Journal of Criminal Law and Criminology

Volume 70
Issue 1 *Spring*

Article 3

Spring 1979

Prisoner Representative Organizations, Prison Reform, and Jones v. North Carolina Prisoners' Labor Union: An Argument for Increased Court Intervention in Prison Administration

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9901-4169/79/7001-0042$02.00/00
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 70, No. 1
Printed in U.S.A.

COMMENTS

PRISONER REPRESENTATIVE ORGANIZATIONS, PRISON REFORM, AND JONES V. NORTH CAROLINA PRISONERS' LABOR UNION: AN ARGUMENT FOR INCREASED COURT INTERVENTION IN PRISON ADMINISTRATION

INTRODUCTION

A movement to reform prisons is under way which is challenging the current methods of prison management. The battle is being waged between prisoners and the administrators with the courts as mediators. The prison reform movement is riding a wave of popular support on a collision course with the traditional custodial concerns of security-conscious prison administrators. On the one hand, criminologists have begun to understand better the debilitating effects that a custodial environment has on rehabilitation prognosis.[1] The relationship between collective violence and inadequate communication mechanisms has been well documented.[2] Penologists are urging that prison inmates be afforded a greater role in the operation and administration of the institution that contains them.[3] More and more commentators are recognizing the benefits, both to the rehabilitative process and the maintenance of internal prison security, offered by such prisoner grievance organizations as prisoner unions and inmate advisory councils.[4]

On the other hand, the legitimization of prisoner grievance organizations promises to be resisted, if not outrightly rejected, by prison administrators. Admittedly, past failures in the development and operation of prisoner grievance organizations have provided reluctant prison administrators with ample grounds for rejecting the establishment of such organizations in their own institutions. Only in the past few years have realistic evaluations been made with respect to the reasons for past failures, the limitations of grievance organizations within prison walls and the requirements for the effective and continuous operation of mechanisms for handling inmate complaints.[5]

Most recently, administrators reluctant to afford inmates a greater voice in the day-to-day operations of the correctional institution received support from a source that has the power to bring the prison reform movement to a standstill. In *Jones* v. *North Carolina Prisoners' Labor Union*,[6] the United States Supreme Court assured the continued presence of the high custody prison[7] when it ruled that neither the first amendment nor the fourteenth amendment is violated by state prison regulations that forbid inmates from soliciting membership in a prisoner labor union or from conducting union meetings.[8] In applying the rational relation test of due process, the Court found that such regulations are reasonably related to legitimate prison security concerns.[9] And, as a basis for its decision, the Court made clear that the judiciary must give appropriate deference to the decisions of prison administra-

[1] *See* text accompanying notes 77–80 *infra*.

[2] *See* text accompanying notes 81–93 *infra*.

[3] As J. E. Baker, in THE RIGHT TO PARTICIPATE, summarized the recommendations of many penologists:

> Whether or not the formalized structure of communication is an advisory council or some other method is really not important. What is important is that correctional administrators recognize and believe that communication with their charges is vital to the proper functioning of the correctional process. Just as the advisory council was an outgrowth of self-government, there is much evidence of the evolvement of other forms of organizations in which the inmate is being recognized as performing an essential role in the correctional system.

J. E. BAKER, THE RIGHT TO PARTICIPATE: INMATE INVOLVEMENT IN PRISON ADMINISTRATION 250–51 (1974).

[4] *See* text accompanying notes 94–98 *infra*.

[5] *See* note 91 *infra*. *See also* Comment, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFFALO L. REV. 963, 966 n.13 (1972); Huff, *Unionization Behind the Walls*, 12 CRIMINOLOGY 175, 186, 189 (1974). *But see* Butler v. Preiser, 380 F. Supp. 612, 621 n.11 (S.D.N.Y. 1974).

[6] 433 U.S. 119 (1977).

[7] The term "high custody prison" refers to an organizational structure found in most American prisons, in which coercion is the major means of control over inmates and high alienation characterizes the orientation of most of the prisoners to the system. Geneally speaking, the tasks of the prison organization, i.e. keeping inmates in and maintaining discipline, are accomplished through the potential or actual use of force. A. ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961) *reprinted in* R. LEGER & J. STRATTON, THE SOCIOLOGY OF CORRECTIONS 9–10 (1977). *See also* text accompanying notes 66–76 *infra*.

[8] 433 U.S. at 121.

[9] *Id.* at 129.

tors when issues concerning inmate custody and care are before the court. The Court noted that:

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.... The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.[10]

Prior to *Jones*, the Court had balanced the administration's security interests against the constitutional rights of prison inmates in determining the legality of prison reforms. But, through the *Jones* mandate, the Court critically disabled recent trends in prison reform, for it is contended that so long as courts blindly defer to the judgment of prison administrators, whose success is judged not in terms of the number of inmates treated or rehabilitated, but rather in terms of the number of inmates securely contained in the institution, prison administrators will not risk adopting reforms that could upset the order and regimen of the custodial institution. Furthermore, it is this author's position that the Court's deferential attitude toward the custodial concerns of prison administrators is a dangerous departure from its past history of active judicial review of regulatory actions by state officials. By relegating a prison reform such as inmate unions to the absolute control of security-minded prison officials, the Court has sacrificed a prisoner's fundamental rights of free speech and association to the mere allegation of a custodial concern for order and discipline. And finally, the *Jones* decision portends a continuing incidence of collective violence in correctional institutions and the chronic failure of prison treatment programs. At a time when penologists are urging that inmate organizations be utilized to increase communication between inmates and the administration, the *Jones* Court has all but assured the survival of prisons characterized by inadequate communication and counterproductive treatment environments.[11]

This comment will discuss the changing position which the court has assumed with regard to judicial intrusion into the corrections system. Additionally, it will demonstrate that the Court's increased deference to the security concerns of prison administrators suggests an unfortunate and possibly dangerous departure from its recent active role in the management of custodial institutions. At a time when more and more correctional specialists are recognizing the inmate's need to speak out on prison conditions and take a more active role in the development and construction of his prison environment, the Court's deferential attitude promises to delay the process by which inmates can acquire greater control over their lives within the prison.

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[10] *Id.* at 126–28 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

[11] From their inception, prisons have come under continuous attack because of the belief that the general conditions of confinement are not conducive to attempts to rehabilitate prison inmates.

In recent years, prison administrators have emphasized their intent to promote rehabilitation, and substantial funds have been allocated to vocational training, educational programs, and a variety of treatment modalities. In spite of humanitarian changes in methods of treating criminal offenders, prisons have failed to achieve the utilitarian goals of reformation and deterrence. The reasons for this failure do not lend themselves to easy cataloguing, but one cause that commentators are becoming increasingly concerned about is that "prisons as formal organizations have really not changed significantly. Initially established to provide custodial control over those assigned to them, their basic structure has undergone relatively little change even though the goals they purport to seek have changed quite extensively." C. THOMAS & D. PETERSON, PRISON ORGANIZATION AND INMATE SUBCULTURES 20–21 (1977).

It is generally recognized that the structure and daily operation of most prisons in this country reflect the continuing dominance of custodial concerns. *See* notes 66–76 and accompanying text *infra*. But only recently have commentators realized that there is a strong correlation between inmate resistance to rehabilitative efforts and the administration's emphasis on custodial concerns. Researchers are increasingly convinced that:

> To the extent that an oppositional inmate subculture has emerged within prison organizations, and to the extent that new inmates are effectively inducted into that subculture when they enter the institution, they become increasingly more insulated from and resistant to any attempts on the part of the staff of the institution that might otherwise encourage them to become meaningfully involved in activities aimed at their treatment, rehabilitation, or resocialization.

C. THOMAS & D. PETERSON, *supra* at 17.

Inmate participation in treatment programs implemented by prison administrators has been found to have little or no effect on the probability of the return of those inmates to criminal behavior when they are released. *See* P. LERMAN, COMMUNITY TREATMENT AND SOCIAL CONTROL (1975); G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT (1971); Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L.C. & P.S. 153 (1966); D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964). Simply, commentators now believe that instituting treatment programs in custodially oriented prisons is an unnecessary waste of time, money and personnel. *See* notes 77–80 and accompanying text *infra*.

