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Leroy D. Clark
The Catholic University of America, Columbus School of Law

Gwendolyn M. Parker

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THE LABOR LAW PROBLEMS OF THE PRISONER

LEROY D. CLARK*

GWENDOLYN M. PARKER**

He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its inhumanity accords him. He is, for the time being, the slave of the state.

Ruffin v. Commonwealth†

The concept of the prisoner as an employee and a worker is not one that is readily familiar. One thinks of the prisoner as an outcast, a lawbreaker, as a menace, perhaps, but the image of the inmate as a builder of roads, a farmer, a janitor, a cook, or a mechanic, is somehow a more muted one; to some, it is even a contradiction in terms. Two striking facts emerge when the prisoner is considered in his capacity as laborer: first, the paucity of legislative and judicial attention given to this aspect of his role (he is truly the “invisible man” in this guise); second, the contradictory policies and goals espoused by legislatures and judges when they do pay attention to this work role. For example, both requiring a prisoner to work and barring him from working have been used as punishment. Some states may require a prisoner to work for the state while in prison and yet simultaneously have statutes which bar him from working for the state when he is released.1 While in prison, inmates are allowed to develop and to use certain skills, such as barbering or jail-house lawyering, which trades or professions, however, are denied to them because of the licensing requirements2 when they return to society.

Prisoners may not, however, conceive that their role as workers invests them with “rights.” The litigation initiated by them reflects concern for “rights” of more immediacy: the right to be free, hence a high

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* Professor of Law, New York University; A.B., City College of New York, 1956; LL.B., Columbia University, School of Law, 1961.
** A.B., Radcliffe College, 1972, candidate for J.D., New York University, School of Law, 1976.
† 62 Va. (21 Gratt.) 790, 796 (1871).
level of habeas corpus petitions; the right to racially-desegregated facilities;\textsuperscript{3} the right to follow specific religious practices, such as special diets;\textsuperscript{4} and the right to receive literature of their choice.\textsuperscript{5}

The paucity of formal legislative or litigative attention to the status of the prisoner as laborer is surprising, in light of the central role that work plays, both psychologically and practically, in the lives of the overwhelming majority of people. It is what we do for most of our waking hours, most of our lives. When the high correlation between unemployment, on the one hand, and commission of first offenses and recidivism, on the other,\textsuperscript{6} is considered, it is even stranger that the relationship of prisoners to work is not seen as the one requiring the most definition and development.

Prisoners are workers, however, and their fields of endeavor have been as nearly diverse as those to be found in any community. This article will examine the history of the prisoner as a worker during incarceration, the goals his work has been seen to fulfill, and the legislative and judicial decisions which have shaped his legal status.

I. PRISONERS AS LABORERS

Any account of the history of prison labor necessitates an interweaving of fact with theory. The evolution of prison labor has been influenced significantly by the tendency to view it as somehow different and set apart from "free" labor.\textsuperscript{7} One factor contributing to this view of prison labor was the belief that prisoners were a separate group deserving only punishment and deprivation; prison labor was perceived as merely a part of that punishment. Even when theory evolved so as to characterize prison labor as rehabilitative, this perspective remained continued. A second factor contributing to this view was the large-scale removal of prison labor from the general labor market, which was due to the efforts of organized labor and some employers who did not have the opportunity to employ prison labor.

Imprisonment "at hard labor," while frowned upon and virtually nonexistent today, had its genesis, paradoxically enough, in efforts by the Quakers in Pennsylvania during the late seventeenth century to bring about penal reform. It was indeed reform because it offered an alternative to the heavy, contemporary reliance on the penalties of death, castration, mutilation, and branding. The goal of the reformers was

\textsuperscript{4} See, e.g., Long v. Parker, 390 F.2d 816 (3d Cir. 1968).
\textsuperscript{7} Lopez-Rey, Some Considerations on the Character and Organization of Prison Labor, 49 J. CRIM. L.C. & P.S. 10 (1958).
to provide the convict with the opportunity for penance and work in isolation. The Quaker system was adopted by other colonies and, thus, became the foundation for later developments. It became the basis for the "Auburn system," developed in 1821 in the prison at Auburn, New York, in which prisoners worked jointly, in silence, for private entrepreneurs during the day and returned to solitary confinement at night. In the open market system, of which Auburn was an example, the focus was shifted from reform of the inmate to profit for the state. The prisoners would work for private entrepreneurs who sold goods or services to the general public.

Three early prototypical forms of open market arrangements were the lease, contract, and piece-price systems. The lease system involved the contracting out of prisoners to a private entrepreneur for a specified time, with the latter assuming total control of the prisoners, supervising their labor, care, and custody; the state received a set fee for the contract. In one state, an entire prison, inmates and staff, was "rented" to the highest bidder among private employers. The state paid only the salaries of the highest correctional officials, warden and assistant warden, but not of the guards and made a net profit from the lease of the premises as well as from inmate labor. Under the contract and piece-price systems, the state maintained its custodial control over the inmates but sold their labor to private contractors. The state was paid a daily per capita fee under the contract system, while in the piece-price system it was paid according to the number of units or articles the prisoners produced.

