Inmate Unions: An Appraisal of Prisoner Rights and Labor Implications

Sidney Zonn

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INMATE UNIONS: AN APPRAISAL OF PRISONER RIGHTS AND LABOR IMPLICATIONS

SIDNEY ZONN*

The author discusses recent decisions concerning prisoners' rights, and examines the arguments for and against allowing inmates to organize unions.

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I. INTRODUCTION

Correctional officials traditionally have been vested by the courts with all the trappings of a government inside the prison walls. Administrative, legislative, and judicial actions were exclusively delegated to the prison official's control. Under these circumstances a correctional facility incorporated all the characteristics of a "total institution" dominating every aspect of a prisoner's being; provid-

* Member, University of Miami Law Review.

1. Administrative features entail the regulation by correctional authorities of all aspects of the inmates' day to day existence. This includes the standard of living, nature of work performed and wages received, if any. See E. Goffman, On The Characteristics of Total Institutions, ASYLUMS (1961).

2. Prisoner conduct is controlled by the enactment of rules designed to curb any form of disruptive institutional behavior. Curfews, dress and grooming standards are among the various methods of control that are used. See E. Goffman, supra note 1.

3. Correctional officials determine to a large extent any distinction between administrative and judicial terminology in evaluating the circumstances under which an inmate may be subjected to the internal judicial process of trial and punishment. See E. Goffman, supra note 1.

4. In defining five groupings of total institutions, one category is interpreted as protecting the community at large from intentional dangers to it. Specific examples in this grouping include jails, penitentiaries, prisoner of war camps, and concentration camps. In this context, the welfare of the individual in the institution is not an immediate issue.

The "total institution" can exist only where the environment possesses the following attributes: 1) a single authority with a single organization designed to fulfill official aims; 2) all aspects of life continuing in the same place with large groups of individuals treated alike; 3) extensive amounts of scheduling and regulation; 4) large numbers of people supervised by a relatively small staff; 5) supervision of conduct which is so pervasive that conduct at one place and time can be used by the staff to control conduct elsewhere; and 6) only minimum opportunity for privacy, property, or family. See E. Goffman, supra note 1.
ing, in a sense, an Orwellian existence for each individual confined.

This form of confinement did not go unnoticed. By a variety of means, inmates, commentators and courts, joined to voice their increasing displeasure with the system.\(^5\) As a result, a movement for prisoner rights developed which has made substantial progress in the areas of religious freedom,\(^6\) racial equality\(^7\) and court access.\(^8\)

From these initial victories the struggle to obtain additional rights sought new avenues and forms of expression. Perhaps the most unusual, and by far the most controversial, has been the evolution from individual to organized action, that is, concerted activity through the inmate union. The inmate union provides a broad spectrum of services, functioning not only as a means for correctional reform, but also as a labor organization seeking higher wages, better working conditions and recognition as a collective bargaining agent.\(^9\) With this dual role, the inmate union is at once powerful, yet vulnerable since it poses a threat, in the view of correctional administrators, to the stability of the entire penal system.

The continued vitality of these unique organizations is now threatened due to the recent Supreme Court decision of *Jones v. North Carolina Prisoners' Labor Union, Inc.*\(^10\) The Court, in refusing to extend the cloak of constitutional protection to this form of union under the first amendment,\(^11\) may have halted in its infancy any trend to continue inmate unions. The thrust of this comment, therefore, will be to review the growth and development of inmate unions and to explore the probable repercussions of *Jones* in this area of prisoner rights and union organization.

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6. E.g., Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961).


11. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).
II. PRISONER RIGHTS

A. *The Hands-Off Doctrine*

In the criminal justice system, constitutional guarantees have in the past been important up to and including conviction. Beyond that, however, the convicted individual faced a no-mans' land of virtually arbitrary and unsupervised discretion on the part of those who might be termed his "keepers." The prisoner had as a consequence of his crime, not only forfeited his liberty, but all of his personal rights except those which the law in its humanity may have accorded him. Throughout his incarceration, he is treated as a "slave of the state." Though more than a century old, no more apt description has detailed his predicament.

It is this philosophy which has thoroughly permeated the correctional structure and has been dubbed the "hands-off" doctrine. Under this view, review of internal operations by courts was flatly refused without explanation. The basis of the doctrine has been found intermittently to rest on judicial restraint, judicial abstention, or judicial abdication where prison matters are concerned. The practical effect of this policy has removed correctional officials from any form of judicial accountability. Thus, once an individual was legally convicted, the doctrine operated to place his grievances beyond the scope of judicial review.

The arguments advanced in support of a hands-off approach are three-fold. The first rationale entails a constitutional analysis, suggesting that concerns of federalism require that state executive functions in this area be free from federal judicial interference. Next, is the concept of financial nonaccountability, meaning that courts can neither appropriate funds for prisons nor interfere with their allocation. A final basis for the doctrine is that the importance of maintaining order requires adherence to disciplinary standards which can only be achieved through unhampered administrative discretion.

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16. E.g., Preiser v. Rodriguez, 411 U.S. 475 (1973) (federal habeas corpus relief unavailable to state prison inmate where relief sought would infringe upon the state's power to administer its correctional institutions).
B. The Wane of Hands-Off

Judicial attitude towards intervention on behalf of prisoner grievances was altered by a series of Supreme Court decisions in the 1960's. Police and prosecutorial conduct began to be carefully scrutinized where the rights of prisoners might be prejudiced; as a consequence, violation of these rights resulted in judicial interference and subsequent enforcement. A basis for this judicial intervention was found in the Civil Rights Act of 1871 which provides a federal forum for aggrieved parties regardless of whether state remedies had first been exhausted. Furthermore, the Supreme Court expressly recognized the right of state prisoners to the protection of the Civil Rights Act when they brought their complaints to the attention of a federal court.