The Developing Role of the Court in Prison Reform

To appreciate fully the effect that *Jones* had on prisoner organizations and may have on prison reform in general, one must understand the changes in the courts' treatment of issues concerning prison conditions and prisoner rights. For years, the judiciary adopted a hands-off policy when asked to review prisoners' complaints. The courts felt that they did not have the power to interfere with the conduct of the prison or its disciplinary methods and that they lacked the expertise to superintend the treatment of prisoners in correctional institutions.[12] In recent years, however, armed with an increased awareness of the deplorable conditions of prisons,[13] the courts began to take a closer look at correction officials' actions, and assumed a more active role in the management of the institutions. The courts no longer awaited the extreme case before asserting their power.[14]

The first inroads on the courts' hands-off approach to prison conditions came in *Coffin* v. *Reichard*.[15] In *Coffin*, a prisoner filed a writ of habeas corpus alleging that at the time he entered a plea of guilty and signed a confession, he was physically ill and mentally incapable of intelligently discussing his case with his attorney. The district court refused to grant the inmate's leave to file his petition on the ground that the inmate was not entitled to the writ. The Sixth Circuit Court of Appeals reversed the district court decision and established the basic standard by which many future prisoners' rights cases would be decided. As the court noted, "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication taken from him by law."[16]

The standard developed by the *Coffin* court has been modified and clarified in the context of reviewing restrictions on first amendment rights. For instance, in *Carothers* v. *Follette*,[17] a case involving the punishment of a prisoner for including statements critical of the prison administration in letters to his family, the court expressed the standard as "[A]ny prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably ... and necessarily ... to the advancement of some justifiable purpose of imprisonment."[18] Still other courts have ruled that prison officials cannot interfere with first amendment rights unless the state can show "a compelling state interest centering about prison security, or a clear and present danger of a breach of prison security, or some substantial interference with orderly institutional administration."[19]

During this period of increased judicial review of prison conditions, two important decisions concerning prisoner representative organizations were

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[12] This basis for a "hands-off" approach is often suggested, rather than stated. *See, e.g.*, Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958); Peretz v. Humphrey, 86 F. Supp. 706 (M.D. Pa. 1949).

More recent cases have sometimes adopted a modified "hands-off" approach, excluding review of all matters of prison administration unless these administrative powers were exercised in a clearly arbitrary or abusive manner. *See, e.g.*, Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); United States v. Blierley, 331 F. Supp. 1182 (W.D. Pa. 1971).

[13] Courts have become more aware of the conditions inside prison walls if for no other reason than that since 1960 inmates have petitioned the courts in increasing numbers for the redress of grievances concerning treatment in custodial institutions. A significant milestone was reached in 1961 when the Supreme Court, in Monroe v. Pape, 365 U.S. 167 (1961), paved the way for prisoners incarcerated in state prisons to seek redress in federal courts for alleged violations of their rights by prison officials. The decision opened prisons and their policies to judicial scrutiny on a broad scale. The federal courts heard complaints about arbitrary rules, overcrowded and inhumane living conditions, lack of medical care and the absence of educational and recreational facilities at prisons. Federal courts now receive annually about 17,000 petitions filed by prisoners, and about one-fourth of these cases deal with allegations that an inmate's civil rights have been denied in prison. Tia Denenberg, *Prison Grievance Procedures,* 1 Corrections Magazine 29, 30 (1975).

[14] The court, in Wright v. McMann, 321 F. Supp. 127, 132 (N.D.N.Y. 1970), *modified on other grounds*, 460 F.2d 126 (1972), *cert. denied*, 409 U.S. 885 (1972), partially explained the reasons for this change when it wrote:

> [I]t is clear that State prisons, or even local jails have become more and more, and rightly so, in this age proper subjects for scrutiny by representatives of the public and the courts when necessary.... No longer can prisons and their inmates be considered a closed society with every internal disciplinary judgment to be blissfully regarded as immune from the limelight that all public agencies ordinarily are subject to.

For a brief exposition of the "hands-off" doctrine and its demise, see Fox, *The First Amendment Rights of Prisoners*, 63 J. Crim. L.C. & P.S. 162 (1972).

[15] 143 F.2d 443 (6th Cir. 1944), *cert denied*, 325 U.S. 887 (1945).

[16] *Id.* at 445.

[17] 314 F. Supp. 1014 (S.D.N.Y. 1970).

[18] *Id.* at 1024 (footnote and citations omitted).

[19] Goodwin v. Oswald, 462 F.2d 1237, 1244 (2d Cir. 1972) (quoting Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970)). *Accord*, Butler v. Preiser, 380 F. Supp. 612, 620 (S.D.N.Y. 1974). The test used by these courts was probably derived from United States v. O'Brien, 391 U.S. 367 (1968).

handed down. In *Goodwin* v. *Oswald*,[20] the Second Circuit Court of Appeals held that a warden of a state prison could not withhold mail sent to inmate union members by a legal aid society, detailing the steps being taken on behalf of the union.[21] Although the court did not directly rule on the legality of the prisoner organization itself, the judges found that there was no "compelling state interest" to justify the interference with "preferred freedoms of individuals."[22] The court noted that the union had not yet urged inmates either to change their work habits or present any demands to prison administrators, and thus that no factual basis supported the fear of the prison officials that the letters would impair the orderly management of the institution. The court based its decision on the sixth amendment's right to counsel and the fourteenth amendment's equal protection guarantees.

In a concurring opinion, Judge Oakes made clear that he favored the formation of prisoner unions to represent inmates and to channel their grievances to the correctional administration. Significantly, he wrote:

> [T]he tragic experience at Attica would make correctional officials, an observer might think, seek more peaceful ways of resolving prison problems than the old, ironclad, solitary-confinement, mail censoring, dehumanizing methods that have worked so poorly in the past. Promoting, or at least permitting the formation of a representative agency might well be, in the light of past experience, the wisest course for correctional officials to follow.[23]

In *National Prisoners Reform Association* v. *Sharkey*,[24] a federal district court was asked to decide whether an inmate organization interested in improving prison conditions[25] posed such a substantial threat to the security of the prison that officials could properly prohibit the group from meeting. In that case, the inmates had asserted that their first amendment rights to associate and petition for redress of grievances were violated by the ban. The court granted a temporary injunction because the state had failed to prove that the restrictions on alleged first amendment freedoms furthered "an important or substantial governmental interest."[26] Although the court, in issuing the temporary injunction, did not have to decide whether the plaintiff inmates actually retained a first amendment freedom to associate in prison, the court did acknowledge that "[t]here is a high probability that, on the merits, it will be found that there is a First Amendment right to associate."[27]

In 1974, the Supreme Court in *Procunier* v. *Martinez*,[28] developed a standard of review for those prison regulations which limit the first amendment's freedom of speech. Although the Court recognized that "First Amendment guarantees must be applied in light of the special characteristics of the environment,"[29] the Court declined to consider whether inmates themselves retain a first amendment freedom to uncensored correspondence with outsiders. Instead, the Court claimed that censorship of inmate mail imposed a restriction on the first (and fourteenth) amendment rights of those outside the prison walls who are writing to inmates. The Court then established a test for determining whether a particular prison rule relating to inmate correspondence imposed an impermissable restraint on first amendment freedoms. According to the Court, for a restraint to be valid, the regulation must further one of the "substantial governmental interests of security, order and rehabilitation," and the limitations of first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.[30] Using this test, the Court concluded that the challenged prison mail censorship regulation was broader than the legitimate interests of the penal administration required[31] and hence was invalid.

[20] 462 F.2d 1237 (2d Cir. 1972).