There were strong parallels between the American open market system and the early English prison system. Private employers also ran the English prisons during the sixteenth century, and prisoners had to work and produce a certain amount above the cost of their care in order to be released. In both systems, the conditions degenerated to scandalous proportions. In America, where prisoners were kept by private employers outside the prison site, housing was extremely poor; food and clothing were cheap and inadequate; and prisoners were worked long hours, often by brutal foremen, under hazardous conditions which resulted in many fatalities. The privately run English prisons also exhibited these harsh characteristics. Additionally, male and female prisoners were housed together with no regard for privacy, and some prisoners were interned indefinitely because they were not able to work enough to purchase their liberty. In both America and England

prisoners received minimal care as a means of enhancing profits.

The lease system, which subjected the prisoner to the total control of a virtual "slavemaster," came under increasing attack for being exploitative and inhumane and was gradually phased out. The contract and piece-price systems, however, came under attack for different reasons. As early as 1913, an article appeared urging the wholesale adoption of the public works and ways system for prison labor. Under this system, prisoners were put to work quarrying stones, constructing buildings, and maintaining the roads. The reasons advanced for so limiting convict labor were that the outdoor work was healthy and rehabilitative; that better roads would be built; that prisoners would be shielded from abuse by private employers; and that prison labor would be removed from competition with free labor. This newly emerging concept of prison labor was designed to rehabilitate the prisoner and remove him from competition with free labor. Prison labor was increasingly directed toward the construction and improvement of public property or toward the production of goods for use within, or for sale to, state and federal institutions.

This process was greatly accelerated by legislation. In 1929 Congress passed the Hawes-Cooper Act, which enabled each state to pass legislation regulating or banning the importation from other states of goods made by prisoners. The Ashurst-Sumners Act of 1935 supplemented this law by providing federal penalties for shipment of prison goods into a state in violation of that state's laws. It also required all prison-made goods to be labeled so as to be identifiable by the public.

The Hawes-Cooper legislation withstood challenge on a number of grounds. It was held not to be a violation of the privileges and immunities clause, because there was no discrimination against out-of-state manufacturers since in-state businessmen were also barred from using convict labor. It was not an unconstitutional delegation to the states of power over interstate commerce, because the "commerce" ended with delivery of the goods to a person within the state. The goods were then property which the state could regulate or ban in pursuit of any legitimate state policy, usually that of combating the unfair competition which free labor faced from unpaid prison labor. The Ashurst-Sumners Act was also upheld on the grounds that Congress, as well as the states, could join in the effort to protect free labor.

By 1935, 33 states had enacted legislation which restricted the sale of prison products to tax-supported institutions and agencies. Of the private entrepreneurs who employed prisoner labor under contract with the state, those who needed access to the open market began to drop their contracts. The result was that the percentage of prisoners involved in the state-use system went from 26 percent in 1885 to almost 100 percent in 1940. In that year, Congress reinforced the system by prohibiting the interstate shipment of goods which private employers had manufactured or developed with prison labor.

The aim of removing prisoners from competition with free labor was not really achieved by changing the character of their work. The prisoner under the state-use system continued to compete with the free civil servant. Free persons would have had to be hired to provide needed services or products, including janitorial and maintenance work in the prison itself, if prisoners had not been so employed. Further, the prison still competed with private industry, to the extent that the latter could have provided state agencies with the goods or services which were being supplied by the prisons. The only way prisoners could have been completely removed from competition for jobs and production would have been to bar prison labor or to give prisoners work which was wholly unnecessary or useless.

The state-use system became predominant due to a number of factors: (1) unionization of public employees was absent or too weak to oppose the employment of prisoners; (2) there was widespread approval of the notion that prisoners should work for their keep; (3) prison labor was "cheap," that is, unpaid prison labor made some state projects more feasible; (4) prisoners were often used in situations where the state had a monopoly in the production of particular goods and services, so private employers did not, as they had under the leasing and contract systems, complain that they were disadvantaged by a competitor who had access to cheaper labor.

While in theory the adoption of a state-use system meant only that prisoners would be limited to public projects, the stark reality was a steady decline in the number of working inmates. The number of prisoners productively employed fell from 75 percent in 1885, to 50

percent in 1926. In 1970, a National Crime Commission stated that "only a few offenders in institutions have productive work."