The transition from judicial restraint to judicial activism occurred despite the widespread belief that the structure of prison society demanded the enactment of special rules and restrictions not otherwise applicable in a free society. As inmates became more sensitive to violation of their constitutional rights during all stages of their post-conviction and incarceration, it became increasingly apparent that involvement by both the judiciary and the legal profession was an essential ingredient to prison reform. A further incentive for judicial activism was the development of a highly politicized prison population which included anti-war protestors and civil rights activists. The combination of judicial activism, legal involvement and prisoner unity helped to define the constitutional boundaries of prisoner rights and attempted to reorganize the power structure in prisons. Needless to say, however, the movement for rights had its

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22. Cooper v. Pate, 378 U.S. 546 (1964). It should be pointed out, however, that the liberal decisions of the Warren Court in areas of civil rights and liberties generally did not extend to the area of correctional reform. Two noteworthy decisions which deal with correctional problems, however, are Johnson v. Avery, 393 U.S. 483 (1969) ("jailhouse lawyers" allowed to assist inmates for post-conviction relief where they were without adequate legal assistance) and Mempa v. Rhay, 389 U.S. 128 (1967) (due process requirements must be applied in a probation revocation proceeding).


24. Chief Justice Warren Burger, an outspoken advocate of increased attention towards the entire correctional process, has been a prime motivating force in admonishing the organized bar to assume greater responsibility in this area. His position is that grievances can be
accompanying martyrs and rallying points. Bloodshed, such as that which resulted at Attica, is well remembered by those on both sides of prison walls. Less remembered, however, are the demands, which in retrospect seem relatively inoffensive: rehabilitation programs for all inmates tailored to their offenses and individual needs, modernized inmate education programs, expanded work release, adequate medical treatment, an end to censorship of newspapers, and freedom to communicate with the outside world at inmate expense.

The advancement of prisoner rights received its earliest impetus in the form of religious freedom which, in large part, was due to the diligent efforts of the Black Muslims. Since then, the right to conduct religious services has been extended to Buddhists. In addition, Orthodox Jewish dietary laws and grooming standards have been permitted notwithstanding contrary prison regulations which provide: "There will be no limitations on hair style and length of hair but beards will be prohibited. . . . Mustaches, defined as hair growing on the upper lip, are permitted. Beards are not permitted since they most readily compromise security because of the consequent rapid modification of appearance." As a corollary to the recognition of a prisoner's right to effectively practice a religious

adequately adjusted through open channels of communication between inmates and correctional officials. He analogized to the labor field:

With proper grievance procedures in a large industrial operation, the hour-to-hour and day-to-day frictions and tensions of employees can be carried up through channels and either guided to a proper solution or dissipated by exposure. This, in essence, is what every penal institution must have—the means of having complaints reach decision-making sources through established channels so that valid grievances can be remedied and spurious grievances exposed.


25. For a detailed look at the roots of inmate unrest and the underlying cause of prison disturbance and riots, see Fox, Why Prisoners Riot, 35 FED. PROB. 9 (1971); Martinson, Collective Behavior at Attica, 36 FED. PROB. 3 (Sept. 1972). Both authors agree that the primary causes of riots are bad food, unsanitary living conditions, oppressive discipline and staff intransigence.


29. Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).


31. 432 F. Supp. at 948 n.1.
preference, this period saw a removal of many of the racial barriers and discriminatory policies prevalent throughout the penal system.\textsuperscript{32}

Another important inroad in the "hands-off" doctrine has been the establishment of a right of access to the courts so that inmates may petition the government for a redress of grievances. In \textit{Bounds v. Smith},\textsuperscript{33} the Supreme Court held that access to the courts was a fundamental constitutional right. In order to preserve this right, the Court required prison authorities to assist inmates in the preparation and filing of meaningful legal papers. Furthermore, to pass constitutional muster, either adequate law libraries or competent assistance from inmates trained in the law must be provided.

A further expansion of the rights afforded prisoners can be found in the area of health services. Under the eighth amendment, the government has been required to provide a full complement of medical care to those whom it incarcerates.\textsuperscript{34} As part of this duty, defective equipment and haphazard procedures must be rectified so as to equal those general standards established in the medical profession.\textsuperscript{35}

The extent to which a prisoner retains the right to send and receive mail, free of official censorship, has posed a more complex set of questions in determining the breadth of prisoners’ rights. The methodology employed by the Court in confronting these issues can best be characterized as circuitous. In \textit{Procunier v. Martinez},\textsuperscript{36} the Supreme Court was presented with an opportunity to define the parameters of a prisoner’s first amendment right to receive mail free from censorship. Instead, the decision was based on the first amendment right of an outside correspondent, thus providing inmates with only an indirect protection from official censorship. The two-pronged test promulgated by the Court evaluated: (1) whether the regulation furthered legitimate governmental interests of security, order and rehabilitation; and (2) was it no broader than necessary to accomplish that purpose.\textsuperscript{37} Unless the test of \textit{Procunier} is complied with, there can be no censorship of incoming mail.\textsuperscript{38} Under this

\begin{itemize}
\item \textsuperscript{32} Lee v. Washington, 390 U.S. 333 (1968); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).
\item \textsuperscript{34} Estelle v. Gamble, 429 U.S. 97 (1976).
\item \textsuperscript{36} 416 U.S. 396 (1974).
\item \textsuperscript{37} \textit{Id.} at 413.
\item \textsuperscript{38} Blue v. Hogan, 553 F.2d 960 (5th Cir. 1977) (magazines advocating prison unionism); Thibodeaux v. South Dakota, 553 F.2d 558 (8th Cir. 1977) (prison officials must show need
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standard, however, any improper censorship would not be a violation of the inmates' rights, but rather the outside correspondent's. This may be a roundabout way of accomplishing the same end since in most instances the inmate receives his mail untouched.