[21] The constitution of the prisoner union set forth as union goals "the advancement of the economic, political, social and cultural interests of the prisoners, the adoption of laws increasing the welfare of prisoners, and the equalization of the rights of prison labor and free labor by expansion and recognition of the former." 462 F.2d at 1241.

[22] *Id.* at 1244 (citations omitted).

[23] *Id.* at 1245-46 (Oakes, J., concurring).

[24] 347 F. Supp. 1234 (D.R.I. 1972).

[25] The National Prisoners Reform Association's general goals were to "improve prison conditions and to make people outside of the prison aware of conditions within." 347 F. Supp. at 1236.

[26] *Id.* at 1238 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[27] *Id.* at 1238.

[28] 416 U.S. 396 (1974).

[29] *Id.* at 409-10 (quoting Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969)).

[30] *Id.* at 413.

[31] Justices Marshall and Brennan, concurring in the judgment of the Court, wrote a separate opinion emphasizing that prisoners should have free access to the mails not as a privilege, but rather as a consititutionally guaranteed right. They would have accordingly found that "prison authorities may not read inmate mail as a matter of course." 416 U.S. at 422 (Marshall, J., concurring).

In *Pell* v. *Procunier*,[32] the Court had an opportunity to define further the governmental interests that could legitimately be served by prison regulations. However, unlike *Martinez*, the *Pell* Court's balancing of interests swung to the favor of the prison officials. In that case, inmates at a state prison objected on first amendment grounds to a prison regulation restricting press interviews with individual inmates.[33] While recognizing that a prison inmate "retains the First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,"[34] the Court noted that first amendment restrictions in the prison were to be analyzed in light of the functions of the corrections system. The Court recognized three interests served by the prison structure: the deterrence of crime, the rehabilitation of those committed to custody, and the maintenance of internal security. Having balanced the free speech rights of inmates against the state's interest in confining prisoners and maintaining security within the prison walls, the Court then recognized that since alternative channels of communication were open to the inmate petitioners in *Pell*, their first amendment rights of free speech were not violated by the challenged prison regulations.

After *Pell* and *Martinez*, two district courts ruled on the legality of prison regulations that affected the development of inmate organizations and continued to utilize a balancing test. In both *Paka* v. *Manson*[35] and *North Carolina Prisoners' Labor Union* v. *Jones*,[36] the courts reviewed the asserted rights of inmate plaintiffs vis-a-vis the governmental interests developed in *Procunier* and applied in *Pell*.

In *Paka*, inmates organized in order to present their grievances to the administration and to formulate proposals for operation of the prison. The administration countered by placing certain inmate leaders in isolation, transferring others out of the prison, and intercepting union-related mail. The inmates challenged the actions of the administration and claimed in a class-action suit to have a right to organize a union and function as a unified group within the prison. The court adopted the Supreme Court's analysis in *Pell* and considered the issue in terms of a "balance between the interest of the prisoners in associating together within an in-prison union and the interest of the state in maintaining internal security within the prison."[37] Despite expert testimony to the contrary,[38] the court found that a prisoners' union would pose a substantial threat to the security of the prison to justify restrictions on the first amendment rights of inmates to associate.

In *Jones*, the district court did not have to decide whether prisoners had a constitutional right to join a prisoners' union since the prison authorities had already permitted the union to be organized. Rather, the court only had to address the issue of whether prison officials could legitimately forbid solicitation of membership in the union by prison organizers. Applying the *Pell* test,[39] the court could find no basis for concluding that a ban on the solicitation of union membership was essential to the security of the prison. In a carefully worded, narrowly stated finding, the court held that the prison officials, "having permitted membership in a union committed to peaceful means to effect change and reform, may not at the same time forbid solicitation of membership."[40]

Even before the Supreme Court ruled on the appeal in *Jones*, inmates asserting a constitutional right to organize a prisoners' union in a correctional institution had little precedent upon which to rely: No court had yet taken that major step of recognizing the first amendment rights of inmates to organize a union in light of the government's interest in deterrence, rehabilitation, and security. In both *Sharkey* and *Jones*, the courts supported the existence of the union, but only in language limited to and conceivably compelled by the facts of the case. In each of those cases, the union was already in operation and had shown itself not to be a threat to internal prison security. A ruling against the union would have involved a retraction of freedoms

[32] 417 U.S. 817 (1974).

[33] Media plaintiffs, in *Pell*, also asserted that the prison regulation unlawfully infringed upon their newsgathering activity in violation of the first and fourteenth amendments. 417 U.S. at 821. In rejecting this assertion, the Court found that the media had available to it other means by which it could obtain access to the prison to gather information for stories. 417 U.S. at 824–25.

[34] 417 U.S. at 822.

[35] 387 F. Supp. 111 (D. Conn. 1974).

[36] 409 F. Supp. 937 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977).

[37] 387 F. Supp. at 115.

[38] *Id.* at 119.

[39] It is not clear whether the court, in *Jones*, interpreted the *Pell* test differently than did the *Paka* court. While *Paka* balanced the first amendment interests of the inmates against the government's penological objectives, the *Jones* court described the test as allowing full first amendment freedom of speech to inmates as long as it did not "conflict with legitimate penological objectives of the institution." 409 F. Supp. at 943.

[40] 409 F. Supp. at 944.

previously extended rather than a refusal to extend additional privileges.[41]

Further, no court had yet supported the notion that a prison union was an effective method of keeping prison officials attuned to problems in the institution and of preserving security by defusing crises before they erupted.[42] Indeed, the *Pell* decision may have heralded a return to the hands-off doctrine so popular among courts before the 1970's. In *Jones*, the district court declined to characterize association of inmates as either "good or bad."[43] The court limited its analysis to the situation where the union had yet to disrupt the operation of the penal institution and where no intent to interfere with the administration was shown. The court in *Paka* went even further by expressly avoiding the question of whether a union could lessen tension between inmates and the correctional staff. According to that court, "[T]he simple and understandable demand that prisons should be better managed is plainly a question of method, and prison administrators must be allowed to decide these difficult, practical and philosophical questions of policy."[44]

If the courts were suggesting that inmates' constitutional freedoms could be limited by prison administrators' pervasive fears about the security of their institutions, then even before the Supreme Court's opinion in *Jones*, one could have predicted that prison unions had a questionable future. After all, if the courts refused to analyze the positive capabilities of a carefully structured prison organization, and only considered the alleged security threat which unions may pose, then the first amendment rights of inmates would lose out to the "governmental interest" every time.

Consequently, if the rights of inmates to organize grievance bodies or inmate unions were on shaky constitutional ground after *Martinez* and *Pell*, the Supreme Court's decision in *Jones* left no doubt that inmates have no constitutional basis to assert first amendment speech and associational rights where a prison administrator fears that such organizations could be detrimental to the maintenance of order in the prison. Although the *Jones* Court did find that first amendment associational rights were implicated by a regulation prohibiting inmate solicitation for a prisoner union, it struck the balance in favor of the "reasonable considerations of penal management."[45] Despite the fact that the district court had found no evidence "that the inmates intend to operate [the union] to hamper and interfere with the proper interests of government,"[46] or that the union posed a "present danger to security and order," the Court found a rational relationship between the ban on solicitation and the legitimate objectives of the prison administration.

The Jones Decision and the Future of Prisoners' Rights

The Supreme Court's decision in *Jones* will have an impact on prisoners' rights that extends far beyond the rights of inmates to organize within the prison walls. *Jones* suggests that the Court may have readopted a hands-off approach to prison affairs where the fears or concerns of prison administrators can be used as a rationale for restricting the first amendment freedoms of prison inmates. The Court made it clear that "central to all other correctional goals is the institutional consideration of internal security within the correctional facilities themselves."[47] Having established that priority as the touchstone for review of prison regulations, the Court was able to sidestep the constitutional mandates of the first amendment by deferring to the "informed discretion of prison administrators" in making those "difficult judgments concerning institutional operations."[48] Under this view, so long as administrators regard a particular inmate activity to be a threat to the internal security of the institution, the Court must defer to the more informed judgment of the administration, regardless of the impact on the first amendment freedoms of inmates. While under a balancing test like that used in *Pell*, the Court would have weighed the first amendment rights of inmates against the custodial concerns of prison officials, the Court in *Jones* chose to consider only the security interests alleged by the prison administration.

