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LABOR UNIONS FOR PRISON INMATES: AN ANALYSIS OF A RECENT PROPOSAL FOR THE ORGANIZATION OF INMATE LABOR

INTRODUCTION

The way to make a bomb is to build a strong perimeter and generate pressure inside. Similarly, riots occur in prisons where oppressive pressures and demands are generated in the presence of strong custodial containment.¹

Present day correctional facilities are highly conducive to internal disorder. Among the factors that have led to this condition are

overcrowding, poor administration, insufficient financial support, political interference, lack of professional leadership, inefficient or non-existent treatment programs, disparities in sentencing, poor and unjust parole policies, enforced idleness of prisoners, obsolete physical plant, and a small group of hard-core and intractable prisoners.²

Recently, considerable attention has been given to methods of reducing tensions within correctional facilities in order to minimize the likelihood of the recurrence of Attica-like disasters.³ One proposal is to allow inmates to form and participate in labor unions for the purpose of bargaining with prison administrators on work-related issues.⁴ At first glance this suggestion appears to be prepos-

1. Fox, *Why Prisoners Riot*, 35 FED. PROB. 9, 10 (March 1971) [hereinafter cited as Fox].

2. *Id.* at 9.

3. See e.g., Fox, *supra* note 1; Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

4. See Bass, *Correcting the Correctional System: A Responsibility of the Legal Profession*, 5 CLEARINGHOUSE REV. 125, 149 (1971). See also the "Bill of Rights," note 60, *infra*; Anvil, July 1971, at 2 (the newspaper of the California Prisoners Union); N.Y. Times, Feb 8, 1972, at 1, col. 2. An earlier discussion of the organization of inmate labor is found in Lopez-Rey, *Some Considerations on the Character and Organization of Prison Labour*, 49 J. CRIM. C.L. & P.S. 10 (1958). For a definition of "union" and "labor union," see letter of Sept. 3, 1971 to Mr. Jovalis McNelley #16013, Drawer B, Stormville, New York 12582 from a representative of the New York Department of Labor. This letter, exhibit "A" in Smoake v. Zelker, Civil No. 71-4095 (S.D.N.Y. 1971), describes a union as follows:

In a broad sense it symbolizes an organization composed of a body of persons united in the pursuit of a common cause or enterprise. . . .

Generally, a labor union is a combination of wage earners organized for their mutual betterment, protection and advancement.

Although this comment deals primarily with the "right" to form labor unions, consideration should be given to the extension of the application of labor union conflict resolution devices to other areas of activity. The success of the application of collective bargaining to community conflict resolution is noted in Kheel, *Collective Bargaining and Community Disputes*, 92 MO. LAB. REV. 3 (1969). See note 72, *infra*.

terous and entirely unrealistic, yet a closer examination indicates that there may be a certain amount of viability to the proposition. The trend toward the unionization of inmates has already been noted in certain European countries.⁵ Inmates may have a constitutionally protected right to participate in some form of labor organization,⁶ and if this right can be exercised to a limited extent without creating serious threats to the security or the order of the institution, an absolute ban on such limited exercise may amount to an unconstitutional deprivation.⁷ Additionally, modern developments in certain federal and state prisons indicate that forms of inmate self-government or inmate participation in prison government can be desirable and useful methods of dealing with many of the problems that do not lend themselves to adequate reform by legislative or judicial bodies.⁸ Finally, unionization may contribute to the rehabilitation of the inmate.⁹

5. See Bass, *supra* note 4; Fox, *supra* note 1, at 13.

6. See notes 10, 11, *infra*.

7. See notes 24-50, *infra* and accompanying text.

8. See notes 67-71, *infra* and accompanying text. For examples of the kinds of reforms that courts and legislatures have demanded, see *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966). Some courts have taken the position that when . . . the responsible prison authorities . . . have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene—and intervene promptly—to restore the primal rules of a civilized community in accord with the mandates of the Constitution of the United States.

Id. at 680. *Jordan* involved the use of "strip" or "quiet" cells for the punishment of inmates. The court required that such cells be provided with the "basic requirements essential to life." *Id.* at 683.

For a view of some of the legislative "reforms" that have been instituted, see Crawford, *Prisoners' Rights—A Prosecutors View*, 16 VILL. L. REV. 1055 (1971):

In 1935 the legislature mandated that Pennsylvania construct a jail system so that 'every person committed . . . may be confined separately and apart from every other person committed thereto.' That strikes me as a demand that we not put . . . two to a cell.

Id. at 1067. An example of an improvement in New York State is seen in the revised Correction Law section 171 which abolishes the "hard labor" requirement. N.Y. CORREC. LAW § 171 (McKinney Supp. 1971-72).

In *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971), the Second Circuit indicated that certain "deplorable" prison conditions could not be adequately remedied by the court: [W]e disclaim any intent by this decision to condone, ignore, or discount the deplorable and counter-productive conditions of many of this country's jails and prisons We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources lie rather with legislators, executives, and citizens in their communities.

For examples of the types of problems which are allowed to persist, see *Quick v.*

I. THE RIGHT TO UNIONIZE: DOES IT EXIST FOR PRISON INMATES?

In theory, "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law."¹⁰ Consequently, the presence or absence of the "right" to unionize turns on both the possession of this right by the ordinary citizen and the constitutional, statutory and practical considerations which might specifically or by necessary implication withdraw this right from the inmate. The right of the ordinary citizen to form and participate in labor unions has been well established.¹¹ However, there is some question as to whether this

Tompkins, 425 F.2d 260 (5th Cir. 1970) (inmate's order of goods from the canteen was not delivered, his money was not refunded, and he was told that it was just too bad); Granville v. Hunt, 411 F.2d 9 (5th Cir. 1969) (inmate complained that he was not fit to do heavy manual labor); Ralls v. Waffe, 321 F. Supp. 867 (D. Neb. 1971) (refusing to allow an inmate to shade his cell light was not a denial of a federally protected right); Argentine v. McGinnis, 311 F. Supp. 134 (S.D.N.Y. 1969) (confiscation of personal property by guards and reclassification of inmate to a lower paying prison job). See also Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATHOLIC U.L. REV. 365, 372-86 (1971): "The typical prison . . . has changed relatively little from the institutions of 150 years earlier." *Id.* at 372. Professor Singer reviews the physical conditions of prisons, brutality in prisons and psychological conditions of prison life. *Id.* at 372-86.

9. See notes 96-104, *infra* and accompanying text.

10. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 355 U.S. 887 (1945).