While there have been important advances in the prisoner rights movement, corresponding limitations have also developed which govern against abuse. The expression of religious practices or beliefs is not boundless and may be curtailed if a threat to prison discipline or security is posed. Moreover, the religion or sect must constitute an actual belief both sincere and bona fide. In Theriault v. Silber, the district court held that the Church of New Song (CONS), a sect envisioned, developed, and implemented by prisoners, was not a religion within the scope of the first amendment, and consequently not entitled to constitutional protection. According to the court, CONS simply provided an expeditious avenue through which members attempted to gain extra privileges and avoid individual sanction because of their proclaimed religious status.

Perhaps a more significant deprivation is the continuing nonexistence of a notion of privacy inside a correctional institution. Inmates cannot assert an immunity from searches and seizures of their persons or their personal property. As stated by the Supreme Court in Lanza v. New York, "It is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room . . . . Official surveillance has traditionally been the order of the day."

Although inmates have been able to express themselves through written communications, they have been prohibited from initiating face to face communications with the press. This prohibition rests on the proposition that the inmate already has consider-


39. See text accompanying notes 27-38 supra.
42. See text accompanying note 77 infra.
able access to outside sources to depict and describe conditions found within the institution. Therefore, the challenged prison regulations could not be said to infringe on the inmates' first amendment rights. Furthermore, it was contended that press interviews with specific inmates would increase their status and enhance their ability as a potentially disruptive force in the prison community.

By virtue of their status as convicts, further limitations have been imposed on prisoners and former prisoners. For example, no constitutional violation has been found in excluding convicted felons from the voting franchise, barring convicted felons from holding union office unless pardoned or in receipt of a good conduct certificate and restricting parolees from associating with certain persons categorized as undesirables.

III. UNION ORGANIZATION

A. The Labor Movement

A brief review of American labor history suggests that unionism's dramatic growth resulted from the business and economic conditions of the twentieth century. Surveying the period of greatest upheaval, the Depression, the need for a new labor policy directed at alleviating the imbalance between strong and intransigent employers and fledgling unions became apparent. Congress responded in 1935 by enacting the National Labor Relations Act (NLRA), a bill that endorsed the right of workers to organize and

47. 417 U.S. at 824. The Court noted that "alternative means" of communication available to the inmates range from written correspondence to visiting privileges with family members, friends of long standing, their attorneys, and the clergy. According to this reasoning, visiting privileges provide ample opportunity to furnish information to the press through these varied sources. Id. at 824-25.


collectively bargain with their employers. Following the end of World War II, labor asserted its new-found strength in constant strike activity. As a result, additional legislation was adopted to reduce concerted activity by the union membership. This legislation, the Labor Management Relations Act, was essentially a Republican attempt to balance the NLRA restrictions on management by imposing similar ones on unions.

By the 1960's, labor's major strides in unionism were focused on the public sector. This development reflected, and was perhaps dependent upon, the expanding role of state and local government as an employer. Thus, unionism's most recent development derived from the same social force that gave the labor movement its impetus during the Depression: the changing public interest. In this context, one might well suggest that the acceptance, and hence survival, of inmate unions will depend upon whether the public interest now extends to them.

B. Inmate Organization

Inmate organization had its origin at California's Soledad Prison. The movement then spread to Folsom Prison where nearly 2,000 inmates participated in a seventeen day prison strike in November 1970. The success of the Folsom strike and the consternation which it caused correctional officials, instilled prisoners with an added incentive to establish a prisoners' union. The United Prisoners' Union found a common organizing tack by combining labor issues with prisoner rights claims. To effectuate common aims,

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54. The statutory language is as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."
58. See Barbash, supra note 52, at 37.
59. Id.
62. Id.
63. A strong emphasis was placed on the disproportionate status of the inmate worker, his pay and working conditions. In 1971 for instance, the average prison wage in California ranged from $.02 to $.16 an hour. The union promised to seek implementation of the minimum wage and workmen's compensation benefits for those incarcerated. The United Prisoners Union declared the inmates' no win predicament in their opening statement:
   Half a man's life is made up of the time he devotes to labor. . . . Work is the major provision of a people. If we do not work we steal. If we steal, the chances are we will be returned to prison. If we can't find work in a system that does not
inmates felt it essential to construct their own internal organization. With the power that accompanied such an organization, no longer did power continue to reside exclusively with official authority. A strong internal organization became the lynchpin from which power emanated; without it concessions granted could easily be withdrawn by the authorities.64

Advocates of an organization of inmates as a tool for the furtherance of legitimate inmate grievances view this effort in terms of a classic labor conflict: employer against employee, institution against inmate. By definition, however, the analogy is not so easily drawn as the inmate has never been considered an "employee" within either the meaning of the NLRA,65 or state statutes.66

Even without the statutory authority of the existing labor relations structure, the organizing effort still has considerable constitutional support under the first amendment's guarantee of freedom of association. The advances of the last two decades had led those connected with the elevation of inmate rights to believe that asso-

provide jobs for everybody, we are sometimes returned to prisons with a parole violation.

We as members of the convicted working class are twisted and mangled in the vise of a cruel system that cares little for human life. We are the last to be hired, the first to be fired. . . . In the widening class struggle in Amerika (sic), we prisoners are the lowest of the low. We are wage slaves inside and outside. . . .

Browning, Organizing Behind Bars, RAMPARTS, Feb. 1972, at 40, 44.