The *Jones* Court can be criticized for its unwise decision to defer blindly to the administrative

[41] *See* Paka v. Manson, 387 F. Supp. 111, 124 n.19 (D. Conn. 1974).

[42] Only Oakes, concurring in Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972), acknowledged that promoting the formation of a representative agency in the prison might well be a way for prison officials to deal with inmates' grievances. *See* text accompanying note 23 *supra*.

[43] 409 F. Supp. at 943.

[44] 387 F. Supp. at 125.

[45] 433 U.S. at 132.

[46] North Carolina Prisoners' Labor Union v. Jones, 409 F. Supp. 937, 944 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977).

[47] 433 U.S. at 132 (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).

[48] *Id.* at 128 (quoting Pell, 417 U.S. at 827).

prison body. Admittedly, "the realities of running a penal institution are complex and difficult,"[49] and prison administrators possess considerably more "professional expertise"[50] in prison management than do judges. But it can be just as persuasively argued that the realities of running a school or a city are also complex and that those charged with these tasks—principals, college presidents, mayors, councilpersons and law enforcement personnel—also possess special professional expertise. Yet, the Court has not traditionally deferred to the judgment of these officials simply because their judgment was "rational." Indeed, whenever the first amendment right to associate is jeopardized, the Court has scrutinized allegations by state officials that certain concerted action threatens the peace and security of the state.

For example, in *Healy* v. *James*,[51] the Court addressed the issue of first amendment rights of association in the university context. In that case, students at a state-supported college, seeking to form a local chapter of Students for a Democratic Society (SDS), were denied recognition as a campus organization by the college president. The Court ruled that the president violated the petitioners' first amendment associational rights because the record failed to support his fears that the organization would be a disruptive force on the campus. The Court did not hesitate to review the justifications asserted by the president for denying recognition of the organization. Indeed, the Court expressed a willingness to scrutinize closely an administrator's justifications for actions that denied associational privileges. As the Court noted, "while a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[52]

Similarly, in *Cox* v. *Louisiana*,[53] the Court found that the leader of a civil rights demonstration in Baton Rouge was deprived of his rights of free speech and free assembly in violation of the first and fourteenth amendments when he was arrested and convicted of disturbing the peace. The trial court had recognized that the gathering of 1,500 black persons in a predominantly white business district was "an inherently dangerous" condition, and the state had contended that "violence was about to erupt" before the demonstration was ended by the police. Nevertheless, the Supreme Court overruled the leader's conviction, in part because the record did not support the contention that the demonstration constituted a breach of peace. The Court made it clear that the communication of ideas by picketing and marching on streets is not afforded the same kind of protection under the first and fourteenth amendments as is pure speech.[54] Yet, the Court did not hesitate to make an independent examination of the whole record to determine whether the state statute was both unconstitutionally vague in its scope and discriminatorily applied by local officials.[55]

In light of these cases exemplifying the active judicial review of regulatory actions by state officials, one can only wonder why the *Jones* Court felt so overwhelmed by the complexity of the task of managing a prison, as to ignore the traditional balancing of interests. In addition to this inconsistency, the Court's approach in *Jones* unwisely assumed a deferential attitude. The goal of prisons, in the eyes of the general public, as well as correctional officials, is custodial control. Prison officials are regarded as successful administrators as long as violence, assaults, escapes and riots are minimized.[56] In order to meet these custodial expecta-

[49] *Id.* at 126.

[50] *Id.* at 128.

[51] 408 U.S. 169 (1972).

[52] *Id.* at 184. Of course, the analogy between the college president and prison administrators cannot be carried too far. Prisons are characterized by conditions that raise unique problems concerning custody and security. However, it is still valid to point out that until its decision in *Jones*, the Court never permitted security concerns of institutional administrators to define the limits of the freedoms guaranteed by the first amendment.

[53] 379 U.S. 536 (1965).

[54] *Id.* at 555.

[55] *See also* Edwards v. South Carolina, 372 U.S. 229 (1963).

[56] To the extent that treatment programs do exist, they are most frequently viewed as a secondary function subordinate to the custodial goals of the penal institution. As two penologists have explained:

> [T]he primary goals of prisons, in the eyes of the general public as well as prison administrators, is custodial control. They are evaluated and evaluate themselves far more in terms of what does not go on within the prison than on what does go on. More specifically, the absence of violence, assaults, riots, escapes, potentially damaging litigation in the courts, and so on are far more salient concerns than the viability or presence of rehabilitation or resocialization programs whose effects are more intangible, less a topic of major public concern, and far less immediate.

C. THOMAS & D. PETERSON, *supra* note 11, at 33. *See also* G. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON (1958). Indeed, the Supreme Court, in *Jones*, reminds us that "central to all other

tions, it is not surprising, then, that prison administrators will impose more limitations on inmate liberties than might seem necessary for the safe operation of the institution, even if certain constitutional freedoms might also be restricted.[57] Justice Marshall, dissenting in *Jones*, recognized this danger of deferring to prison administrators' institutional decisions that present constitutional questions:

> A warden seldom will find himself subject to public criticism or dismissal because he needlessly repressed free speech; indeed, neither the public nor the warden will have any way of knowing when repression was unnecessary. But a warden's job can be jeopardized and public criticism is sure to come should disorder occur. Consequently, prison officials inevitably will err on the side of too little freedom.[58]

Neither Justice Marshall nor this writer are suggesting that the concerns of prison administrators be ignored when courts adjudicate the constitutional claims of prisoners. Courts are well acquainted with evaluating the weight and validity of informed opinions concerning matters in which the court lacks expertise. However, the courts must bear in mind that "the ultimate responsibility for evaluating the prison officials' testimony, as well as any other expert testimony, must rest with the courts, which are required to reach an independent judgment concerning the constitutionality of any restriction on expressive activity."[59] It is not enough to say that problems such as prisoner unions and inmate grievance organizations involve policy decisions best left to the judgment of prison officials. The very fact that first amendment rights are restrained makes the decision more than an administrative problem. Instead, it places the courts in the very position to which they are most accustomed; that is, judging the constitionality of decisions made by governmental authorities, in light of the rights violated and the alternatives available for promoting the governmental interests in the least restrictive manner possible.

Assuming that prison officials are able to convince a court that a ban on inmate grievance organizations is essential to the maintenance of security and order within the prison, the court's analysis should not just stop. Rather, the Supreme Court in *Martinez*, imposed still another requirement for determining whether a particular prison regulation imposes an impermissible restraint on first amendment freedoms. The *Martinez* Court required that the limitation of first amendment freedoms be no greater than necessary for the protection of the particular governmental interest asserted. In other words, if a court concludes that an inmate association posed enough of a threat to the security of the institution to warrant its restriction, the court must ask whether a complete bar of the organization is the measure that least restricts the inmates' alleged first amendment liberties.[60]

Commentators, and some courts, have recognized that less restrictive limitations on prisoner organizations exist which afford administrators control over the accompanying security risk, while preserving inmates' first amendment rights. A useful analogy is the limitation which states place on the freedom of public employees to act collectively. In order for the states to protect the general public from inconvenience and possible threats to safety, public employees may be denied the right to strike. Similarly, in the prison context, a prohibition on strikes by inmates would be justified by considerations of safety and order both inside and outside the institution.[61]

One commentator has noted that "[l]imitations

correctional goals is the institutional consideration of internal security within the correctional facilities themselves." 433 U.S. at 132 (quoting Pell v. Procunier, 417 U.S. 817 (1974)).

[57] The case law is replete with examples of prison administrators adopting a security conscious attitude that neglected to make any adequate provision for inmates' due process rights. *See* CORRECTIONS, *supra* note 13, at 30.