In the past inmates have brought actions to end the unconstitutional deprivation of certain fundamental rights under 42 U.S.C. § 1983 (1970):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Actions brought under the Act have involved religious freedoms (*e.g.*, Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970)), access to mails and access to courts (*e.g.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970)), allegations of cruel and unusual punishment (*e.g.*, Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970)), etc.

11. The first amendment prohibits Congress from "abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The fourteenth amendment prohibits states from enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." Thomas v. Collins, 323 U.S. 516 (1945), made it clear that "[t]he right to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as part of free speech but as part of free assembly." *Id.* at 532. States may regulate the activity of a labor union, but may not "trespass upon the domains set apart for free speech and free assembly." *Id.* The right to form a labor union and to participate in the union is protected against government interference by the first and fourteenth amendments. American Fed'n of State, County & Municipal Emp. v. Woodward, 406 F.2d 137 (8th Cir. 1969); NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948).

Section 7 of the National Labor Relations Act guarantees to all workers the right to organize freely for collective bargaining purposes. 29 U.S.C. § 157 (1965). Clearly this sec-

right has been specifically or impliedly withdrawn from inmates.

Although New York law does not specifically withdraw the unionization right from inmates,¹² the current posture of the Department of Correctional Services is not favorable to inmate unions. According to a departmental spokesman:

[T]he relationship of the inmates to the Department of Correctional Services is not that of an employer-employee. . . .

The Department of Correctional Services will not permit nor recognize any inmate labor organization within the Department. Such labor organization is contrary to the best interests of the Department and the general welfare of the inmate population.¹³

tion contemplates the right to join a union. Section 8(a)(1) of the Act declares employer interference, restraint or coercion of employees in the exercise of their section 7 rights to be unlawful. *Id.* § 158(a)(1). Section 202 of the N.Y. Civil Service Law (McKinney Supp. 1971-72) gives public employees the right to unionize.

12. See motion for summary judgment in the case of *Smoake v. Zelker*, Civil No. 71-4095 at 5 (S.D.N.Y., Oct. 26, 1971), where it is noted that New York law does not specifically bar inmate unions. See also N.Y. CIV. SERV. LAW § 200 *et seq.* (McKinney 1959); N.Y. CORREC. LAW § 170 *et seq.* (McKinney 1968).

13. Letter of Oct. 8, 1971 to Lawrence D. Ross, Esq., Legal Aid Society, Criminal Appeals Bureau, 119 Fifth Ave., N.Y., N.Y. 10003 by a representative of the New York Department of Correctional Services. This letter was offered in evidence in the case of *Smoake v. Zelker*, Civil No. 71-4095 (S.D.N.Y., Oct. 26, 1971). See also Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 537 (1963): "[I]t is clear that the right to assemble and to petition for a redress of grievances is not permitted in prison."

On February 7, 1972, representatives of the inmates of Greenhaven Prison in Stormville, New York announced the formation of the Prisoners Labor Union at Greenhaven. N.Y. Times, Feb. 8, 1972, at 1, col. 2. Commenting on this announcement, New York State Corrections Commissioner Russell G. Oswald said:

In no manner or way have we given permission to start such a union. This could become a complex legal problem and I don't want to go any further since this may end up in the courts.

Buffalo Evening News, Feb. 8, 1972, at 1, col. 3.

To determine the sentiments of prison administrators with respect to labor unions and other forms of inmate bargaining, the author conducted a survey of state corrections departments. On February 3, 1972 a copy of the following questionnaire was mailed to the correctional services department of each of the fifty states and the District of Columbia:

Gentlemen,

This questionnaire is part of a nation-wide survey to gather information for a Law Review comment to be published in No. 3 of volume 21 of the *Buffalo Law Review*. The comment explores the arguments for and against the formation of inmate labor unions. Your cooperation in responding to the following questions will prove invaluable to the successful completion of this project. . . .

- | | | |
|--|-----|----|
| 1) Would you oppose the formation of inmate labor unions to bargain with administrators concerning prison working conditions? | YES | NO |
| 2) If a labor union could be structured so that threats to security or order within the institution could be brought below current levels, would you oppose its formation? | YES | NO |

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- | | | |
|---|-----|----|
| 3) Are you opposed to all forms of "bargaining" between inmates and administrators? | YES | NO |
| 4) If 3 was answered "NO," what type(s) of bargaining would you favor? | | |
| 5) Feel free to make any additional comments. | | |

Despite the tendency to discard such surveys, and the severe time limitation which required an immediate response, representatives of 24 states completed and returned the questionnaire. One state expressed unwillingness to comment on the unionization of inmates. Another did not answer questions one and two. Judging from the nature of the replies, some administrators have given careful attention to the unionization proposal. This may have been responsible for the readiness of some departments to respond. However, the unusual nature of the subject matter of the questions may have been responsible for the refusal of many administrators to respond: some may have viewed the questions as outrageous, ridiculous and unworthy of response, while others may have believed that the issue was too "hot" to handle at the time.

The responses to the first three questions were as follows:

1) Would you oppose the formation of inmate labor unions to bargain with administrators concerning prison working conditions?	YES	NO
	20	3
2) If a labor union could be structured so that threats to security and order within the institution could be brought below current levels, would you oppose its formation?	YES	NO
	15	8
3) Are you opposed to all forms of "bargaining" between inmates and administrators?	YES	NO
	10	14

Clearly administrators are not in favor of the "unionization" of inmates. However, approval increases as security threats decrease, and many administrators do not oppose all forms of inmate bargaining.

The concerns of administrators were evidenced by their responses to questions four and five. While some indicated that normal industrial unions or unions to bargain about non-labor issues would be preferable to inmate labor unions, others were opposed to all types of unionization. One respondent to the questionnaire stated that

[b]argaining is give and take for both sides. With inmates its all take until they say I take your life.

This was a rather extreme statement, but the underlying concern for security should be recognized as a practical difficulty which must be faced. Other administrators fear that abuses will follow the granting of power to inmates. Still others fear staff problems and changes in the nature of the institution as a result of the increased managerial burden of unions. A final group indicate that bargaining is counterproductive to the rehabilitation of inmates and to the mutual honesty and freedom of communication which is most desirable in a prison environment. This group contends that unions intensify the adversary features of the prison environment, and that good administration rather than "bargaining" is the key to success in eliminating the problems of prison life.

