller's objective necessity into one of subjective belief.²²⁴ After describing the relevant Eighth Amendment standards, the court found that necessary actions in response to a prison riot did not meet those standards.²²⁵ The prison officials more directly responsible for the decisions to take back the prison also received qualified immunity with respect to the violence of the retaking, though not for the subsequent reprisals.²²⁶ Three decades of criminal prosecutions and civil suits ended in 2000, when Judge Michael Telesca of the Western District of New York approved the \$12 million settlement for Attica inmates from the New York State government.²²⁷ The ambition was to finally close the book on this bloody episode in the history of the state.

CONCLUSION: CLOSING THE BOOK, OPENING REASSESSMENTS

The aim of this Note has been to unbury the dead and to recapture the intellectual world of the prisons of 1971. Even as the aftermath of Attica led the state to implement reforms, and the style of prisoners' rights litigation pioneered in the South expanded throughout the nation, progress has been uneven. To be sure, significant progress has been made along some dimensions. In their study of judicial involvement in prison reform, Malcolm Feeley and Edward Rubin note that, following the Arkansas cases, inmates could no longer be forced to pay inmate leaders for access to food or be subjected to such brutalities as having electrodes placed on their genitals by prison staff.²²⁸ These improvements are, of course, not to be taken lightly.

²²² *Id.* at 18–19.

²²³ See Haywood Burns, *Political Uses of the Law*, 17 *How. L.J.* 760, 770–71 (1971). “[T]he response of the corrections officials was in general mindless and lawless; because not only did they not respond to established grievance procedures followed by the prisoners, but when the prisoners resorted to self-help the response was one of indiscriminate violence, of wholesale slaughter, of failure to regard the law.” *Id.*

²²⁴ See *Al-Jundi v. Estate of Rockefeller*, No. CIV-75-132E, 1988 WL 103346, at *5 (W.D.N.Y. Sept. 28, 1988). “The plaintiffs . . . disagree that an order to retake was necessary at the time and that Rockefeller’s conduct, in authorizing such order, was motivated or abused by his political aspirations. These claims do not derogate from the necessity that a decision be made based on what was then seen to be transpiring.” *Id.*

²²⁵ See *id.* at *7 (“It has never been held that an order to use force only if necessary to settle a violent prison riot and to rescue hostages is conduct of the nature just described.”).

²²⁶ See *Al-Jundi v. Mancusi*, 926 F.2d 235, 239–40 (2d Cir. 1991).

²²⁷ See *Al-Jundi v. Mancusi*, 113 F. Supp. 2d 441, 443 (W.D.N.Y. 2000). New York State reached a separate \$12 million settlement with the families of the guards in 2005. See Francis X. Clines, *For Some New Yorkers, the Attica Uprising Is a Current Event*, *N.Y. TIMES*, Jan. 19, 2005, at A18.

²²⁸ FEELEY & RUBIN, *supra* note 18, at 79.

Inmate lawsuits grew rapidly in the years following these cases.²²⁹ However, the Prison Litigation Reform Act of 1996 significantly reduced the frequency of such suits by raising the bar for complaints and by narrowing the available relief.²³⁰

But even if the most egregious violations of prisoners' rights are now forbidden, the number of people subject to incarceration has grown dramatically since 1971. This growth in the incarceration rate represents an ambiguous victory, at best, for the prisoners' rights movement. There is growing recognition that mass incarceration represents a defining feature of American society in the late twentieth and early twenty-first centuries.²³¹ Even as responsibility for mass incarceration is laid at the feet of the rise of the political right in America (including the war on drugs, mandatory minimums, and "tough on crime" politics),²³² it is also essential to recognize the complicity of prison reformers in tacitly legitimating the concept of incarceration. It is important not only to recognize the contingency of these developments, but also to recall the optimism that existed in 1971 among those who would use the law against the state, as well as among those who saw politics and social movements as opportunities for more fundamental change. This Note argues for resisting the closure and the "lessons learned" perspective of post-Attica prison reform.

The current state of the law of prisoners' rights allows for challenges to particularly egregious conditions — a right recognized in the recent *Brown v. Plata*²³³ decision. But, as critics of prison conditions litigation have noted, these cases continue to take for granted the basic structure of incarceration, and in some sense have legitimated the growth of incarceration rates over the past four decades.²³⁴ Furthermore, while addressing the worst forms of prisoner abuse, these laws fail to speak to the structural violence of the prisons — the terror described by Jackson and Melville, and the dehumanization described by nearly all inmates. In the face of this psychic violence, laws predicated upon physical brutality and barbarous living conditions provide inadequate protection. The prison movement of 1971 recognized this inade-

²²⁹ Schlanger, *supra* note 12, at 1578–87.

²³⁰ *Id.*

²³¹ See FRIEDMAN, *supra* note 9, at 316. "We throw people into prison at an astonishing rate. There has never been anything like it in American history. Penology is overwhelmed by the sheer pressure of bodies. The general public is not interested in rehabilitation, not interested in what happens inside the prisons, not interested in reform or alternatives. It wants only to get these creatures off the streets." *Id.* See generally Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703 (2010).

²³² See, e.g., ALEXANDER, *supra* note 13.

²³³ 131 S. Ct. 1910 (2011) (limiting prison population to 137.5% of original design capacity); see also Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013), for an assessment of the current state of the law.

²³⁴ We can see some progress: at least *Plata* urged that overcrowding be remedied by releasing inmates. Compare *Plata*, 131 S. Ct. 1910, with Schoenfeld, *supra* note 14.

quacy, before the traumas of that year redirected attention to the material conditions of prison life. We would do well to remember its struggles and the intellectual space that it opened.