[58] 433 U.S. at 141–42 (Marshall, J., dissenting).

[59] *Id.* at 142–43.

[60] Other courts have pointed out that the mere possibility of some vague threat to a governmental interest cannot justify wholesale restriction of first amendment freedoms. In Butler v. Preiser, 380 F. Supp. 612 (S.D.N.Y. 1974), inmates challenged a ban on the solicitation of funds from inmates for the Attica Brothers Defense Fund as a violation of their first amendment freedom to associate. The court enjoined the prohibition, in part because the correctional officials failed to show a clear and present danger to prison security in the solicitation and association of inmates within the institution. The court made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." 380 F. Supp. at 620–21 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969)). If this same standard for review were applied to correctional administrators' distrust of prisoner unions, the mere allegation of the possible security risk posed by such organizations should not outweigh inmates' first amendment freedoms of speech and association.

[61] *See* Comment, *supra* note 5, at 973. *See also* North Carolina Prisoners' Labor Union v. Jones, 409 F. Supp. 937, 945 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977); Goodwin v. Oswald, 462 F.2d 1237, 1249 n.2 (2d Cir. 1972) (Friendly, C.J., dissenting).

as to the size, time, and location of meetings and the 'revolving' representation of the union" might be necessary in light of the organization of prison life.[62] In *Jones,* the district court recognized the necessity of these time, place and manner restrictions. While the lower court ordered the prison administration to permit membership in a prison union dedicated to peaceful reform and to allow the solicitation of new members, the court also limited the power of the union by prohibiting concerted action or organized resistance of prison discipline, and by allowing prison officials to refuse to negotiate or to contract with the prisoners' union.[63]

However, the argument that there exist less restrictive alternatives to the complete abolition of prisoner unions may have been mooted by the Supreme Court's decision in *Jones.* Recall that *Martinez* required that governmental regulations imposing restraints on first amendment freedoms both further a substantial interest *and* be no greater than necessary to protect the particular interest involved. The Supreme Court in *Jones* eliminated the second prong of the *Martinez* test by bootstrapping it into the issue raised in the first prong. The Court chose not to evaluate whether the ban on the prisoner union solicitation was narrowly drawn. Rather, the Court merely assumed that if the custodial concerns, expressed by the prison administration in response to union solicitation, were reasonable, then the regulations were presumed to be "drafted no more broadly than they need be to meet the perceived threat."[64] It seems then, that after *Jones,* the sole test for determining whether a prison regulation imposes an unconstitutional restraint on first amendment freedoms is whether the prison administration can allege that the challenged regulation furthers the maintenance of internal security in the correctional facility.

Prior to *Jones,* prison inmates were assured of at least minimal scrutiny of prison regulations that allegedly infringed upon first amendment freedoms of speech or assembly. In *Martinez,* the Court had reaffirmed the belief that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[65] With *Jones,* however, the Court departed from the philosophy sounded in *Martinez* and heralded a return to the hands-off doctrine where first amendment rights of inmates are allegedly violated. On the one hand, it is suggested that this approach is not only inconsistent with the Court's analysis of first amendment issues raised in similar contexts, but also sets a dangerous precedent by lavishing unrestricted discretion in the hands of prison administrators. Even more important, however, such an approach can only hamper recent trends in the treatment and rehabilitation of prison inmates.

Recent Trends in Prison Reform

Sociologists recognize that confinement institutions may be characterized on a continuum according to the relative emphasis the organization places on either of two goals—custody and treatment.[66] The first, the coercive model, is reflected in the organization typical of the high custody prison. In the high custody prison, both inmates and lower echelon staff are deprived of decision-making opportunities by a myriad of rules that dictate orderly, predictable responses to almost every conceivable situation.[67] While information may flow upward, only nonexplanatory directives filter down to the lower echelon employees or inmates.[68] Coercion is the major means of control applied in such organizations to assure fulfillment of the major organizational task—keeping inmates in.[69] By con-

[62] *See* 21 Buffalo L. Rev., at 983.

[63] North Carolina Prisoners' Labor Union v. Jones, 409 F. Supp. 937, 945 (E.D.N.C. 1976), *rev'd* 433 U.S. 119 (1977).

[64] 433 U.S. at 133.

[65] 416 U.S. at 405–06.

[66] *See* R. Leger & J. Stratton, *supra* note 7; D. Cressey, Handbook of Organizations (1965); A. Etzioni, A Comparative Analysis of Complex Organizations (1961).

[67] As Leger and Stratton have commented:

> The high custody prison is governed by myriad rules that dictate orderly, predictable responses to almost every conceivable situation. The effect of this complex system of regulations is to deprive both inmates and lower echelon staff of any initiative or decision-making opportunities. For the prison guard, his occupational role instills a short term time perspective; the routine and rituals of custody force an extreme present orientation. After a period of time in the institution, the guard himself becomes dependent upon directives from above. This dependency is accompanied by attitudes of subordination, a feeling that the people on top are smarter than those on the bottom.

R. Leger & J. Stratton, *supra* note 7, at 4.

[68] *Id.* at 2.

[69] A. Etzioni, A Comparative Analysis of Complex Organizations (1961) *reprinted in* R. Leger & J. Stratton, *supra* note 7, at 7, 9. Examples of coercive organiza-

trast, in the purely therapeutic community, authority and control are decentralized so that information and decision-making are shared at all staff levels. Since every staff member is considered part of the rehabilitative effort, the communication structure is bilateral in nature with information flowing both up and down the administrative hierarchy.[70]

A careful inspection of the characteristics of the coercive model is certainly justified since criminologists find the correctional institution in America to be the epitome of the coercive model. It has been argued that:

> [T]he primary goal of prisons, in the eyes of the general public as well as prison administrators, is custodial control. They are evaluated and evaluate themselves far more in terms of what does not go on within the prison than on what does go on. More specifically, the absence of violence, assaults, riots, escapes, potentially damaging litigation in the courts, and so on are far more salient concerns than the viability or presence of rehabilitation or resocialization programs . . . [71]

The high custody institution engenders three basic responses. First, coercive organizational structures isolate at the bottom of a highly stratified system those who are being processed. While the system encourages adherence to an unusually formal and rigid set of rules, regulations and policies, it also serves to inhibit communication between staff and inmates.[72] Secondly, the alienation stimulated by the system's rigidity and structure tends to weaken prosocial attitudes and behavior that inmates may have had prior to their entry into the prison. Inmates will band together, formulating an organization of criminal values in clearcut opposition to the values of conventional society and to prison officials as representative of that society.[73] The literature suggests that "prolonged confinement fosters high levels of integration into an inmate society within which a broad spectrum of essentially antisocial attitudes and behavior are systematically reinforced."[74]

Finally, researchers have found that the more strictly administrators control the institution, the greater the agression expressed by inmates against both staff and other inmates.[75] More than one researcher has concluded that "[t]he proportion of disciplinary problems to total prison population is roughly dependent upon the level of custodial control and its oppressiveness."[76]

The coercive institutional model, in part because it fosters the alienating responses discussed above, has been found to be incompatible with the rehabilitative goals of correctional institutions. While the relationship between guards and inmates in custodial institutions is characterized by hostility, mistrust, and suspicion, sociologists have argued that a "positive and co-operative type of staff-inmate relationship is a prerequisite for . . . treat-

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tions are concentration camps, prisoner-of-war camps, custodial mental hospitals, forced-labor camps, relocation centers and the large majority of prisons.

[70] R. LEGER & J. STRATTON, *supra* note 7, at 3.

[71] C. THOMAS & D. PETERSON, *supra* note 11, at 33. *See* G. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON (1958). To argue that prisons are too custodially oriented is not to suggest that custody goals are unnecessary in the prison context. All organizations must pursue some types of goals that relate to the maintenance of control over the activities of their participants. But Thomas and Peterson have made it clear that:

> [O]rganizational effectiveness is likely to be impaired when the attainment of control goals is felt to be so problematic that unusually large proportions of organizational resources must be allocated to the acquisition of the necessary level of control over those being processed. . . .
>
> Thus, it is not that the desire or need for the acquisition and maintenance of social control over inmates is detrimental; it is the degree of emphasis placed on this processing prerequisite and the manner in which the organization is structured in its attempt to serve this goal that is at issue.