The inherent limitations of the state-use system and the exclusion of prison labor from the private labor market are only partly responsible for the decline in the productive use of prisoners as laborers. Another contributing factor derives from inconsistent goals articulated for prison labor. Prison labor is now viewed as rehabilitative: a means for prisoners to learn self-discipline, habits of thrift, and a marketable skill. A man is hardly given an incentive to be thrifty, however, when, as in some prisons, he is paid only twenty-five cents a day for his labor. Similarly, attention to rehabilitation may require individualized work and remedial education, but this goal clashes with any program primarily geared to minimizing the cost of incarceration. Such a policy tends to leave the prisoner uneducated and mandates maximized production by unskilled labor.

The disparity in treatment between prisoners and free laborers is reduced when prisoners are allowed to work outside the prison in work-release programs. However, even here, the availability of such work is restricted. At the federal level prisoners can only be employed in industries where there is an insufficient supply of local labor. Correctional officials have narrowed eligibility even further by adopting internal rules, such as limiting participation to prisoners with six months or less remaining of their sentences.

II. LITIGATION ESTABLISHING THE PRISONER'S RIGHTS AS A WORKER

The judicial response to the prisoner's status as a worker has resulted in delineation, uneven at best, of some rights and privileges, coupled with widespread denials of basic rights accorded to other workers. The three most salient features of the decisions in this area have been a recognition that the prisoner has not been specifically included or excluded by most legislation touching the work relationship, a general reluctance to extend to prisoners the benefits of general protective labor legislation without such specific authorization, and a widely disparate treatment of identical issues by courts in different states.

23. The federal act authorizes work release programs provided that the rates of pay and other conditions of employment will not be less than those paid or provided for work of similar nature in that locality in which the work is to be performed. 18 U.S.C. § 4082(c)(2) (1970).
A. Employment Related Injury and Disability

Most of the earliest grievances brought to the courts arose from the hazardous conditions under which prisoners often labored, both within and without the prison walls. Suits by prisoners to recover for on-the-job injuries have met with varied results. In 1926 in one of the earliest cases, a divided Alabama court held that, when a convict was killed due to the negligence of supervising guards while working on a public highway, his survivors were entitled to sue in tort.\(^{25}\)

A serious question arose in that case as to whether the municipality might be shielded from the suit because of the sovereign immunity doctrine, which in its extension protected governmental agencies from wrongful acts of police officers while arresting or guarding prisoners.\(^{26}\) The court acknowledged that the doctrine had also been so extended that prisoners normally had no right to sue for injuries sustained because of poor prison conditions or for injuries resulting from work incidental to their sentences.\(^{27}\) Reasoning that voluntary workers could sue the municipality for such injuries, the court held that the same protection should be given to involuntary workers.\(^{28}\)

Two years later, however, in *Warren v. Booneville,*\(^{29}\) a Mississippi court denied recovery to a convict who had permanently lost the use of one leg because he was forced to repair streets with chains and shackles on his legs. The court discounted the Alabama holding as the minority position and viewed the involuntary nature of the employment as a reason for denying recovery. The prisoner’s work was viewed as incidental to his custody. The court supported this conclusion by noting, as a factual distinction from the Alabama case,\(^{30}\) that the alleged cause of the injury was the shackling of the prisoner during work, which was “clearly” an incident of custody.\(^{31}\) The state, regardless of how it directed the prisoner to serve his sentence, was holding him primarily for security reasons. Thus, the court held that the state was performing the “governmental” function of custodian and was immune from the suit.\(^{32}\) Even though the court admitted that the work was “corporate” in nature,\(^{33}\) the holding demonstrates the unique position of the inmate as laborer, for no matter what activity he engages in, he is a convict above all else.

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26. Id. at 523, 108 So. at 540.
27. Id. at 523-24, 108 So. at 541.
28. Id. at 524, 108 So. at 541.
29. 151 Miss. 457, 118 So. 290 (1928).
30. Id. at 462-64, 118 So. at 292.
31. Id. at 466, 118 So. at 293.
32. Id. at 467, 118 So. at 293.
33. Id. at 461, 118 So. at 291.
The *Warren* case states the majority rule. Even in situations involving a much stronger claim that the prisoner was employed in nongovernmental work, recovery has been denied. In one Massachusetts case, a municipality had "leased" some prisoners to a private manufacturer who was making clothing and other articles for sale to the general public. The plaintiff prisoner was assigned to a work house which supplied coal used in lighting rooms where these prisoners worked. The prisoners, whom the plaintiff was assisting, were clearly engaged in private employment, not even remotely arguable as "public service" such as street repair, and the city derived a profit from the leased-prisoners' labor. Nevertheless, recovery was denied. The court reasoned that regardless of the nature of the activity undertaken at the site, the plaintiff was assisting in servicing a custodial site for prisoners.