It is difficult to evaluate the responses which were received. While they indicate an unwillingness to accept unions at the present time, they also tend to support the belief that some form of "bargaining" would be acceptable in many institutions. Although a few administrators are bitterly opposed to *all* forms of inmate collective bargaining, others are extremely receptive. As security problems are diminished, acceptability increases. This may imply that administrators would be willing to accept unions if they could be structured so as to minimize the undesirable consequences which many believe are inevitable. The abuses rather than the bargaining are the cause of the resistance. Although our results are inconclusive, they indicate the need for an intensive investigation of the particular objections of corrections officials in order to determine the legitimate administrative requirements which must be met by any workable, viable inmate organizational effort. This study will hereinafter be referred to as *Survey*.

This statement is, no doubt, based on the belief that the rights of "workers" do not belong to prison inmates¹⁴ because they are not "employees"¹⁵ or have forfeited their rights as employees. However, if the New York Public Employees' Fair Employment Act definition of employee were used, the inmate would apparently be a member of the employee class;¹⁶ he is "employed" by the Department of Correctional Services¹⁷ and his labor or products may be sold by the Department to the state, political divisions thereof or public institutions at prices "as near the usual market price for such labor and supplies as possible."¹⁸ The inmate, in turn, "may receive compensation for work performed during his imprisonment."¹⁹ Payments are to be according to "graded wage schedules . . . based upon . . . the value of work performed."²⁰ Inmates may dispose of money received only upon the receipt of approval from the commissioner.²¹ With the exception of this last consideration, it would seem that inmate "employees" resemble public employees in most work-related aspects.

Assuming that the inmate worker is a "public employee"

14. See generally Lopez-Rey, *supra* note 4.

15. "Employees" in this context refers to members of the national labor force. See *id.*

16. N.Y. CIV. SERV. LAW § 201(7) (McKinney 1959):

The term "public employee" means any person holding a position by appointment or employment in the service of a public employer.

Public employer is defined as follows:

The term "government" or "public employer" means (i) the state of New York . . . or (vi) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state.

Section 202 gives public employees the right to unionize. N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1971-72).

The National Labor Relations Act is not applicable to inmate "employees" because the NLRA definition of "employee" specifically excludes all individuals who are not employed by "employers" from the protection of the Act. See 29 U.S.C. § 152(3) (1965). "Employer" as defined by the Act does not include "any State or political subdivision thereof . . ." *Id.* § 152(2).

See *Hudgins v. Hart*, 323 F. Supp. 898, 899 (E.D. La. 1971), which indicates that although inmates are not entitled to the protection of the Fair Labor Standards Act, they are employees of the state.

17. N.Y. CORREC. LAW § 171 (McKinney Supp. 1971-72) provides as follows:

The commissioner of correction and the superintendents and officials of all penitentiaries in the state may cause inmates . . . who are physically capable thereof, to be employed, for not to exceed eight hours of each day, other than Sundays and public holidays, but such labor shall be either for the production of supplies for said institution, or for the state, or any political divisions thereof, . . . or for the purposes of industrial training and instruction.

18. *Id.* § 186.

19. *Id.* § 187.

20. *Id.*

21. *Id.* § 189.

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within the definition of the Public Employees' Fair Employment Act, it is necessary to determine whether the fact that he is also an inmate strips him of the normal unionization rights of the public worker. Although "[a]n individual once validly convicted and placed under Department of Correction jurisdiction is not to be divested of all rights and unilaterally abandoned by the remainder of society,"²² to "secure custody of prisoners and to assure orderliness within [correctional] institutions, it [is] . . . necessary to subject prisoners' behavior to a number of controls and regulations."²³ The determination of whether institutionalization necessarily removes the unionization right from the inmate depends on his possession of that right and the extent to which its exercise must be limited to maintain security and order within the institution.

The right to unionize is itself a composite of the more fundamental freedoms of speech, press, peaceable assembly and petition for redress of grievances.²⁴ Inmates possess some of these rights,²⁵ and cases dealing with such inmate liberties as freedom to receive and read literature²⁶ and freedom of religion²⁷ indicate that the rights afforded by the first amendment to every American are to be vigorously protected and may be restricted within the correctional facility only if a "compelling state interest centering about prison security, or a clear and present danger of breach of prison discipline, or [the threat of] some substantial interference with

22. *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45-46 (1961).

23. Note, *The Problems of Penology: Prison Life and Prisoners' Rights*, 53 *Iowa L. Rev.* 671 (1967). In *Price v. Johnston*, 334 U.S. 266, 285 (1948), the Supreme Court noted that:

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a reaction justified by the considerations underlying our penal system.

The Connecticut District Court came to a similar conclusion in *Berrigan v. Norton*, 322 F. Supp. 46, 51 (D. Conn. 1971):

These plaintiffs must face the fact that they have temporarily forfeited many of the rights associated with free men during their period of commitment.

24. See discussion in *supra* note 11.

25. Cases which have recognized this include *Cooper v. Pate*, 378 U.S. 546 (1964); *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir. 1964); *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

26. *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).

27. *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Pierce v. La Vallee*, 293 F.2d 233 (2d Cir. 1961).

orderly institutional administration”²⁸ exists. If this standard is applicable to the first amendment freedoms which represent the component parts of the right to unionize, then these same considerations would be applicable to a determination of the extent to which the Constitution would protect the right of inmates to form and participate in labor unions. The maintenance of security within the institution has traditionally been a sufficiently compelling state interest to warrant the restriction of civil liberties.²⁹ Yet even where this interest has been found to exist, the limits of permissible regulation have been narrowly construed by commentators³⁰ and courts³¹ who believe that the test requires that the limitation selected be the least restrictive way of meeting the interest³² of the state. The “clear and present danger” which would justify the restriction of first amendment freedoms exists only if the words or conduct in question are “directed to inciting or producing imminent lawless action and [are] likely to incite or produce such action.”³³ “Substantial interference with orderly prison administration” is not demonstrated by a showing of mere inconvenience to administrators.³⁴ To determine the impact of these considerations on the ability of inmates to unionize, it is necessary to determine the extent to which they allow prison administrators to restrict the more basic freedoms which comprise the unionization right.

Security and order arguments have enabled prison administrators to severely curtail the basic freedoms of speech and assembly.³⁵ Courts have noted that “although the rights of free speech

28. *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970). See also Rabinowitz, *The Expansion of Prisoner's Rights*, 16 VILL. L. REV. 1047 (1971):

[P]risoners live under our Constitution, and are entitled to all of the rights enjoyed by anyone else, subject only to such modification as is necessary because of their status.