Payment of substandard wages may force defendants to seek forms of public assistance and welfare and place inmates in a position without any financial resources when released. As a result, the incentive to work is removed since the wage system does not adequately provide a responsible means for supporting either the inmate or his family.

Those proposing change indicate that payment of regular wages could provide both incentive and responsibility that is lacking. Further, it would enable prisoners to pay taxes, reimburse the state for room and board and provide financial support for their dependents. The implementation of such a structure has been urged as a positive step towards reintegration into society. Comment, Minimum Wages for Prisoners: Legal Obstacles and Suggested Reform, 7 U. Mich. J.L. Ref. 193 (1973); R. Goldfarb & L. Singer, After Conviction 631 (1973); ABA Joint Committee on Legal Status of Prisoners, The Legal Status of Prisoners (1977 Tent. Draft); Standard 4.1-4.4 and Commentary, represented in Am. CRIM. L. Rev. 377, 458-65 (1977) [hereinafter cited as ABA STANDARDS].

64. See notes 52-60 supra and accompanying text.

65. "Employee" must be defined in context with "employer." To fit within the category of an employee one must be in the service of an employer. See 29 U.S.C. § 152(3) (Supp. 1975). However, the term "employer" does not include "any State or political subdivision." 29 U.S.C. § 152(2) (1970), as amended (Supp. V 1975). The interrelation of these two definitions removes the inmate from the purview of the Act.

66. See, e.g., FLA. STAT. § 447.203(3)(f) (Supp. 1976) (which states: "'Public employee' means any person employed by a public employer except: Those persons who have been convicted of a crime and are inmates confined to institutions within the state"). See also FLA. STAT. § 944.49(5) (Supp. 1976) (which states: "No prisoner compensated under this section shall be considered as an employee of the state . . . nor shall such prisoner come within any other provision of the Workmen's Compensation Act."). CAL. PENAL CODE §§ 2700, 2766, 2791 (West Cum. Supp. 1970) (amended 1976).
ciational freedom was also a protected right. Consequently, organizational efforts occurred in a number of states all over the country.\(^7\)

Generally, the inmate union combines the characteristics of an organization seeking the expansion of prisoner rights with the traditional goals of a labor union seeking a bargaining status on wages, hours, and other terms and conditions of employment.\(^6\) Since it transcends the traditional union by incorporating social, economic, and sometimes political goals, the inmate union may be considered a sophisticated hybrid with a broad based approach to a variety of inmate problems. This approach is rooted in the state of confinement which encompasses every aspect of the inmates' existence.\(^9\) Therefore, wages and working conditions\(^0\) can constitute only one area of potential reform. Thus, to be truly effective, a union must look beyond labor issues to the remainder of the inmate's fundamental concerns such as his living conditions and his personal requirements.

Several theoretical justifications have been offered for the acceptance of the inmate union as a method of resolving differences between inmates and administration. Sharing the power with inmate leadership could be a constructive form of allocating responsibility and preventing large scale disturbances, of which riots have been the predominant form.\(^7\) By granting an inmate organization a degree of representation and control, equilibrium could be introduced into the system, and tension could be reduced among the inmates.\(^2\) Moreover, official recognition of the inmate union would furnish an extrajudicial forum for dispute resolution and result in a corresponding savings of judicial time and taxpayers' money. Most important of all, the inmate union would give the inmate a share of self-determination, as he would become cognizant of the responsibility delegated to him and aware of the ramifications of his own

\(^67\). The most comprehensive efforts took place in California, Georgia, Kansas, Maine, Michigan, Minnesota, New York, North Carolina, Ohio, Rhode Island, Washington, D.C. and Vermont. The eventual disposition of these efforts was not nearly as successful. See Huff, Unionization Behind the Walls, 12 CRIM. 175 (1974); Survey, note 129 infra.


\(^69\). See note 4 supra.

\(^70\). For consideration of application of the minimum wage and workmen's compensation benefits to inmates, see ABA STANDARDS 4.1-4.6 and Commentary, supra note 62, at 193; Comment, Minimum Wages for Prisoners: Legal Obstacles and Suggested Reform, 7 U. MICH. J.L. REF. 193 (1973); Comment, Unionizing America's Prisons—Arbitration and State-Use, 48 IND. L.J. 493 (1973).


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actions and those of his fellow inmates. This involvement in the decision-making process would have a rehabilitative effect as it would provide the inmate with an opportunity to make choices analogous to those he would be required to make outside of prison.\(^73\)

In contrast to the justifications for the inmate union are the practical realities of its operation inside the prison system. To the correctional bureaucracy, the idea of inmate unions is contradictory to penological objectives. Support by prison officials of inmate unionization would indicate their assent to the idea of a community of rights, a concept at odds with the traditional view of punishment for crime.\(^74\) There is, therefore, little incentive for authorities, who have no legal obligation to do so,\(^75\) to agree to any significant dealings with inmates.