These cases dealt primarily with the common law of torts; prisoners fared no better, however, when the extent of coverage of legislation on employment rights was at issue. A Georgia court ruled that a convict injured while deployed on a chain gang was not entitled to protection under the state's workmen's compensation law because he was not, within the meaning of the statute, an "employee" of the particular county whose roads he was repairing. The court gave no reasons for its conclusion beyond the citation of cases which determined whether a master-servant relationship existed by these standards: the master must have the "complete control and direction" of the servant, the right to discharge him, the power to put another in his place, or the authority to put him about other work. The county benefited from the prisoner's work but successfully claimed that control over his sentence and supervision of his work was lodged in the prison warden. The court did not consider whether a master-servant relationship existed between the state, which ran the prison, and the prisoner. The correction officials clearly exercised the kind of dominion over the prisoner which would have satisfied all the standards for a master-servant relationship.

In other states the courts have been more explicit about why the prisoner, under workmen's compensation acts, is not deemed to be "employed" by anyone. As factors precluding an employment relationship, and thereby grounds for denying inmates recovery, the courts have cited the absence of a formal salary or wage and of state legislation requiring prisoners to work. As reasons for excepting prisoners from

35. Id. at 508, 24 N.E. at 782.
36. Id. at 508-09, 24 N.E. at 782.
38. Cf. id. at 158-59, 128 S.E. at 778.
the coverage of workmen's compensation legislation, these distinctions sometimes seem illogical, if not absurd, when applied to concrete cases. In *Watson v. Industrial Commission*, an Arizona court sought to distinguish its denial of benefits to the petitioner-prisoner from an earlier case, *Johnson v. Industrial Commission*, in which it allowed a prisoner to recover. The grounds relied upon for distinction were that the prisoner in *Johnson* worked for a private company rather than the state; that the company provided "compensation" to the prisoner in the form of lodging, food, and sundries; and that work by prisoners was not compulsory when *Johnson* was decided.

A close examination of these distinctions raises a serious question of whether they were substantial enough to warrant a different result. In *Johnson*, the court emphasized that no guards supervised the prisoner at his work place with the private corporation. Similarly, in *Watson* the court specifically found that "the work of the prison farm is usually performed without supervision of an armed guard or member of the prison staff"; indeed, on the day that the petitioner was injured, he was under no such supervision. The *Watson* court nevertheless concluded that the prisoner's work was under the "general supervision and direction" of the state. It is clear, however, that, even if there was no specific occasion in *Johnson* for the state to intervene after the prisoner was under the immediate supervision of the private employer, the correctional officials retained ultimate control over the prisoner since he was still under their jurisdiction while serving his sentence. If the private employer handled the prisoner in a manner incompatible with his custody or acted to discipline him, the state could have terminated the employment. Thus, the prisoner in *Johnson* was, to the same extent as the prisoner in *Watson*, under the "general supervision and direction" of the state. Moreover, the power to terminate the services of the prisoner, retained by the state in both cases, is indicative of the existence of a master-servant or employment relationship.

The notion that the prisoner in *Johnson* received "compensation" from the private corporation which supplied him with food and lodging makes sense only if viewed from the state's perspective. To the extent that the private corporation provided lodging and food, the state, of course, was relieved of that financial burden. From the prisoner's perspective, however, these items were the same "compensation" he would have received from the state as part of normal maintenance of custody had the corporation not provided them. The *Johnson* court did state

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42. 100 Ariz. at 329, 414 P.2d at 145.
43. *Id*.
44. *See* 88 Ariz. at 357-58, 356 P.2d at 1023.
that the food and lodging supplied by the corporation were "different," and "perhaps" better than that supplied by the state and that some things which the prisoner received, such as cigarettes, would not necessarily have been supplied by the state. However, these are infinitesimal differences and seem insufficient to turn mere sustenance, which would be supplied in any case, into "compensation." Nor do these differences seem a sufficient basis upon which to turn a substantial question of law. A broader sense of the term "compensation," moreover, was present in both cases. Both prisoners were permitted the desirable option of working away from the prison, and each received a reduction in his sentence on the basis of the number of such days he worked. This was obviously the real inducement and "compensation" for which the prisoners labored.

Finally, the requirement that prison labor be voluntary before an employment relationship can exist is, at best, merely judicial formalism. While this might accurately reflect the historical reality that most employment relationships have been based on contract and mutual agreement, it ignores traditional notions of fairness and the very nature of compulsory labor. An individual who is forced, through compulsory work, to subject himself to risk and personal injury is at least as deserving of compensation for such losses as an individual who voluntarily assumes, by the exercise of his choice to work, such risks and the injuries resulting therefrom.

The distinctions between prison labor and free labor, relied upon in cases like Watson to preclude recovery by prisoners for work-related injuries, are suspect further when the fairness of the results and the underlying purpose of the workmen's compensation acts are considered. The court in effect says that a person who is compensated for his labor is protected, while the person who is initially disadvantaged by not being compensated is further penalized by the withholding of protection. None of these cases advert to the fundamental purpose of workmen's compensation legislation, which was to grant protection to workers who had been left remediless under the traditional tort law by the very kind of narrow definitions of the master-servant relationship in which the courts currently indulge.