29. See *Wright v. McMann*, 321 F. Supp. 127, 132 (N.D.N.Y. 1970).

30. See Rabinowitz, *supra* note 28; 84 HARV. L. REV. 1727, 1731 (1971):

[T]he ultimate validity of any condition should depend not only on whether it contributes significantly towards furthering such state interests, but also on whether it does this without curbing a needlessly large amount of speech.

31. *Barnett v. Rogers*, 409 F.2d 995 (D.C. Cir. 1969); *Wright v. McMann*, 321 F. Supp. 127, 132 (N.D.N.Y. 1970).

32. See Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

33. *Bandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

34. See *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968) where the “administrative convenience” argument was insufficient to justify the stringent limitations imposed on the right of inmates to receive periodicals and newspapers.

35. See *Smoake v. Zelker*, Civil No. 71-4095 (S.D.N.Y., Oct. 26, 1971), where an inmate was alleging the deprivation of first amendment freedoms by correctional officers who disci-

and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction"³⁶ Since these restrictions are applicable to the ordinary citizen, those who are confined must suffer at least this same restraint.³⁷ In *Price v. Johnson*³⁸ the Supreme Court held that the rights of inmates may be curtailed even more than the rights of those who are not confined.³⁹ This additional restraint is required if security and order within the institution are to be maintained. An indication of the extent to which the rights of inmates may be curtailed or withdrawn was provided in *Roberts v. Peppersack*,⁴⁰ which dealt with attempts by an inmate to organize a collective protest against prison conditions. The district court⁴¹ held that the prisoner

has no judicially enforceable right to advocate open defiance of authority within the prison walls. . . . Supreme Court statements to the effect that there is no absolute right to freedom of speech means [*sic*] that attempts to speak in a milieu where such speech may incite an insurrection against the authorities must be tempered. Prison authorities cannot be expected to permit such conditions in the name of free speech. In a prison environment, where the climate tends to be more volatile than on the streets, strong restraints and heavy penalties are in order.⁴²

A similar result was reached in *Fulwood v. Clemmer*,⁴³ where the court upheld the propriety of curtailing a religious speech which tended to incite a breach of the peace, even though no breach of the peace actually occurred.⁴⁴ The conclusion flowing from these cases is that the nature of the prison situation creates an extremely volatile atmosphere, and prison authorities cannot be expected to allow *any* speech, assembly or activity which might tend

plined him for making a peaceful speech about unionization to a group of from 30 to 50 inmates. See also Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 537 (1963).

36. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Roberts v. Peppersack*, 256 F. Supp. 415, 428 (D. Md. 1966).

37. *Roberts v. Peppersack*, 256 F. Supp. 415, 428 (D. Md. 1966).

38. 334 U.S. 266 (1948).

39. *Id.* at 285.

40. 256 F. Supp. 415 (D. Md. 1966).

41. District Court of Maryland.

42. 256 F. Supp. at 429-30.

43. 206 F. Supp. 370 (D.D.C. 1962).

44. *Id.* The extremely "volatile" nature of the situation is important to describe. The speech in question was made on a recreation field during a baseball game. Five or six guards and six or seven hundred inmates were on the field. The speaker "made references to the white race as liars, thieves and murderers." *Id.* at 377.

to incite an insurrection within the institution. If the unionization of inmates would have this effect, it could be banned. That unionization would inevitably lead to this result, however, is not clear. It is possible that a labor organization would reduce the heightened tensions and frustrations within the institution by providing inmates with a legitimate channel for the communication and redress of grievances and by structuring and legitimizing the informal organization which already exists within most institutions. In the general labor force, employer acceptance of and cooperation with labor organization has resulted in a reduction of union militancy and the stabilization of industrial relations.⁴⁵ If the formation of unions within correctional facilities would have this effect, it is possible that administrators would have legal and social responsibility to allow unionization.

At the present time it is clear that inmates do not have an administratively, legislatively or judicially recognized right to unionize.⁴⁶ Inmates have recently fought courtroom battles to secure such basics as toilet paper and other essentials in "strip" cells,⁴⁷ freedom from beatings and constant harassment,⁴⁸ freedom to profess unconventional religious beliefs,⁴⁹ etc. The necessities of institutional life required the imposition of certain limitations on the underlying constitutional rights which were involved in each of these cases. Yet although these constitutionally protected rights had never been completely withdrawn from inmates, litigation was necessary to bring these theoretically retained rights into the realm of reality. Current litigation has indicated that all inmate activity which may tend to incite disorder within the prison may be curtailed or prohibited.⁵⁰ An inmate labor union would be allowed

45. See R. LESTER, *AS UNIONS MATURE* 29-30 (1958):

[U]nions have lost some of the militancy and rambunctiousness that characterized them before World War II. During the 1940's and 1950's they became more disciplined and businesslike.

. . . .
[C]ontributing factors . . . have been . . . greater employer acceptance and cooperation with labor organizations, [and] the increase in workers' living standards under full employment

Union militancy is, of course, one reaction to employer hostility and threats to the union's existence.

46. See discussion in *supra* note 35.

47. See *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

48. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

49. See *Cruz v. Beto*, 329 F. Supp. 443 (S.D. Tex. 1970).

50. See *supra* note 42 and accompanying text.

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only if it could be structured so as to minimize or avoid any tendency to incite disorder. As with the right to a humane environment, the right to personal security, and the right to exercise religious beliefs, a right to unionize theoretically exists within these guidelines; but if this right is to become reality, administrators, legislatures and courts must be convinced that inmate unionization can be viable even within the necessarily narrow borders which exist.

II. PRACTICAL CONSIDERATIONS IN THE EXERCISE OF THE LIMITED UNIONIZATION RIGHT

There are many groups in our society who, because of their status, are not entitled to the protection of every single provision of our Constitution. We all understand this and make necessary adjustments. [T]he military . . . [c]hildren . . . people who are mentally ill . . . and . . . perhaps . . . students do not have protection of all the provisions of the Constitution. But the Constitution gives all of these people its protection, to the greatest extent possible (*see, e.g., In re Gault*, 387 U.S. 1 (1967)), and the same rule should apply to prisoners.⁵¹

Inmates may have the right to unionize, but the nature of the correctional facility necessitates the substantial limitation of that right.⁵² Thus, as in the case of other public employees,⁵³ the right to strike⁵⁴ might be denied: unresolved disputes could be submitted to binding arbitration. In the case of public employees, the paramount state interest being protected is the need to shield the general public from the serious inconvenience and possible threat to safety which would accompany a strike.⁵⁵ Similarly, the prohibition of strikes by inmates would be justified by considerations of safety and order, both within and without the institution. Additional limitations might be imposed upon the size of the audience to a union speech or gathering,⁵⁶ or upon the location or time of

51. Rabinowitz, *supra* note 28, at 1048.

52. Limitations may be imposed to maintain security and order, to further the rehabilitative goal, etc. *See Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

53. *See* N.Y. CIV. SERV. LAW § 200 *et seq.* (McKinney 1959).