If there are faults with the existing prison power structure dominated by the prison authorities, why develop a countervailing power base containing all the inherent deficiencies of the first? The creation of an inmate union, while creating a power balance, would prove counterproductive to its purpose of increasing communication between the parties. Rather than resulting in increased interaction, opposing groups in the prison community would only become more alienated.\(^76\) Notwithstanding the opportunity for positive change unionization offers, it also creates the opportunity for concentration of power in the hands of inmates who could utilize the organization for corrupt purposes. At the same time these inmates would be able to insulate themselves from harm through their status as union officials.\(^77\)

75. See text accompanying notes 88-91 infra.
76. T. MURTON, THE DILEMMA OF PRISON REFORM 175 (1976). Murton's conception of the disruptive nature of the inmate union is all the more important because he is critical of present prison policies and seeks a substantial effort toward prison reform. He does not view the union as a curative, but as just another symptom of the correctional system disease. The escalation of force to meet force does not, in his opinion, attack the underlying inadequacies of the system; rather, it simply clouds them. Id. at 175.
77. This is precisely the experience as related by inmate Peter Remick of Walpole State Prison, Massachusetts. His book IN CONSTANT FEAR (1975) traces the organization and implementation of a union, the National Prisoners Reform Association (NPRA) at Walpole, during 1972 and 1973. The NPRA replaced its predecessor Inmate Counsel and thereafter promoted such illicit activities as the distribution of drugs, prostitution, protection, and the elimination of inmates who opposed or criticized its policies. Id. at 68-69.

Remick's account details a potentially good idea gone sour. The initial NPRA election was held by secret ballot conducted by the National Center for Dispute Settlement of the American Arbitration Association and was certified as fair by inmate representatives and guards designated by the prison administration and other state departments. Although the procedures followed were proper, the representation elections were falsified beforehand. Id.
The apprehension on the part of the citizenry to the development of unionism in both the public and private sectors must also be considered. Prison officials have been able to take advantage of this in their opposition to inmate unions. Citing the special considerations in effectively running a prison, they argue that the inherently antagonistic relationship between administrators and inmates creates an even more inappropriate atmosphere for unionization than exists in the public sector. Under this viewpoint, the possible threat to the security of the public institution a fortiori precludes union organization. Finally, they argue that the alleged stability which has built up over the years in the public and private sectors may have no relevance to the issue of the utility of inmate unions.

IV. JUDICIAL ASSESSMENT OF INMATE UNIONS

The brief history of inmate organizing activity has been replete with attempts to secure bargaining status with official authority. While some prisoner rights claims have reached the United States Supreme Court for ultimate resolution, the union issue has received differing and often evasive interpretation by lower federal courts. In Goodwin v. Oswald, the Prisoners' Labor Union at Greenhaven challenged a prison seizure of letters concerning the formation and certification of the union. The information had been compiled and furnished by the Legal Aid Society. Although delivery of the mail was ordered, the court avoided ruling on the legality of inmate unions or prison organization.

at 61. Hard core offenders gained control of the NPRA and transformed it into a profitable business for their personal advantage and a shield to ward off sanctions by the correctional authorities: "The idea of the prison reform, at least in NPRA terms, isn't for real reform—it's to antagonize the guards." Id. at 65.

Although Remick's account is an expose of only one inmate union, it presents a graphic account of actual abuses of inmate unionization. 78 For a discussion of how prison security may be promoted by inmate unions see Comment, The First Amendment Behind Bars: Prisoners' Right to Form a "Union", 8 Pac. L.J. 121, 134-36 (1977).


81. See text accompanying notes 27-38 supra.

82. 462 F.2d 1237 (2d Cir. 1972). The Prisoners' Labor Union at Greenhaven was never recognized by correctional officials as a bargaining representative or spokesman for the inmates. Id. at 1239.

83. Judge Oakes, however, in a concurring opinion analyzed the recognized deficiencies of a penal system that could foster prisoner unrest and concluded that some form of inmate
Prior to 1977 only two district court opinions had confronted the associational rights of prisoners to organize. In *National Prisoners Reform Association v. Sharkey*, inmates of the Adult Correctional Institution of Rhode Island challenged a prohibition against organizational meetings issued by the Assistant Director of Corrections of the Rhode Island Department of Social and Rehabilitative Services. Earlier meetings had been conducted in the presence and with the approval of the warden and other supervisory personnel. These meetings had concentrated on the Association’s goals to improve prison conditions and inform the community of existing conditions. The district court enjoined the Assistant Director from proscribing the associational meetings. The court required the state to carry the burden of establishing that its regulations furthered a substantial governmental interest and that the restriction on first amendment freedoms was no greater than necessary to protect that interest. The state had failed to show that any threat of violence, breach of security, or even an increased security workload would result. Thus, the court stated: “Prisons do not exist outside the law. They are institutions created by law and prison officials are subject to law. The discretion vested in these officials is always subject to the limits imposed by the Constitution.”

Two years later in *Paka v. Manson*, a federal district court again faced the issue of a prisoner union. *Paka* had basically the same factual background as did *Sharkey*, but included certain aggravating circumstances which weighed heavily in the court’s decision. The court found that, although correspondence between a prisoner and his attorney may be protected, inmates did not have a union should be given the opportunity to rectify legitimate inmate grievances: “There is nothing in federal or state constitutional or statutory law that forbids prison inmates from seeking to form an organization or agency or representative group of inmates concerned with prison conditions and inmates’ grievances.”

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86. 347 F. Supp. at 1238.
87. Id. at 1240.
89. The prisoners did not seek to establish a labor union. They only wanted to form an organized group with elected representatives to meet with prison administrators to discuss grievances and to propose institutional changes. 387 F. Supp. 111, 115 (D. Conn. 1974).
90. The aggravating circumstances which weighed heavily in favor of the State’s interest involved a letter written by Weusi Paka, a leading inmate organizer, which was addressed to the local chapter of the NAACP. It described a fictitious, violent incident occurring after the date on which the letter came into possession of prison officials. This tactic not only could have undermined the administration of the institution, but also could have posed a definite threat to internal order by creating additional friction between inmates and correctional officials. Id. at 113. It also put into serious doubt whether the organization could responsibly handle authority and decision-making power. Id. at 123, n.19.
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protected first amendment right to form a union. The Supreme Court decision of *Pell v. Procunier* provided guidance in that it evaluated alternative means of communication when balancing first amendment rights against legitimate governmental interests. In applying this analysis, the *Paka* court reasoned that there were various administrative avenues for individual inmates to communicate their grievances to prison officials—either through the prison chain of command, the correctional ombudsman, or the Prison Association. In view of these alternatives, the abridgement of the right to organize was considered minimal when compared to the state's interest in the security of its prisons. The conclusions drawn by the *Paka* court indicate that there are segments of our society which, due to a seemingly justified need for stricter governmental supervision, will not enjoy as broad first amendment protections as the rest of society.