C. THOMAS & D. PETERSON, *supra* note 11, at 22, 26. *See also* Baker, *Inmate Self-Government*, 55 J. CRIM. L.C. & P.S. 39, 42 (1964).

[72] *See* C. THOMAS & D. PETERSON, *supra* note 11, at 39, 42 and R. LEGER & J. STRATTON, *supra* note 7, at 28.

[73] In 1942, Norman Polansky directed a study to determine the effects of different kinds of prison "atmospheres" on the structure of the inmate community. At that time, he concluded, in part, that "the more onerous one makes prisons, the more will he facilitate the process of atomization and social disruption." Polansky, *The Prison as an Autocracy*, 33 J. CRIM. L.C. & P.S. 16, 22 (1942).

Not long after Polansky's study, Lloyd Ohlin, in describing the characteristics of the inmate subculture, wrote, "The [inmate] code represents an organization of criminal values in clear cut opposition to the values of conventional society, and to prison officials as representatives of that society." L. OHLIN, SOCIOLOGY AND THE FIELD OF CORRECTIONS 28-29 (1956). Since then, others have recognized that this characterization is "consistent with the preponderance of the research literature." C. THOMAS & D. PETERSON, *supra* note 11, at 46.

[74] C. THOMAS & D. PETERSON, *supra* note 11, at 46.

[75] *See, e.g.*, Polansky, *supra* note 73, at 21.

[76] Fox, *Analysis of Prison Disciplinary Problems*, 49 J. CRIM. L.C. & P.S. 321, 323 (1959); Polansky, *supra* note 73, at 20-21.

ment goals."[77] Sociologists agree that treatment programs in high custody prisons are bound to fail.[78] It has been stressed that:

> *correction of the offender can occur only under the favorable conditions in treatment-orientated institutions or in the community at large* ... [T]reatment programs, which require such factors as decentralized control, affective relationships between staff and clients, and a relatively egalitarian atmosphere, are simply not compatible with the organizational environment fostered by the goal of custody.[79]

Since offenders are believed to be persons who have been unable to make socially acceptable decisions in the past, it is argued that custodial prisons, organized with a view toward minimizing offender decision-making, serve only to reduce inmates to a state of dependency.[80] Psychological maturity cannot develop in institutions where communication between staff and inmates as well as between inmates is restricted or unfriendly, and where decision-making and autonomy are sacrificed for the security offered by rules and regimen.

While many criminologists have recognized the relationship between high custody prisons and the failure of treatment programs, others have begun to realize that increased participation by inmates in decision-making can forestall the periodic outbursts of collective violence that have plagued many American prisons in recent years. Vernon Fox may have summarized the relationship between custodial institutions and collective violence best: "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 containments. Riots are reported more frequently from custodially oriented prisons."[81]

It is clear that there exists a tenuous peace between inmates and their custodians in all too many American prisons.[82] For example, the Special Committee on Attica examined the causes of the outbreak of violence occurring at the Attica prison several years ago and found that "most correction officers were not equipped by training to communicate to their inmate charges, and did not consider it their duty to understand or to resolve inmate problems."[83] The Commission found that rules at Attica were poorly communicated, often petty, selectively enforced, and perpetuated a system of favoritism, harrassment, and discrimination.[84] Even where seemingly arbitrary rules had a legitimate basis in security, they were rarely explained to inmates. A deep mistrust between inmates was found to be equally prevelant, surfacing when rioting inmates were found to be unwilling to let representative inmates negotiate an agreement with officials anywhere but in front of inmates, hostages and newsmen.[85]

Conditions at Attica were not unique to that institution. The Commission found that "the prob-

[77] Berk, *Organizational Goals and Inmate Organizations*, 71 AM. J. OF SOC. 522 (1966) *reprinted in* R. LEGER & J. STRATTON, *supra* note 7, at 33, 36. *See also* J. E. BAKER, *supra* note 3, at 20.

[78] According to Thomas and Peterson, "correctional failure is to be expected when the organizations involved adopt organizational structures that are not designed to facilitate the pursuit of for want of a better term are often referred to as prosocial changes in the attitudes, values, and behavior of inmates." C. THOMAS & D. PETERSON, *supra* note 11, at 21. *See also* D. Cressey, *Prison Organizations*, in J. MARCH, HANDBOOK OF ORGANIZATIONS (1965) *reprinted in* R. LEGER & J. STRATTON, *supra* note 7, at 20.

[79] R. LEGER & J. STRATTON, *supra* note 7, at 6 (emphasis in the original).

[80] *See* D. Cressey, *Prison Organizations*, in J. MARCH, HANDBOOK OF ORGANIZATIONS (1965) *reprinted in* R. LEGER & J. STRATTON, *supra* note 7, at 20. Sutherland and Cressey have argued that one of the reasons for self-government programs for prisoners is "if prisoners are to be reformed, they must be permitted to participate in social situations which are to some extent representative of the kinds of noncriminal social interaction in which they will be expected to participate upon release." E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 523 (9th Ed. 1974).

[81] Fox, *Why Prisoners Riot*, 35 FED. PROBATION 9 (1971). Others have recognized the relationship between the maximum custody prison and the collective type of riot in prisons. *See* Hartung & Floch, *A Social-Psychological Analysis of Prison Riots: An Hypothesis*, 47 J. CRIM. L.C. & P.S. 51, 56 (1957) and C. THOMAS & D. PETERSON, *supra* note 11, at 49.

[82] P. KEVE, PRISON LIFE AND HUMAN WORTH 52 (1974). According to Keve, "The major impediment to any effort to ameliorate this general problem is that inmates and guards have such widely different perceptions of what is going on, and each has so little capacity to grasp the viewpoint of the other."

[83] ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xv (1972) [hereinafter cited as ATTICA REPORT].

[84] *Id.* at 74, 75. The Commission on Attica emphasized that "[r]ules assume a special prominence in prisons, where adherence to unvarying routines reassures the security conscious correction staff." Just as inmates had a difficult time understanding the prison regulations "[i]n the absence of generally understood guidelines, correction officers had great discretion in interpreting and enforcing the rules." *Id.* at 74–75.

[85] *Id.* at 209. *See* Coulson, *Justice Behind Bars: Time to Arbitrate*, 59 A.B.A. J. 612 (1973).

lems in that institution at that time are sufficiently representative of the prison universe to justify some generalization."[86] In essense, the Commission concluded that the present system, by frustrating the opportunities for inmates to redress wrongs and assume some control over their lives in prison has merely served to increase the threats to prison internal security.[87] Indeed, "the lesson of Attica" has been echoed elsewhere. In *Landman* v. *Peyton,* for instance, the Fourth Circuit Court of Appeals recognized that "Experience teaches that nothing so provokes trouble for the management of a penal institution as a hopeless feeling among inmates that they are without opportunity to voice grievances or to obtain redress for abusive or oppressive treatment."[88] In the absence of other tools, disorder and insurrection become the only method for creating public awareness and effecting change.[89]

Investigators in search of a cure for collective violence in correctional institutions have recently urged that inmate participation in the decision-making process not only be fostered, but also that inmates be encouraged to participate *collectively* in the administration of the correctional institution. Vernon Fox, for one, argues that at the very least, communication barriers must be broken down if prison riots are to be eliminated: "[G]ood communication can avoid the predisposing causes of riot.... Prison riots can be eliminated when upward and downward communication, combined with discretionary use of authority, reduces the probability of serious confrontation that should not have to occur in a democratic society."[90]

However, the question that has bothered criminologists for years is how to establish more effective lines of communication between inmates and the administration. Reform minded corrections officers have tried to promote the development of inmate councils, but until recently most administrators opposed such organizations.[91] Many prisons have

[86] ATTICA REPORT, *supra* note 83, at xii.