While the Mississippi court in Warren, which denied relief to a

45. This requirement cannot be justified by the fact that compulsory labor is usually part of the prisoner's sentence and is thus considered punishment. Uncompensated injury arising out of such labor is a distinct and additional penalty and thus cannot be considered part of the legislatively prescribed punishment. Query whether due process does not require either that such an additional penalty be explicitly stated in the statute defining the offense, or in the absence of such notice, that this extra punishment be prohibited and recovery allowed.


47. 151 Miss. 457, 118 So. 290 (1928).
prisoner who was permanently disabled and obviously handicapped in finding work after his release, bemoaned the injustice of the result, it felt that the problem could only be corrected by legislation. This approach may be properly cautious, but it may also defeat the creative role that the judiciary should play. The reality of much legislation is that those who passed it will not have considered every problem of inclusion or exclusion. The courts, however, have had another body of legislation, the statutes authorizing imprisonment, which could have provided guidance and authority for resolving the problem of recovery for prisoners' work-related injuries. If rehabilitation is a primary goal of incarceration, a court could reasonably find that the absence of a supportive adjustment for the prisoner is incompatible with that goal and could construe the statutory or common law requirements accordingly. This would be particularly appropriate where the partial or total inability of the prisoner to earn a living upon release occurred as a result of activity which he was encouraged or compelled to engage in.

Ironically, two courts which have considered this factor held that, since the plaintiff-prisoner's activity was primarily "rehabilitative," it was not "employment." Neither court explained why it could not be both. One of these courts did not consider whether the work was mandatory or uncompensated, so these traditional factors played no role in the decision. Thus, only if the work done by the incarcerated person is neither designed to be, nor in fact will be, useful to him in the post release situation can there be a recovery. Working while learning a trade or skill would presumably not qualify, but breaking rocks on a chain gang might satisfy the requirement, since few would regard it as "rehabilitative." Many courts may be embarrassed to embrace unabashedly the notion that the aim of imprisonment is "rehabilitation" because of the wide gap between that proposition and the reality of prison life. One of the courts which did discuss rehabilitation was dealing with the juvenile situation, where such rhetoric is indulged in more frequently. However, decisions denying compensation may themselves contribute to the failure to realize the goal of rehabilitation.

The failure of the courts to consider the purposes of workmen's compensation legislation, or the statutes governing imprisonment, can be explained by a deep-seated reluctance to treat prisoner-laborers as free laborers are treated. Providing prisoners with the same protection against loss due to injury as is enjoyed by regular workers would not

48. For a fuller development of the argument that allowing prisoners to qualify for workmen's compensation would promote the goal of rehabilitation, see Note, Granting Workmen's Compensation Benefits to Prison Inmates, 46 S. CAL. L. REV. 1223, 1232-38 (1972-73).


50. 359 Mich. at 598, 103 N.W.2d at 443.
even remotely jeopardize or interfere with the custodial-surveillance-control relationship which the state could claim is primary. Yet, because punishment and isolation are so integral to the view of the prisoner, this is never even noted by the courts.

While most courts bar recovery absent a specific provision of the workmen's compensation laws, there are a few exceptions. In a California case, the court recognized that statutes which make inmate labor mandatory and deprive an inmate of his civil rights would normally operate as a bar to a finding that an employment relationship existed. The court held, however, that where a later statute authorized the California Highway Commission to "employ" convicts on public roads and provided for the payment of a daily wage to the inmates so employed, a master-servant relationship did exist under the state's Workmen's Compensation Act. In reaching this result, the court reasoned that just as earlier statutes deprived the inmate of his right to make a true contract for hire, the later one restored that right to inmates engaged in certain work. The standards created in the California case, that is, whether there is compensation for the work done and whether any affirmative statutory authorization can be found for the premise of an employment relationship, have been reiterated in many cases since that time.

Within the federal system, a statute specifically authorizes workmen's compensation for inmates injured while engaged in labor in federal prisons. Some prisoners have tried to establish an alternative ground for recovery under the Federal Tort Claims Act, but the Supreme Court has held that the provision of the workmen's compensation law is an exclusive remedy. This is in accord with the legislative response of those states which have considered similar claims.

B. Minimum Wages

Claims for a minimum or standard wage have met with even stronger
resistance in the courts than claims for work-related injuries. Such claims have revived the more archaic pronouncements that a prisoner is not entitled to the fruits of his labor and that a convict cannot be a true employee of the state, even absent statutes making compulsory labor a part of the prison sentence.