V. *JONES v. NORTH CAROLINA PRISONERS' LABOR UNION*

Six years passed from the inception of the first prisoners' union at Folsom Prison until the first Supreme Court decision squarely facing the issue of the associational rights of inmates. In *Jones v. North Carolina Prisoners' Labor Union*, the North Carolina Department of Correction enacted regulations that had a devastating effect on the union. First, they forbade inmate solicitation of other inmates to join the union. Next, they did not permit inmates to conduct union meetings. Finally, the regulations prohibited delivery of all union publications mailed in bulk to inmates who received them for redistribution to the remainder of the inmate population.

The union instituted a civil rights action attacking these policies by alleging violations of the first and fourteenth amendment rights of its members. The district court opinion found constitutional violations by prison authorities for failure to allow inmate solicitation for union membership, meeting privileges, and refusing

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93. Id. at 824.
94. The correctional ombudsman functions as a go-between for the inmates. The relative merits or deficiencies of these individuals are beyond the scope of this Comment. For a nation by nation treatment of this subject see W. GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTION IN NINE COUNTRIES (1966). For a discussion of a state plan, see Note, *The Corrections Ombudsmen—A Legislative Note in the Ohio Plan*, 3 CAP. U.L. REV. 77 (1974).
95. 387 F. Supp. at 117-18. The Prison Association is a statewide group interested in penology.
97. Id. at 2536.
receipt of the union publications. 99

On appeal, the Supreme Court reversed and upheld the challenged regulations. 100 Justice Rehnquist, writing for the majority, developed an approach incorporating much of the rationale of Pell v. Procunier. 101 Applying the Pell 102 test, the court reached a similar conclusion to that reached in Paka v. Manson; 103 the guarantee of first amendment associational rights must yield to the reasonable considerations of correctional management in the continued security of the penal system. As stated by Justice Rehnquist:

The interest in preserving order and authority in the prisons is self-evident. Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration. . . . The case of a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots. . . . When weighed against the First Amendment rights asserted, these institutional reasons are sufficiently weighty to prevail. 104

The majority apparently chose to ignore a variety of tests applied previously by other courts when confronting the same or similar issues, such as a clear and present danger test, compelling state interest test and a least restrictive alternative test. 105 Instead, the Court applied the less exacting standard 106 of a rational basis test. In response, Justices Marshall and Brennan pointed out in dissent that many rules and regulations imposed on students and citizens by school and city officials, though "rational," do not outweigh the first amendment rights of these individuals. In their view, the test for prison officials should be no different "simply because prisons are involved." 107 The dissent succinctly elaborated the eventual re-

100. 97 S. Ct. at 2538.
101. 417 U.S. 817 (1974) (prison regulation allowing media representatives to interview random inmates and refusing permission for inmates to initiate interviews held constitutional).
102. See notes 46-48 & accompanying text supra.
104. 97 S. Ct. at 2542 (citation omitted).
106. 97 S. Ct. at 2541. The rational basis test requires only a minimal showing on behalf of the administration that their actions are reasonable under the circumstances. The conclusion on the part of the administrators that inmate organizations or unions pose a likelihood of disruption to the prison community is enough to satisfy the test and permit associational restrictions.
107. 97 S. Ct. at 2546.
result of continued application of this standard:

If the mode of analysis adopted in today's decision were to be generally followed, prisoners eventually would be stripped of all constitutional rights, and would retain only those privileges that prison officials, in their "informed discretion," designed [sic] to recognize. The sole constitutional constraint on prison officials would be a requirement that they act rationally.108

In addition to the first amendment challenge, the inmates asserted a fourteenth amendment claim alleging a denial of equal protection. This was based upon the prison policy of extending bulk mailing and meeting privileges to the Jaycees, Alcoholics Anonymous, and the Boy Scouts while denying them to the union. The Court rejected this claim, holding that a prison was not a "public forum" which entitled any and all organizations to equal treatment.109 In the Court's view, it was within the particular expertise of correctional administrators to determine which groups exhibited the most potential to aid the inmates socially, spiritually, or even politically. Thus, the correctional administrators need simply demonstrate a rational basis110 for the distinction applied to different organizational groups to satisfy the requisites of equal protection. The alleged adversary nature of the union and its coexistence with the administration is therefore enough to justify different treatment.111

The Court further reinforced its new standard by shifting the burden of proof as to which party must demonstrate the existence or nonexistence of a threat to security. According to the Court, "the burden was not on appellants [Department of Correction] to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order,'" but rather on the union to show the prison officials have exaggerated their response.112 This statement indicates that it is up to the inmates to make a showing that the union does not endanger the security or stability of correctional facilities. Prior to this pronouncement, the burden had been on correctional officials to demonstrate that actual tension existed and that the limitations

108. Id. at 2549 (emphasis added).
109. Id. at 2542-44. Cf. Greer v. Spock, 424 U.S. 828 (1976) (military installation, which allowed civilian entertainers and speakers to perform while refusing political candidates a right to speak and disseminate campaign literature, did not violate equal protection or convert the base into public forum).
110. 97 S. Ct. at 2543.
112. 97 S. Ct. at 2539.
imposed were not exaggerated responses to imaginary concerns.\textsuperscript{113} As a result of this holding, the inmates, the union, or any other related organizations are confronted with a paradox since they are unable to demonstrate the responsibility and reliability of an organization unless they are first given an opportunity to organize, something which correctional regulations may permissibly prohibit. This shifting burden, if applied to all prison rules, will virtually eliminate any challenge by prisoners as to the deprivation of their rights under the Constitution.