[87] *Id.* at xvi.

[88] 370 F.2d 135, 141 (4th Cir. 1966), *cert. denied,* 385 U.S. 881 (1966), *cert. denied,* 392 U.S. 939 (1968).

[89] *See* W. GELLHORN, WHEN AMERICANS COMPLAIN 150 (1966). Professor Gellhorn explained 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." Along these same lines, and expressing a similar analysis, Corrections Magazine reported that:

> Many recent prison disturbances have been attributed to the unwillingness of inmates to live under monolithic control. After investigating the Attica Prison uprising of 1971, for example, the McKay Commission in New York concluded that one cause of the rebellion was the lack of nonviolent ways for inmates to express their accumulated grievances.
>
> Moreover, most administrators recognize that incarceration builds frustration and that it makes sense to provide an outlet for complaints. "A grievance procedure [should be] the main method of reducing conflict and tension in prison," says George Nicolau, vice-president of the New York-based Institute for Mediation and Conflict Resolution (IMCR), a private dispute settlement agency....
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> In Nicolau's view, there are three options for corrections policy: "coercion countered by resistance; endless litigation [by prisoners]; or a mutual recognition of legitimacy [by inmates and staff] coupled with a mutually acceptable dispute settlement system."

CORRECTIONS, *supra* note 13, at 29–30.

[90] Fox, *supra* note 81, at 119. Fox carefully distinguishes between predisposing and precipitating causes of riots. Predisposing causes refer to those pressures that build up the readiness to riot. In contrast, the precipitating cause is the "trigger" or spontaneous precipitating event that "detonates" or sets off the riot. When Fox speaks of a need for greater communication between inmates and prison staff, he is speaking of alleviating one of the primary predisposing causes of prison riots.

Other commentators have recognized this close relationship between riots and insufficient communication between inmates and prison staff. One author has written that "Psychology tells us that the provision of channels of communication so that an individual can be assured of his being heard will provide the kind of satisfactory emotional outlet that will make collective shouting unnecessary." J. E. BAKER, *supra* note 3, at 21.

In 1973, the South Carolina Department of Corrections gathered empirical data on collective violence in United States correctional institutions by surveying prisons throughout the country. The researchers hypothesized that by comparing data gathered from prisons that had had riots in recent years with prisons that had not, they might uncover some of the variables in the prison environment that increase the probability of riots. COLLECTIVE VIOLENCE IN CORRECTIONAL INSTITUTIONS: A SEARCH FOR CAUSES, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS COLLECTIVE VIOLENCE RESEARCH PROJECT (1973) [hereinafter cited as COLLECTIVE VIOLENCE]. The study, in part, supported what Professor Emerson Smith of the University of South Carolina had predicted. "[I]n prisons, as in other social settings, riots are a result of unresolved conflicts." *Id.* at 34.

Above all else, the inmate organization can aid the administration in apprising it of the issues that are generating the greatest heat in the prison. As Paul Keve has explained, inmates "need experience in the democratic exercise of responsibility. If they are not given a legitimate chance to voice their concerns and to work to improve their condition, they will reach periodic boiling points when they 'participate' in management destructively." P. KEVE, PRISON LIFE AND HUMAN WORTH 155 (1974).

[91] J. E. Baker, in THE RIGHT TO PARTICIPATE, reports that to a great extent views and positions on the use and value of inmate advisory councils vary depending on the

some form of grievance mechanism, but most are informal,[92] and all too often the complaint is heard that either grievances are not taken seriously or that the right people never hear them.[93]

In the past few years researchers have begun to investigate the possibilities of harnessing the informal inmate social organization to promote more effective lines of communication between staff and inmates. An informal organization always has developed in correctional institutions. Inmates in prison are isolated from society. The institutionalization that characterizes their life style generates common problems of adjustment which stimulate interaction and cooperation with those similarly situated. And finally, inmates are members of an institutional organization that can never fully anticipate or control all behavior through the formal system alone. The informal organization therefore supplements the formal organization's task of maintaining control over the behavior of inmates.[94] Richard Cloward discovered that the "inmate elite" in the informal prisoner organization consti-

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group or the purpose of the group doing the talking. It is clear, however, that support for inmate councils has only recently shown any positive gains. J. E. BAKER, *supra* note 3, at 244-45.

One reason inmate advisory councils have received so little support from correctional staff is that the councils traditionally have failed to either be representative of the inmate population or improve staff-inmate communication significantly. However, penologists searching for reasons as to why the inmate advisory councils have failed, have not criticized the basic premise of inmate representative organizations. Rather, they have pointed to the way in which the councils were organized and managed to explain the pattern of unsuccessful inmate councils. Sutherland and Cressey have explained that:

> [I]nmate councils have tended to become mere window dressing. They are made up principally of inmates called "square Johns" or "do-rights," and these types of inmates do not have the respect of the real inmate leaders. They take actions which are of little significance to the government of the prison, and all their actions are subject to veto by the warden.

E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 525 (9th ed. 1974).

J. E. Baker posits four reasons for why the inmate council has been such a dismal failure. He suggests that 1) all too often the inmate councils depend on and, indeed, operate only so long as a catalytic leader (administrator) sponsors the organization, 2) the councils have emerged in prisons unprepared for inmate self-government and without proper administrative support, 3) the councils have been applied across the board to inmates in every kind of institution and 4) the councils have been used to permit inmates to discipline other inmates in the prison. Baker comments that "Discipline is a part of the treatment process which must be retained in toto by prison personnel." Simply, inmates lack the objectivity required of a disciplinarian. Baker, *supra* note 71, at 42. For a general discussion of the drawbacks and flaws of past and present attempts at democratization of the prison, see Scharf, *Democracy and Prison Reform: A Theory of Democratic Participation in Prison*, 55 PRISON JOURNAL 21 (1975).

[92] Corrections Magazine reports:

> A national survey conducted by the Center for Correctional Justice in May, 1973, found that most prison administrators believed they should adopt a formal grievance procedure. Of the 209 institutions responding to the survey, 166 reported that they already had one. Half of these programs had begun since March, 1972.
>
> In evaluating the survey results, however, the CCJ concluded that in many cases the existing, informal grievance-resolving practices had been hastily elevated to the status of formal procedures with little substantive change. Most of the procedures specified no time limits for responses to complaints and many did not require grievances to be written. Only fifty institutions had designated a particular staff member to handle incoming complaints.
>
> "Everybody says that they have grievance mechanisms," says Micheal Keating, assistant director of the CCJ, "but when you really look at them, they're not too good. People want to do something, but they haven't got the faintest idea what to do."

TIA DENENBERG, *supra* note 13, at 32.

[93] One prison research study found that inmates often voice their discontent that "their opinions and problems do not seem to reach the man in the top decision-making post." COLLECTIVE VIOLENCE, *supra* note 90, at 24. Ronald Goldfarb, in JAILS, echoed this finding when he quoted a New York prosecutor's conclusion that,

> When an inmate had a complaint or a grievance, he felt that he had no recourse within the prison system. If he wrote a complaint to a high ranking officer or the warden, it had to be submitted, unsealed, to the guard on duty—who often was the very individual against whom the complaint was made. Most inmates believed that their complaints never reached the staff members to whom they were addressed and that a written complaint was an exercise in futility. Many of them did not submit complaints because they feared they would be further harassed or even suffer loss of "good time"....
>
> Some method of assuring inmates that complaints and grievances will be forwarded to someone with authority must be developed. Whatever method is chosen, the inmates should be able to believe that their complaints and grievances are being properly reviewed by someone who is not automatically prejudiced against them. Operatives indicate that this would go a long way to reduce the pettiness and frustration that exist within the institution.