54. *Id.* § 210: "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike."

55. *See* Civil Serv. Emp. Ass'n v. Helsby, 31 App. Div. 2d 325, 297 N.Y.S.2d 813 (3d Dep't 1969).

56. *See* Rabinowitz, *supra* note 28, at 1049: "I do not suppose that mass meetings in prisons are practicable."

such a gathering. It is possible that in some institutions the limitations would necessarily be so severe as to preclude the exercise of all forms of unionization. Administrators could not be expected to permit any form of activity which would disrupt the tense equilibrium which exists in some of the more volatile prisons. However, this should be the exception rather than the general rule. Courts have recognized that while

there are risks in every phase of human life . . . [the security interest of the state] can never justify treatment and procedures in prison confinement proven violative of human decency and constitutional rights.⁵⁷

A minimal risk to security, which can be met by the imposition of restrictions which do not require the prohibition of all forms of the constitutionally protected right, is not sufficient to warrant an absolute ban on all exercises of the right. The least restrictive limitation is the most that may be imposed.⁵⁸

To understand the extent to which inmates might expect to organize within the confines of the present correctional system, it is important to consider some of the existing forms of inmate organization or inmate bargaining which, in a sense, are "precedent" for the unionization concept. Similarly, it is important to consider some of the apprehensions of prison administrators who have given considerable thought to the consequences which have been indicated by past organization attempts.

A. *Existing Forms of Inmate Bargaining: Precedent For Inmate Labor Unions?*

At the present time two inmate "unions" exist within the United States.⁵⁹ Although prison administrators have not recognized these organizations as bargaining agents for their inmate members, it is important to briefly review their major features because these efforts represent the first attempts to apply concepts of *full unionization* to inmate labor.

The United Prisoners Union was formed in California for the purpose of organizing inmates and ex-convicts into a unit to

57. *Wright v. McMann*, 321 F. Supp. 127, 132 (N.D.N.Y. 1970).

58. See text *supra* note 32.

59. The United Prisoners Union, also known as the California Prisoners Union, 4718 Melrose Ave., Los Angeles, Calif. 90004 [hereinafter referred to as U.P.U.]; Prisoners Labor Union at Green Haven, Green Haven Prison, Stormville, N.Y. 12582.

demand the redress of various grievances.⁶⁰ The literature of this organization suggests that some of its aims transcend the immediate problems of prison inmates and encompass the goals of a great many of the groups which together comprise the "oppressed" class.⁶¹ However, some of the goals seem to parallel the aims of the normal employee union: Article III section (2) of the "Bill of Rights" calls for the establishment of a minimum wage, disability compensation, vacation from work with pay, pension plans, retirement benefits and life insurance.

The formation of the Prisoners Labor Union at Green Haven was announced by representatives of the inmates of Green Haven Prison in Stormville, New York on February 7, 1972.⁶² At the request of union leaders, the executive committee of District 65 of the Distributive Workers of America agreed to accept the group as an affiliate.⁶³ The inmates consider themselves to be "public employees"—entitled to bargain collectively with administrators under the Public Employees' Fair Employment Act.⁶⁴ Immediate bargaining concerning wages, hours and working conditions is sought: but long range goals include the economic, political, social and cultural uplift of inmates.

The U.P.U. and the Prisoners Labor Union at Green Haven represent the extreme in inmate democracy and self-determination, and contrast sharply with the present ban on the use of any type of concerted action to redress inmate grievances. However, some realistic form of unionization can be found within these polar extremes.

The pattern could be taken from student government functioning under a university administration. It could be taken from

60. See U.P.U., *The Bill of Rights of the Convicted Class* (1971) [hereinafter cited as the "Bill of Rights"].

61. *Id.* The scope of the U.P.U. concerns include sex and race discrimination (Article IV) and the Vietnam war (Article IX). Some of the goals of the U.P.U. appear to be seeking rights beyond those constitutionally guaranteed. Article III section (3) of the "Bill of Rights" of the U.P.U. would prohibit the imposition of forced labor on prisoners. However, the thirteenth amendment to the United States Constitution allows for such an imposition as punishment for a crime:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States.

See also *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

62. N.Y. Times, Feb. 8, 1972, at 1, col. 2.

63. *Id.* Unlike the U.P.U., the Prisoners Labor Union at Green Haven has elected to affiliate with an "outside," established union.

64. *Id.* at 28. See also N.Y. CIV. SERV. LAW § 200 *et seq.* (McKinney 1959).

a civilian government operating under military occupation by the victors after a war, such as those civilian governments in Japan or Germany after W. W. II. The pattern in the Federal Bureau of Prisons and some other systems has been the inmate council, where elected inmates discuss problems and appropriate policies with the prison administration, making recommendations and suggestions. A suggestion box system for inmates might be instituted if other approaches appear to be too innovative.⁶⁵

One or more of these suggested forms of "organization" might be acceptable at the present time. The criteria for selecting the precise form should be the minimization of security risks and the maximization of the organizational rights of the inmates.

Recent developments indicate that collective bargaining between inmates and administrators can be an extremely effective method of correcting institutional problems and averting disorders. *Morris v. Travisono*⁶⁶ involved extended negotiations between administrators and inmates over certain rules, practices and conditions of life at the Rhode Island Adult Correctional Institution. The district court judge acted as an arbitrator in the dispute and approved an agreement which the parties themselves had negotiated. The court retained jurisdiction over the dispute for an eighteen month period subsequent to entry of the decision to ensure the effectiveness of the agreement.⁶⁷ Similarly, the Center for Correctional Justice⁶⁸ located in the District of Columbia has been developing non-judicial methods of settling disputes and of resolving grievances of offenders. Fact finding, negotiation, conciliation, mediation and arbitration⁶⁹ are employed.⁷⁰ The procedure of the Center begins with independent fact finding to determine the nature of a particular complaint. Grievances which cannot be resolved through negotiation are dealt with by the var-

65. Fox, *supra* note 1, at 13.

66. 310 F. Supp. 857 (D.R.I. 1970).

67. *Id.* at 861.