As Chief Justice Burger noted in his concurring opinion, the decision does not address the relative merits or deficiencies of the inmate union, but only whether such an organization has the constitutional right to exist in a prison society.\textsuperscript{114} Thus, according to the Chief Justice, the lack of this protection does not signal an automatic end to the union as the prison officials may in their discretion still permit inmate unions.\textsuperscript{115}

Regardless of how the opinion is approached, its inevitable and ultimate outcome is a death knell for inmate unions of any shape or form.\textsuperscript{116} The dissent of Justices Marshall and Brennan is directed at what they perceive as the “apparent fear of a prison reform organization . . . [and] a giant step backwards towards that discredited conception of prisoners' rights and the role of the courts.”\textsuperscript{117} Specifically, they oppose the distinctive first amendment treatment which is utilized in isolating the prison from the remainder of society.\textsuperscript{118} Blind abdication of decision making to the exclusive province of correctional officials fails to account for their obvious self-interest in maintaining the status quo and repressing that which would have the possibility of creating internal unrest. The long term forecast of the majority opinion results in the inevitable erosion of prisoner rights wherever the administration is capable of demonstrating they acted rationally.

The union in Jones was moderate in both its structure and


\textsuperscript{114} 97 S. Ct. at 2544.

\textsuperscript{115} Id.

\textsuperscript{116} See Survey, note 129 infra.

\textsuperscript{117} 97 S. Ct. at 2545. Marshall’s reference is to the “hands-off” doctrine. For added discussion see text accompanying notes 13-18 supra.

goals. Defending human and civil rights, gathering community support for prison reform, providing post-release aid in job hunting, and advancing economic, political, social and cultural interests were its primary concerns. As with the Attica demands, none of the union's aims could be interpreted as radical, nor would they appear an imminent threat to prison security. Consequently, the absence of any analysis of the merits of a prisoner organization from the Court's opinion detracts from its acceptability. This fault becomes all the more glaring when one recognizes that in other countries successful organizations exist which deal with a full panoply of prisoner claims and represent a constructive force in the correctional system.

Both the American Bar Association and the National Advisory Committee on Criminal Justice Standards and Goals have devoted attention to the wide spectrum of inmate organizational activities including freedom of association, prisoner employment, wages, and the protection of federal and state labor laws. The organizations are in favor of granting inmates certain

119. See Brief for Appellee at 43.


121. Sweden and Denmark are two countries with a long history of prison reform. KRUM, the Swedish movement, and KRIM, its Danish counterpart, are well organized groups of ex-inmates, students, and intellectuals. Prisoners have a right to form inmate grievance commissions which are authorized to communicate with the prison administration concerning grievances and develop other procedures for inmate involvement in the functioning of the institution. These groups have achieved many of the basic demands of their American counterparts such as liberal visitation rights, leaves and furloughs. As stated by the Director General of the National Correctional Administration: "According to Swedish law there is nothing to prevent the inmates of penal institutions from forming their own organization. The general freedom of association applies to them. Likewise there is nothing to prevent them from electing bodies within the institution to further their demands." Ward, Inmate Rights and Prison Reform in Sweden and Denmark, 63 J. Crim. L.C. & P.S. 240, 244 (1972) (citing B. Martinsson, Prison Democracy in Sweden, Sweden Informational News Release, April 16, 1971, at 1). See also R. Goldfarb, Jails 409 (1975), in which the Norwegian (KROM) and Finnish (November Movement) counterparts of Swedish and Danish prisoner reform organizations are discussed.


123. See National Advisory Committee on Criminal Justice Standards and Goals, in Compendium of Modern Correctional Legislation and Standards (2d ed. 1975).


rights and protection in all of the above stated areas. Their belief is that inmate organizations should be given the opportunity to prove their worth. If agitation results, the organization could be dealt with accordingly. Even inmate strikes receive the approval of the ABA as a method of peaceful protest protected by the first amendment.\textsuperscript{128} In its view, participation in these activities, without more, would not be grounds for either discipline or sanction. To ignore these aforementioned considerations is to ignore the reality of a potentially effective force to facilitate change.

If the relatively moderate demands of the union in \textit{Jones} can be so easily avoided, then an organization attempting to incorporate not only prison reform but traditional labor concepts of collective bargaining, grievance procedures, and binding arbitration can certainly expect absolute opposition.\textsuperscript{129} A labor union connotes power,
pressure and an uneasy relationship as far as prison administrators are concerned. At its most basic level, it gives the union an equal voice in bargaining with the administration. This is especially true if there were present a specified grievance procedure leading to arbitration for those problem areas which remain unresolved.\textsuperscript{30} An

less, those who had such experience reaffirmed the fear that such organizations represent a security threat to the institution, are a cause of violence, and do not work as a stabilizing force to curb disorder.

Most of the states were familiar with the Jones decision and its holding. Two states had misconstrued the decision as a strict prohibition against any form of inmate union. Initially, the pollsters had expected that more states would interpret Jones in this manner, perhaps a self-serving analysis. One effect of the decision may be the uninhibited responses to the questionnaire from correctional administrators. They freely voiced their approval of the Supreme Court opinion and its concurrence with their own internal policies.