In a Michigan case, 60 13 prisoners sought coverage under minimum wage legislation for administrative and clerical work done in connection with a drug-testing project run by a private drug company. They were being paid from 35 cents to $1.25 per day. Applying an "economic reality" test to its finding that the drug company did not have the power either to hire or fire the inmates, the court held that the inmates were not employees of the company under either the Michigan Minimum Wage Law 61 or the federal Fair Labor Standards Act. 62 The court did not find that prisoner status automatically barred coverage under the minimum wage laws but rather stated that stronger supervisory control had to be demonstrated. In this case the private employer's control over the prisoners was very weak—not only were the company's requests to take on or release certain inmates denied occasionally but correctional officials exercised power to control work hours and disapprove particular tasks for inmates.

Although state agencies are specifically included as "employers" under the federal Fair Labor Standards Act, the court did not entertain the claim that the state was the employer if the private company was not. This issue probably was not considered for the same reason that the plaintiffs' claim of unjust enrichment against the state was denied. 63 Based on its construction of the Michigan Prison Industries Act, 64 the court stated that the labor of the prisoners was the property of the state. 65 This reading 66 of the Act withstood thirteenth and fourteenth amendment challenges because punishment for a crime is expressly exempted from the prohibition against involuntary servitude. 67 The court might have been more receptive to the equal protection claim if it had not assumed that the power of the state to compel work necessarily freed it from any duty to pay wages. The power to compel un-

63. 334 F. Supp. at 778. The state benefited from leasing out the prisoners because the private companies, as the quid pro quo for cheap labor, had agreed to turn over title to the research buildings they had constructed to the state.
65. 334 F. Supp. at 791.
66. Id. at 792-93.
67. See U.S. CONST. amend. XIII.
compensated labor, however, is not logically a necessary implication of the power to compel labor.\textsuperscript{68}

An unjust enrichment claim against the private companies was defeated, although it appeared the deployment of the prisoners was a violation of state law. The court held the exclusive sanction to be criminal prosecution; civil damages could not be inferred as a supplementary remedy because the real beneficiaries of the legislation were free workers, who were to be spared competition from prison labor. The plaintiffs also alleged unequal treatment with respect to other prisoners, in part because they were being used illegally. This claim was denied when affidavits showed that they were paid better than other prisoners doing the same or comparable work.\textsuperscript{69}

Indeed, a lack of uniformity in the restrictions on prisoners' earnings seems to be widespread. In the federal penal system, prisoners in work-release programs must receive the prevailing wage in the area where they work, which, in some situations, would mean the minimum wage prescribed by law.\textsuperscript{70} Yet, prisoners who are not allowed into work-release programs are not covered by minimum wage laws. Prisoners who are not allowed to work outside the prison are usually so restricted because it is feared that they will escape. This possibility of flight, however, furnishes no rational basis for paying the worker in prison less than a prisoner who works outside of prison. Security needs are fulfilled by keeping the former individual in prison under surveillance; paying him less while he is there obviously has nothing to do with preventing escape. On the contrary, there is some evidence that limiting prisoners to "slave" wages has made the maintenance of intra-prison security more difficult; the pennies-per-day wage policy has often been one of the major complaints of rioting prisoners.\textsuperscript{71} Moreover, it is irrational that the prisoners who are most likely to have adjustment problems upon leaving prison should be released in a more impecunious condition than less risky prisoners.

It has been argued that it would be unfair to pay minimum wages to prisoners since some nonconvict labor is not covered and that to extend coverage to the currently noncovered free labor in some marginal

\textsuperscript{68}It may, for example, be possible to force people to be employed in the army, but a new set of constitutional problems would be presented if such labor were totally uncompensated.

\textsuperscript{69}334 F. Supp. at 793. If the "property-of-the-state" characterization were carried to its logical limits, these other prisoners obviously would have no claim of unequal treatment even with this admission. We shall see later how the courts deal with this problem.


\textsuperscript{71}See, e.g., NEW YORK STATE SPECIAL COMM'N ON ATTICA, REPORT ON ATTICA 49-51 (1972). One of the 28 demands for change made by rioting prisoners was that they be paid a minimum wage. \textit{Id.} at 253.
industries, so as to alleviate any unfairness, might cause unemploy-
ment. The projected lack of parity between a covered convict and
a noncovered non-convict results from too narrow a basis for legitimate
comparison. Although the wages of the prisoner would be higher, he
would still be in a less favored position because of the severe limitation
on his liberty—few of the low-paid uncovered free laborers would
change places with him to get his higher wage. In any event, the ideal
solution is that all persons should be covered by minimum wage legisla-
tion and, in those instances or industries where employers might go out
of business or cut back on employment, for example, domestic service,
the government ought to provide a subsidy to the industry or a wage
supplement to the worker.