68. The Center for Correctional Justice is a private, non-profit, District of Columbia corporation which is authorized by the District of Columbia Department of Corrections to sponsor a unique and comprehensive legal services program in institutions and programs under the Department's jurisdiction. The Center is located at 1616 H Street, Northwest, Washington, D.C. 20006.

69. See Center for Correctional Justice, an outline of strategies published by the Center for Correctional Justice at 4 [hereinafter cited to as Outline].

70. The Center is currently working with the Youth Services Division of the District of Columbia Department of Corrections. The Division serves about 1,500 offenders between the ages of 18 and 26. See Outline, *supra* note 69, at 4.

ious conflict resolution techniques available to the Center. Litigation is a measure reserved as a last resort. As of November 6, 1971 the Center had addressed itself to a number of problems, and had met with success in setting up negotiating procedures, reinstalling vending machines in the visiting hall, extending visiting hours, improving medical care, etc.⁷¹ The Center has not been involved in any labor disputes, but the success which the general labor force has experienced in bargaining collectively with employers is abundant evidence of the utility of this device in the labor field.⁷² In light of this, there may be reason to believe that the methods of settlement which have been used to resolve disputes in other areas of prison life would meet with success if they could be applied to the area of labor relations.

The strategy of the Center is to gradually increase the privileges granted to inmates as they show an increasing willingness to accept greater responsibility. Thus, as the threat to security or order is reduced the rights of the inmates are broadened. An agreement reached concerning the placement and use of vending machines is an excellent example of the way the procedure operates. Subject to preliminary conditions, inmates and administrators agreed that:

4. For an initial sixty (60) day trial period to begin when the machines arrive at the Youth Center, one additional officer will be required to be stationed within the visiting hall. If the additional officer is not available on a particular visitation day, the vending machines will not be made available that day.
5. If, after the first thirty (30) days of the trial period, the machines were not made available in the visiting hall for at least one-

71. See Center For Correctional Justice, Second Quarterly Report 5 (Nov. 6, 1971) [hereinafter cited as Report].

72. See Kheel, *Collective Bargaining and Community Disputes*, 92 MO. LAB. REV. 3 (1969), where the generally recognized success of collective bargaining in resolving labor disputes is noted.

[T]his system of collective bargaining works far better than most people realize, producing agreements and stable relationships in more than 99 percent of all negotiations.

Id.

In pointing to the unique applicability of collective bargaining to the resolution of labor disputes, Mr. Kheel notes that:

Disputes over wages or other financial provisions of a collective bargaining contract cannot be settled by resort to a ready legal standard. Not only is there no legal basis for requiring . . . such adjustments, but their variety is so infinite as to make imposition by law an impossibility.

Id.

half (1/2) of the scheduled visiting periods due to the unavailability of an additional officer, for the remaining (30) days of the trial period the machines will be placed within the visiting hall every visiting day, whether or not an additional officer is available.

6. If after the 60-day trial period no serious problems arise with respect to inmates taking anything bought from the machines out of the visiting hall or the security of the machines, the installation of the machines will be considered permanent and no extra officers will be required in the visiting hall.

.
8. Should the presence of the machines create security or staffing problems at the institution, the vending machines may be removed.

9. The Superintendent will consult the IAC and CLP before making any decision which will require the removal of the machines.⁷³

This agreement was signed by the president of the Inmate Advisory Council and the Superintendent of the institution.

B. *Meeting the Fears of Administrators*

In an attempt to determine the primary factors which would prompt administrators to object to the unionization of prison inmates, the author conducted a survey among the correctional services departments of each of the fifty states and the District of Columbia.⁷⁴ Although the printing deadlines of the *Review* imposed severe time limitations upon the departments, and despite the tendency of many administrators to discard such questionnaires, responses were received from representatives of twenty-five states. Many of the responses indicated the careful attention which a number of states have given to the real problems which attend *any* organizational effort. The results of the survey roughly paralleled the findings of a 1964 study of attitudes toward inmate self-government attempts.⁷⁵ Most administrators do not favor inmate labor unions because they fear abuses of inmate power, intensified problems of control and security, the difficulty of "bargaining" with poorly adjusted, socially deviant inmates, and the effect of bargaining on the continuing existence of penal institutions.

The tragedy of the use of the "trustee" guard in the Arkansas

73. Report, *supra* note 71, app. A(1).

74. For an analysis of the survey results, see *Survey supra* note 13.

75. See Baker, *Inmate Self-Government*, 55 J. CRIM. C.L. & P.S. 39 (1964).

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correctional system⁷⁶ has led many administrators to fear the granting of power to inmates. Many believe that abuses are an inevitable consequence of any such grant. "The strongarm inmate or the cutie is likely to become a leader in this type of activity [inmate self-government] and enforce the wishes of a few on the many."⁷⁷ Other commentators point out, however, that

[i]nmate leadership is present in all prisons. . . . The constructive use of inmate leadership is an obvious way to avoid riots. Some type of inmate self-government that involves honest and well supervised elections of inmate representatives to discuss problems, make recommendations and perhaps, even take some responsibilities from the administration could be helpful. . . . [I]t is in the interest of the administration to know the inmates' thinking and their action. In any case, downward communication is not enough.⁷⁸

The Center for Correctional Justice has sought to avoid the problem of the powerful inmate by selecting representatives on a revolving basis.⁷⁹ Selection of union representatives might follow this same pattern.

Another problem feared by administrators is that of control. Many correctional officers believe that the organization of inmates into a unit would make control within the institution difficult or impossible. In the words of one administrator:

About 40 years ago there was [a self-government group] . . . and it did not work out well. . . . I understand that as time went on

76. For a brief description of the horrors of the Arkansas Penal System and the use of the "trusty" or inmate guard, see Note, 23 ALA. L. REV. 143, 144 (1970). Assaults, fights, stabbings, homosexual attacks, etc. resulted from the use of these guards.

77. This was a response received from an administrator in reply to a survey questionnaire asking about the value of inmate council groups. The results of the survey are found in Baker, *supra* note 75, at 43. The majority of the responses were not in favor of inmate councils. However,

[i]t is interesting to note that of 44 responding institutions only 13 report experience with inmate self-government or advisory council groups. Six respondents who have never had direct experience with such groups expressed a negative view, based usually on the negative experience of others.

Id. at 45.

See also Survey, *supra* note 13. One administrator noted that "placing power in the hands of strong individuals is not in the best interest of institutions."

78. Fox, *supra* note 1, at 13. See also Survey, *supra* note 13. A number of the Survey responses stressed the need for formal and informal communication.