R. GOLDFARB, JAILS: THE ULTIMATE GHETTO 413-14 (1975).

[94] Berk, *Organizational Goals and Inmate Organization*, 71 AMER. J. OF SOC. 522, *reprinted in* R. LEGER & J. STRATTON, *supra* note 7, at 44.

tuted "the single most important source of control in the prison."[95] He found that not only did inmate leaders play critical roles in averting riot conditions, but they also served as an integrating force to stabilize relations between inmates and staff. According to Cloward, "[The inmate elite] stand between the inmate system and the formal system, binding them together. They mediate and modify the diverse pressures emanating from each system. They bring order to an otherwise strifeful situation."[96]

Given the existence of an informal inmate social organization and the stabilizing effect it has on the prison environment, many criminologists have urged that the inmate organization be utilized to increase communication between inmates and the administration and reduce the probability of collective violence in the institution. As Vernon Fox contends:

> Inmate leadership is present in all prisons, as leadership is present in all groups of people. 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 to take some responsibilities from the administration could be helpful.[97]

It has also been noted that inmate self-government can further the rehabilitation process of inmates by allowing inmates to participate in social situations which are to some extent "representative of the kinds of noncriminal social interaction in which they will be expected to participate upon release."[98]

Despite the support that criminologists have given inmate self-government proposals, there remains a "Catch 22" quality to the issue. Just as researchers came to the conclusion that the informal inmate organization can be a stabilizing force in the prison environment, they also found that the structure of the informal inmate system is a direct reflection of the formal organizational structure of the prison.[99] When prison officials rely heavily on

[95] R. Cloward, THEORETICAL STUDIES IN THE SOCIAL ORGANIZATION OF THE PRISON, 20 48 (Social Services Research Center 1960).

[96] *Id.* at 48. Many penologists attribute the informal inmate self-government with maintaining peaceful prison conditions during those periods when the organization has been allowed to flourish. Indeed, two sociologists who tried to find an explanation for the increased number of prison riots in the early 1950's, discovered, in part, that one of the significant reasons for the riots was that prison authorities were dissolving the semi-official, informal inmate self-government. Hartung & Floch, *supra* note 81, at 52. It is the researchers' belief that "Some form of inmate self-government, whether unofficial or official, is necessary for the maintenance of peace in a modern maximum custody prison." *Id.* at 57. One of the characteristics of the informal inmate social organization that the researchers considered essential to the efficient administration of the prison was the interest inmate leaders had in the peaceful operation of the prison. They concluded,

> There is at least one way of minimizing the possibility of the collective type of riot recurring, assuming that the fortress type of prison will be retained for the great majority of prisoners. This is by exploiting inmate-leaders *under official direction* so that they will once again have incentives for and a stake in a smoothly-operating, peaceful prison.

Id. at 57 (emphasis in the original).

Vernon Fox has echoed this same feature of the inmate social organization. According to Fox:

> 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.... Regardless of how it is organized, it should promote upward and downward communication between inmates and prison administration and it should provide the inmate leadership with a vested interest in the status quo.

Fox, *supra* note 81, at 118.

[97] *Id. See also* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 523 (9th ed. 1974).

[98] E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 523 (9th ed. 1974). J. E. Baker adds,

> [T]he advisory council represents one of the most satisfactory devices for encouraging the inmates of a prison to think constructively about their own institutional environment and provides a means by which inmates may share the responsibility with the staff of making the prison a better place in which to live.

Baker, *supra* note 71, at 47. See generally Meier, *Violence and Unrest in Prisons,* PROCEEDINGS OF THE NINETY-NINTH ANNUAL CONGRESS OF THE AMERICAN CORRECTION ASSOCIATION 61 (1969).

Admittedly, one of the fears that prison administrators have is that acquiescence to the demands of prisoners will necessarily lead to greater violence. C. David Garson, for one, has directly challenged this assumption:

> First, there is no evidence that when prisoners' demands are granted there is either more or less rioting than when they are ignored. Second, to the extent that officials have granted prisoners' demands, prison reform has been advanced. Indeed, prison rioting has been one of the main vehicles for prison reform, each riot series reawakening and promoting further reform advances.

Garson, *Force Versus Restraint in Prison Riots,* 18 CRIME AND DELINQUENCY 411, 419 (1972).

[99] *See* Berk, *Organizational Goals and Inmate Organization,* 71 AMER. J. OF SOC. 522 (1966); Street, *The Inmate Group in Custodial and Treatment Settings,* 30 AMER. SOC. R. 40 (1965); Vinter & Janowitz, *Effective Institutions for Juvenile Delinquents: A Research Statement,* 33 SOC. SERVICE REV. 118 (1959).

coercive power, adopt a highly centralized power structure and create a rigidly stratified organizational structure, it appears probable that a comparable and highly oppositional informal organization will emerge among inmates. While inmate leaders in custodial prisons assist in the maintenance of internal order by regulating inmate behavior, it is usually "at the cost of the corruption of the formal authority system."[100] In contrast, the informal organization in treatment institutions tends to be supportive of the official structure[101] and informal leaders are likely to be more cooperative than their counterparts in custodially oriented prisons.[102] The less formal the methods of control, and the more the treatment needs of inmates are considered in the institution's demands for conformity, the less resentful and hostile the inmate organization becomes.[103] Conversely, commentators report that:

> As the deprivations which are imposed become more pronounced, so does the probability that an inmate subculture will emerge, a subculture within which a premium is placed on a variety of attitudes, values, and behavior that are in direct opposition to the prison, its policies, its programs and its staff.[104]

Research into the nature of inmate organizations suggests a most disturbing dilemma. On the one hand, the harnessing of the informal inmate organization has been cited as the primary mechanism for fostering communication between inmates and the administration in an effort to stabilize the prison environment and reduce the probability of inmate collective violence. Yet, on the other hand, those institutions that are most prone to inmate riots are the very prisons which breed inmate subcultures that maintain a tenuous stability through a coerciveness antithetical to treatment goals and socially acceptable values. So long as prisons maintain custodial environments, centralizing control in a highly structured, coercive organization and depriving inmates of decision-making opportunities, prison conditions will generate an oppositional, informal, inmate organization and treatment programs will chronically fall short of expectations.

[100] Berk, *supra* note 99, *reprinted in* R. LEGER & J. STRATTON, *supra* note 7, at 33, 46.
[101] *Id.* at 44.
[102] *Id.* at 42.
[103] *Id.* at 46.
[104] C. THOMAS & D. PETERSON, *supra* note 11 at 50–51.

CONCLUSION

The Supreme Court's decision in *Jones* could be narrowly viewed as simply limiting prisoners' first amendment freedoms of speech and association in the context of prisoner unions. It is contended, however, that the decision will have an impact on prisoners' rights that extends far beyond the rights of inmates to organize within prison walls. The *Jones* decision suggests that the Court will assume a deferential attitude toward prison administrators' fears, when prisoners' assertions of first amendment rights threaten the order and regimen of the high custody institution. Although research continues to reveal the limits of the high custody institution in rehabilitating criminal offenders and maintaining order within the prison walls, the Court's deferential stance all but guarantees the continued existence of prisons characterized by inadequate communications structures and of counter-productive treatment environments. Furthermore, if, as penologists increasingly argue, the high custody prison is a breeding ground for collective violence, then one can predict that unreviewed prison regulations restricting the availability of grievance mechanisms for isolated and alienated inmates can only serve to foster more frequent disturbances and riots in correctional institutions.

Prison administrators are fond of announcing the adoption of new rehabilitation techniques and the implementation of new treatment programs in the prisons they oversee. The very term "correctional" institution is a reflection of the language of reform that is used to describe the goals of the modern American prison. Yet reality demands that we more honestly evaluate the role of the prison in contemporary society. It is time that we heed the warning of penologists that so long as effective custodial control is the primary goal of the American prison, rehabilitation cannot take place. If prison reformists wishfully thought that at least some progress had been made toward establishing less restrictive treatment environments in recent years, the Supreme Court, in *Jones*, corrected that view and removed all doubt that custodial concerns shall indeed control the direction of prison conditions in the years to come.

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