C. Job Seniority and Security

Fourteenth amendment claims by prisoners of unequal treatment in
employment have not been totally unsuccessful. In United States ex
rel. Motley v. Rundle, a black inmate successfully claimed that he lost
his job security as a result of racial discrimination. The petitioner had
been denied the privilege of returning to his former higher paying job
upon return from a temporary transfer to another jail, while white
inmates after similar transfers had been accorded the privilege. In
reaching its conclusion, the court did not discuss the effect on the
prisoner's claim of the fact that the state could have paid him nothing
in either job or barred him from working altogether.

Most other cases, however, do consider these factors, and the
Motley case, when put in the context of other cases, may provide little
support for claims of unequal job treatment which do not involve racial
discrimination. One court denied a prisoner's claim that he be dove-
tailed into the seniority system with respect to pay when he was trans-
ferred from one prison in the state to another. The court refused
to disturb unequal treatment of prisoners where any possible legitimate
state purpose was being served. It was found that the plaintiff had
been transferred to a more relaxed, minimum security prison and that
this could serve as compensation for the loss in pay upon transfer. The
court stated that the correctional officials may have thought it would
disturb the goal of rehabilitation to lower the pay of prisoners already
at the minimum security prison in order to accord the plaintiff the

76. Id. at 787-88.
77. Id. at 790.
seniority status he enjoyed in the former institution. The court went so far as to note that the distinctions made between prisoners would even have passed scrutiny under the National Labor Relations Act if they had been negotiated by a union under a duty not to discriminate arbitrarily against a portion of the workers it represented.

It is important to recognize that prisoners have no statutory or negotiated right to job seniority and security within the prison. Rather, this protection is wholly dependent upon the discretion of the prison officials. It is only after these privileges are granted that any limit is placed on the exercise of that discretion. Even then, it is the rather broad limits, at least in this context, of the equal protection clause to which the prisoner must look for protection.

D. Pensions

Another labor problem confronting the prisoner is the effect of his conviction and incarceration upon already accrued labor rights, that is, rights to pension or retirement fund benefits. There is a myriad of statutes bearing on this issue, but relatively few cases. Again, this is perhaps a comment on the prisoner's own lack of self-identification as a worker. These statutes are of two basic types: blanket provisions which mandate that no person convicted of a felony shall be entitled to a pension, and causal provisions or ones which require some nexus between the type or time of conviction and the nature of the employment. Often these two types shade into one another, as with the statutes requiring that a police officer, even when retired, continue to live an exemplarily, conviction-free life. In *Ballard v. Board of Trustees of The Police Pension Fund*, the court dealt with precisely this kind of statute and found that it directly contravened a state constitutional mandate that a conviction could not effect a forfeiture of estate. The court reached its conclusion "fully cognizant of and in sympathy with the state's interest in assuring that those who are charged with the enforcement of our laws continue to exemplify that standard of moral character which commands the respect of those persons whom they serve."

Encouraging though this case and others like it may be, the difficulty lies in its rather narrow ground of decision. Nowhere in the opin-

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78. *Id.*, at 790-92.
79. *Id.*, at 789.
84. 313 N.E.2d 351 (Ct. App. Ind. 1974).
85. *Id.* at 356.
ion is there language to suggest that, without the state constitutional provision, some further ground beyond mere conviction is needed for divestment of a right to pension. In a New Jersey case \(^{87}\) decided under a similar statute but without the benefit of the constitutional provision, the loss of the pension right was upheld. The statute \(^{88}\) provided that no pension was to be paid to a person while confined in a penal institution as a result of a conviction for a crime involving moral turpitude. The court upheld the statute without analyzing the appropriateness or necessity of the statutory mandate. \(^{89}\) The court concluded that since the plan was essentially an involuntary one, no contractual right to payment existed and the plaintiff was thus entitled to payment only when he satisfied whatever guidelines the pension legislation had established. \(^{90}\) This distinction between a voluntary and an involuntary plan is an interesting one, which often works to an aggrieved employee’s detriment. However, unlike the New Jersey court, the Ballard court found that when an employee retires, even though the plan was an involuntary one, the heretofore statutory right ripens into a contractual one.

Once again the prisoner may find himself in the ironic position of being accorded fewer rights because he had so few to begin with. Prisoners who had no choice in their pre-prison jobs as to whether they would contribute to a pension plan, find themselves after conviction with even less protection than those who had the choice of whether or not they would participate in a plan. It is difficult to criticize statutes which condition pension payment upon satisfactory completion of one’s duties or which state that a forfeiture will result if an employee is subsequently found guilty of misappropriation of government funds. \(^{91}\) Such qualifications are an added incentive for honest and diligent performance. Many states, however, require no such nexus. \(^{92}\) In support of such statutes, it might be argued that they are necessary to prevent the onerous financial burden on the state that would result if it had to pay both a pension and the expense of the prisoner’s incarcerations. If that were the case, perhaps some reduced pension during incarceration would be in order rather than totally divesting the prisoner of the right to payment. At the very least, it would seem that the right to a pension should be revived upon the prisoner’s release. If he has