79. See Statement of Linda R. Singer, Executive Director, Center for Correctional Justice Before Subcommittee No. 3 of the House Committee on the Judiciary, 92 Cong., 2d Sess., Nov. 11, 1971, at 8 [hereinafter cited as Statement to the House Committee on the Judiciary].

it became involved in the administration of the institution. We found it was most unsuccessful.⁸⁰

Another administrator cited an instance where the security of the institution was threatened.

Many years ago, probably 25 or 30, the Inmate Council used their privilege to meet in the evening within a cell block to plan and execute an escape attempt. One of the guards was severely beaten. That episode ended the Council.⁸¹

The Center for Correctional Justice has minimized control problems by gradually increasing the role of the inmates and, at the same time, making it clear to inmates that greater responsibility and additional privileges are inseparably tied.⁸² Other commentators believe that control problems are minimal if inmates feel that they have a vested interest in the maintenance of order.⁸³ A union could provide the needed interest because, by its nature, it is oriented toward the resolution of the pressing employment problems which pervade institutional life. Inmate Councils have traditionally been directed toward "intra-mural interest programs such as recreation and entertainment."⁸⁴ One administrator noted that "[t]he group has no authority and its suggestions are accepted as nothing more. . . ." ⁸⁵ Councils adopted under these circumstances cannot create sufficient enthusiasm or interest to be effective channels of inmate grievances and frustrations. In the absence of such channels disorder and dissension are inevitable.⁸⁶

80. See Baker, *supra* note 75, at 45.

81. *Id.* See also Survey, *supra* note 13, where the fear for personal safety is evidenced by the statement of an administrator.

82. Statement to the House Committee on the Judiciary, *supra* note 77.

83. See, e.g., Fox, *supra* note 1, at 13-14.

84. See Baker, *supra* note 75, at 45.

85. *Id.* at 44.

86. See Bass, *supra* note 4, at 125: "[I]nsurrections [are] the ultimate tactical resource available to inmates who want to force change." In the absence of other tools, disorder and insurrection are the only method for effecting change. See W. GELLHORN, WHEN AMERICANS COMPLAIN 150 (1966). Professor Gellhorn notes that

riots and "strikes" in state prisons, where they occur far more frequently than in similar federal institutions, may reflect the inadequacy of the available grievance mechanisms; they seem chiefly designed to draw outside attention to inside problems.

But see Baker, *supra* note 75, at 44, where a prison administrator described the cause and consequence of the demise of the inmate council:

Through the years there have been many rehabilitative programs that have placed more control in the inmate's hands and each one of these programs have proved disastrous. . . . One of these rehabilitative programs caused the riot (in 1952).

The general labor movement experienced a marked decline in militancy and a concurrent increase in discipline and "business-like" conduct as employer acceptance of and cooperation with labor organizations became more widespread.⁸⁷ A good faith bargaining effort by prison administrators, which gives recognition and responsibility to inmates, and which is characterized by the acceptance of and cooperation with inmate representatives, may very well lead to a similar reduction of tension and hostility.

Many administrators do not feel that inmates are capable of determining their destinies within the correctional institution. "When a prisoner is adjusted enough to advise how to run the prison he doesn't belong here. He should be released."⁸⁸ This may be true with respect to some inmates, but current experiments such as that of the Center for Correctional Justice lead the observer to discount the general application of this proposition. Inmates have shown themselves to be capable of assuming responsible roles in assisting with the administration of the institution. A lesson to be learned from the conduct of inmates during the 1971 Attica disruption warns against dismissing or ignoring their intelligence and competence in formulating and negotiating various proposals for change.⁸⁹ Other institutions have witnessed a similar acceptance of responsible attitudes by inmates in tense confrontation situations.⁹⁰

One final consideration should be mentioned. Some administrators may believe that the unionization of inmates would make life "inside" too much like life on the "outside." Administrators who support collective bargaining between inmates and authorities believe that such bargaining will provide inmates with fair

It is going on nine years now that we have the place under control. Custody is in first place . . . before you can teach you have to have attention. We have had no trouble during this period.

87. See R. LESTER, *supra* note 45.

88. Baker, *supra* note 75, at 44. At least one commentator believes that prisoners "are poorly equipped by nature or training to participate in rational planning for themselves or their companions." See W. GELLHORN, *supra* note 86, at 145. See also *Survey*, *supra* note 13; some administrators believe that unions are counterproductive to rehabilitation, and that good administration rather than "bargaining" is the key to dealing with the poorly adjusted inmate.

89. For a description of the "bargaining" which occurred within the Attica facility, see *TIME*, Sept. 20, 1971, at 12-14; *TIME*, Sept. 27, 1971, at 18-31.

90. See, e.g. *N.Y. Times*, Nov. 28, 1971, at 1, col. 2, for a brief description of the "negotiation" which occurred during the recent disruption at the Rahaway State Prison, Princeton, New Jersey. The dispute ended peacefully after a negotiated settlement between the governor of New Jersey and the inmates.

wages, and that such wages will bring about an end to prisons as we know them.⁹¹ Prisons will more closely resemble modern industrial society. Although certain administrators would welcome this result,⁹² others could be expected to oppose. Unionization would not be compatible with the punitive orientation which is a major characteristic of the present correctional system.⁹³ The "management" of the inmates by direction and discipline would become more and more difficult as they gained additional rights. However, "[i]t is widely agreed among penologists that . . . the purpose of prison is rehabilitation."⁹⁴ It is just as widely agreed that this purpose has not been realized.⁹⁵ If unionization would enhance the likelihood of successful rehabilitation, and thereby further the general purpose of the prison, it would seem that each institution should be willing to implement such a program, despite the resultant increase in the managerial burden.

III. UNIONIZATION AS A REHABILITATIVE TOOL

As was alluded to earlier, inmate councils are believed by some administrators to be counterproductive to the rehabilitative goal.⁹⁶ If this is true, the explanation may lie in the "advisory" nature of councils and in the corresponding powerlessness of their members.⁹⁷ By contrast, an inmate union which offers *true power* to inmates but which is designed to eliminate many of the abuses

91. See Report of the National Conference on Prisoners' Rights, University of Chicago Continuing Education Center, Nov. 7, 1971, at 25, for comments by John Boone, Superintendent of the Lorton Complex in Virginia. For comments by David Fogel, Commissioner of the Minnesota Department of Corrections, see *Id.*

92. See *id.*

93. See Johnson, *A Basic Error: Dealing With Inmates As Though They Were Abnormal*, 35 FED. PROB. 39, 43 (Mar. 1971), for a description of the punitive nature of the present system. See also *Survey*, *supra* note 13. One administrator noted that "we must not forget the victim of the crime. The primary purpose of prison is the lockup."