Comments of the administrators foresaw a decrease in the trend towards organizing these types of groups. Organized inmate action would be neutralized and curtailed. Many of the administrators justified their position by pointing out that there were alternative internal procedures through which prisoners could register displeasure with official policy. In some prisons various inmate advisory groups could act as the spokespersons for the inmate population; in others, prison ombudsmen were an institutional avenue of redress. The significant aspect of this is the importance placed on the advisory nature of all these different representative groups. The advisory capacity through which they serve has no official authority or power beyond that which the administration allows. The lack of official authority provides the principal distinction from an inmate union which possesses inherent power to aid in decision making.

Since Rhode Island was the only participating state to indicate that it had an inmate union operating within the correctional system, its response was of particular interest. According to officials, the limited purpose of the union is to bring about prison reform. There is no bargaining between the respective parties. The existence of unions was not noted as having either a stabilizing or disruptive effect. The Department of Correction further commented that upon completion of a dispute resolution system currently being developed by the American Arbitration Association a decision will be made on the feasibility of allowing an inmate union to continue. This comment is rather revealing because it might be a harbinger of the removal of unions in Rhode Island. One other state which asked that its identity be kept confidential indicated its allowance of inmate unions, but currently has none operating there.

One set of answers was especially responsive to all questions and can be used to summarize the prevalent feeling today among correctional authorities:

This decision [Jones] will allow prison officials to understand clearly their authority with respect to placing limitations on the goals and method of inmate groups and organization. I see this decision as an uncharacteristically clear pronouncement by the court in an area where their [sic] decisions are usually vague or unrealistic. ... The recognition that prison administrators may exercise discretion in permitting the formation of group activity clearly aids the officials in keeping order within the institution. No good can come from placing inmates in adversary roles against prison officials. This is what a prisoner's union, or a similar group, by whatever name it may be called, would result in.

Response from Sue Rouprich, Attorney for the Secretary of Correction, Louisiana Department of Correction.

130. It has been suggested that the arbitration model that has proven successful in the labor field could be modified to fit the penal context. Successful implementation of a model of this type would necessitate the independent existence of a dispute resolution system, free from political commitments and distinct from the administration. Any other structure would likely evoke suspicion from the inmates. Independence could be achieved if groups such as
equal voice signifies the introduction of a degree of credibility into the correctional relationship. Direct negotiation, however, defies the customary correctional philosophy aimed at submissiveness. Authorities find it difficult to deal with inmates who are argumentative in seeking their objectives. Because of this, inmate selection of representatives, and bargaining rather than advising are particularly grating and distasteful to most correction officials. This entrenched behavior on the part of some correctional officials is as detrimental to the legitimate interests of all parties as the alleged harmful effects of concerted activity by inmates.

VI. CONCLUSION

The significance of the Jones decision is both interesting and unusual because it transcends seemingly divergent areas of the law. Confined to the subject of prisoner rights, the opinion makes evident that a highwater mark has been reached. Thus, Jones marks a continuing recession of the movement to extend prisoner rights. By permitting broad discretion on the part of correctional authorities, future attempts at inmate organization will likely meet unflinching resistance.

Refusing to allow this type of concerted activity will undoubtedly hinder further advancement of prisoner rights. This may necessitate a return to individual action which lacks the force and intensity of group action. In essence, the Court has accomplished a subtle return to the hands-off doctrine by its relegation of prison administration almost exclusively to correctional administrators.

the Center for Correctional Justice, National Center for Dispute Resolution, or the American Arbitration Association set up and developed a negotiating structure and provided assistance in its implementation.

Quick response to inmate grievances would also be a vital function if the system were to prove workable. Thus, specific grievance procedures and time limits would have to be established and enforced. Immediate attention to problems would avoid criticism of a do-nothing attitude, which is all too often the hallmark of a bureaucracy. Finally, if the arbitrator's decision is to be of real value, it must be final and binding on the parties.


132. See Survey at note 129 supra.
The recurrent theme of the recent decisions of the Court is that "prison officials must be accorded latitude."133 This language, cited on numerous occasions, has now been elevated to a point where courts will ordinarily defer to the expert judgment of correctional officials on matters of penal policy.

Extensive criticism of the hands-off doctrine may be unwarranted. There is an acknowledged need for certain flexibility on the part of the correctional administrator who is trained to confront the everyday problems inside the prison and determine the most appropriate way to facilitate their handling. Any further relinquishment of judicial scrutiny would not serve the best interests of any of the parties involved and may well be a dangerous path to follow.

The pattern of the Court's treatment of the inmate union highlights what is increasingly becoming known as the "decline of unionization."134 While forty percent of the American labor force was unionized thirty years ago, today only twenty-five percent is comprised of union members. Although union membership continues to increase in the public sector, it is encountering formidable resistance from both the taxpayers and public service employers. It remains questionable whether public service unions can retain recent gains of job security and retirement pay in view of the current economic situation. The decline in union strength can also be measured by the erosion of union leadership through its reluctance to infuse new blood into the old guard. These deficiencies have been increasingly evident by labor's importance in wielding political clout with Congress in helping to enact legislation favorable to labor's viewpoint. It may now be that the most telling blow to labor's image has been delivered by its onetime advocate, the public. Recent public opinion polls have found less public trust in labor than in any other institution.135

In the final analysis, if rehabilitation is an actual goal of the penal system, a hybrid union, at the very least, deserves the opportunity to establish its credentials or lack thereof in the correctional setting. It does not have to do so with the full accompaniment of rights, privileges, and economic weapons of the private and public sectors. To simply shun the possible existence of beneficial features of the inmate union without carefully drawn conclusions, not only impugns the judicial integrity of the bench, but neglects an alternative form of improving the prison environment and expediting dispute resolution within the system.

135. Id.