94. Singer, *supra* note 8, at 387.

95. See, e.g. Jaffee & Reed, *Jamming the Revolving Door*, 33 FED. PROB. 32 (Dec. 1969): The AGE-OLD problem in rehabilitation has always been the dilemma of the revolving door. The adolescent enters the institution, serves his time, is paroled, and then almost inevitably is rearrested and returned to the institution to serve more time. . . .

Modern investigations show that the inmate often leaves without a marketable skill, with low reading and math level, and returns to his former environment angrier at the world and himself than he was before his incarceration. His existence becomes one cycle after another through the revolving door.

Id.

96. See text accompanying *supra* notes 77, 80 & 81.

97. See text accompanying *supra* note 85.

found in inmate-operated institutions,⁹⁸ could be a useful tool for the genuine rehabilitation of inmates.⁹⁹ "True power" should not be defined so broadly as to enable inmates to preempt administrators in the exercise of their duty to maintain order and security within the institution, nor so narrowly as to prevent inmates from assuming a meaningful role in the formulation of work-related policies and programs. The scope of the bargaining should be as broad as practicable, and the bargaining should be structured so as to assure that within the designated bargaining area administrators do not have the unreviewable power to unilaterally veto the good faith proposals of the inmate representatives.

The unionization envisioned by this comment involves collective bargaining between elected inmate representatives and administrative representatives.¹⁰⁰ Negotiation would be the most desirable method of conflict resolution, but if it proved ineffective mediation or arbitration might be selected. "Lawsuits should be brought where there is no alternative."¹⁰¹ Inmates would not have the right to strike: hopefully disputes could be resolved through negotiation or mediation, and arbitration would finally resolve remaining disputes. Limitations as to the size, time, and location of meetings and the "revolving" representation of the union might be instituted as required by the necessities of prison life. The area of permissible bargaining should be as broad as practicable. This would be in keeping with the belief that the right to unionize exists for inmates and should be curtailed only to the extent necessary to maintain order and security within the institution.¹⁰²

98. See *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark 1970), dealing in part with abuses of power granted to inmate guards.

99. See generally Lopez-Rey, *supra* note 4, for an in-depth analysis of the prospects for and consequences of the integration of prison labor into the general work force.

100. With increasing frequency, various authorities are coming to recognize the widespread applicability of collective bargaining to the resolution of various disputes. See generally Kheel, *supra* note 72. The utility of this extrajudicial system has long been recognized in the area of labor relations, and recently collective bargaining has proven to be a highly successful method of dealing with civil rights, campus unrest and other community conflict situations. *Id.* See also N.Y. Times, Mar. 18, 1972, at 1, col. 7, which indicates that a grievance committee has been elected at New York's Attica Correctional Facility. The committee will meet with prison administrators to discuss various institutional problems.

101. Report of the National Conference of Prisoners Rights, *supra* note 91, at 23. This statement was made by John Palmer, a member of the Ohio study group on Corrections.

102. See text accompanying *supra* notes 10-50.

A union could prove to be rehabilitative in a number of ways. Leadership qualities among inmates would be developed; participation by the institutional population in this legitimate grievance structure would encourage and stimulate in the inmates those qualities of citizen involvement which they would encounter upon their release from the institution; together with administrative and legislative reform, the bargaining activities within the institution would have the potential to remove many of the dehumanizing, deplorable conditions which have been allowed to persist within many institutions—thus making the facilities more conducive to rehabilitation; the opportunity to become involved in meaningful employment within and upon release from the institution would be enhanced by the bargaining objectives and by the possible involvement of the prison unions with national or international unions;¹⁰³ and the ability to negotiate for a fair wage would enable the inmate to assist his dependents and/or to save a sum of money which would increase the likelihood of his successful entry into the general society upon his release.¹⁰⁴

CONCLUSION

If prisoners have a constitutionally protected right to engage in some form of labor unionization, it is important that this right be safeguarded and that its exercise be allowed to the fullest extent possible. In the absence of a "constitutional right," it might nevertheless be desirable to allow the formation of such organizations. Clearly something is wrong with the nature, operation and consequence of our correctional system. The method of dealing with inmates is largely responsible for this condition. To "keep the lid on" or to "keep the situation cool" many administrators have adopted a policy which stresses containment, restriction and discipline. The inmate has been forced to tolerate this policy at "whatever price to his humanity and prospects for a normal future life,"¹⁰⁵ and the general society has suffered upon the return of

103. For a discussion of labor's position with respect to the employment of offenders, see Perlis, *Labor's Position on the Employment of Offenders*, 6 NPPA J. 138 (1960). It might be expected that labor which feels threatened by prison workers would not be enthusiastic about this "competition." See Lopez-Rey, *supra* note 4, at 19. But if prison industry followed the state use plan, the friction from outside should be minimal. See Rodli, *Revolution in Prison Industries*, 6 NPPA J. 146, 151 (1960).

104. See Lopez-Rey, *supra* note 4, at 18.

105. *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d. Cir. 1971).

the "angry and resentful"¹⁰⁶ inmate to the outside population. No one doubts the difficulty of the task which corrections officials must regularly face. Security is the primary goal in the maximum security institution, and to insure its adequacy stringent and sometimes severe practices are necessary.¹⁰⁷ Yet

the man under detention continues to be a man. He is not free, but neither is he without rights. The question to be considered is how the prisoner's residual rights can best be protected without destroying a penal institution's discipline.¹⁰⁸

Recent developments have indicated that "bargaining" between inmates and administrators can be an effective way of dealing with many institutional problems and of relieving some of the tension and frustration which build to intolerable levels in such institutions.¹⁰⁹ When combined with the experiences of the general labor force, which has witnessed a general decline in militancy as employer acceptance of and cooperation with labor unions has increased,¹¹⁰ these developments indicate that one of the many forms of labor organization could be an effective means of safeguarding many of the rights of inmates and of providing a realistic alternative to litigation or insurrection.

PAUL R. COMEAU

106. *Id.*

107. *See Roberts v. Peppersack*, 256 F. Supp. 415, 429-30 (D. Md. 1966).

108. W. GELLHORN, *supra* note 86, at 145-46.

109. *See text accompanying supra* notes 66-73.

110. *See R. LESTER, supra* note 45.