\(^{87}\) Salley v. Firemen’s & Policemen’s Pension Fund Comm’n, 124 N.J.L. 79, 11 A.2d 244 (Sup. Ct. 1940).
\(^{89}\) 124 N.J.L. at 82, 11 A.2d at 246-47.
\(^{90}\) Id. at 83-85, 11 A.2d at 247-48.
\(^{91}\) See, e.g., MASS. ANN. LAWS, ch. 32, § 15(3) (1973).
\(^{92}\) See, e.g., CAL. GOV’T CODE § 50883 (West 1966); IND. ANN. STAT. § 48-6405 (Burns 1963); MINN. STAT. ANN. § 423.809(5) (1958); N.D. CENT. CODE § 40-45-15 (1968); TEX. REV. CIV. STAT. art. 6220 (1970).
qualified for a pension, he is an older worker who, by virtue of his age
(to say nothing of the conviction), may have difficulty finding employ-
ment to replace the income from the lost pension. 93

E. Unions

A most fundamental worker demand, and one which the inmate pop-
ulation is slowly beginning to seek, is the right to form a union and
bargain collectively for improvement in working conditions. 94 Some
litigation demanding that correctional officials recognize and bargain
with the prisoners' unions has been instituted, but all unsuccessfully to
date. 95

The claims primarily have been that the right to form a union is a
right of free association protected by the first amendment 96 and that
prisoners retain all fundamental rights unless taken from them ex-
pressly or by necessary implication. 97 The constitutional claim is weak,
in light of the fact that the thirteenth amendment authorizes involuntary
servitude for those convicted of crime. 98 It is well known that organiza-
tion by slaves for any purpose was not tolerated and, indeed, even the
most embryonic grouping was treated as criminal. 99 If the thirteenth
amendment allows most of the incidents of slavery to attach to prison-
ers, then any state or federal statute which explicitly barred prisoner
organizations would probably not violate the first amendment if con-
strued consistently with the thirteenth.

Existing legislation is silent on the issue of whether prisoners are
among those granted the right to organize. Federal and state prisoners
who work in a prison are not covered by the National Labor Relations

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93. If prisoners were given regular wages they should be eligible for unemployment
insurance if they can not find work when released from prison. In Massachusetts re-
cently, prisoners were denied unemployment compensation when they were laid off from
their work-release jobs because of state legislation which said they must be available for
work without undue restrictions. Prisoners were probably not considered when the legis-
lation was passed. It is far from certain, however, that the need for continued income
would be absent simply because the prisoner was in jail, since he might be contributing
to the support of his family. It shows again, though, the need for specific legislation
with the prisoner in mind.

94. Prisoners have tried to form unions in New York, California, Rhode Island,
Washington, Michigan, and Massachusetts. One organization, the National Prisoners' Reform
Association, has called for a nation-wide coalition of all prisoners' unions.

95. E.g., In re New York Dept of Correctional Serv. & Prisoners Labor Union, 5

also, Comeau, Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for
Organization of Inmate Labor, 21 BUFFALO L. REV. 963 (1972) [hereinafter cited as
Comeau].

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

98. U.S. CONST. amend. XIII.

Act, which protects the right of workers to organize.\textsuperscript{100} This is not because they are prisoners, but because governmental agencies, which the prisoners would have to claim as employers, are exempt from coverage.\textsuperscript{101} Federal prisoners, however, might claim coverage under Executive Order No. 11491,\textsuperscript{102} which grants certain federal employees a limited right to form labor organizations. The only potential impediment in the order itself is the provision which precludes its application to any agency "which has as a primary function . . . security work, when the head of the agency determines in his sole judgment, that the order cannot be applied in a manner consistent with national security requirements and considerations."\textsuperscript{103} It is probable that this exemption was not meant to apply to prisoners, for in other parts of the section it refers to agencies doing "intelligence" or "investigative" work and specifically names the FBI and the CIA. The language "security work" was thus probably meant to apply only to agencies doing intelligence work. Further, the only persons working in prisons who are explicitly excluded from coverage are "guards" which provides a strong argument of statutory construction that others in the institution (like prisoners) who were not expressly excluded are covered.\textsuperscript{104}

One statute, however, might suggest that a wholly intraprison union is not possible; for it prohibits persons convicted of a felony from holding office in a union.\textsuperscript{105} This would not prevent a group of prisoners from joining an established union outside the prison. However, this would not be a wholly satisfactory solution since one of the valuable aspects that should result from prisoner unions is the development of prison leaders and a sense on the part of inmates of sharing control over their situation.

The fact that new legislation may be needed is made clear by those cases in which the claim is made that prisoners are employees of the state government. Those opposing these claims have pointed to the difficulties involved in opening prisoner-held jobs to regular civil service competition and to the need for new legislation to deal with the

\textsuperscript{103} Id. at 256.
\textsuperscript{104} This argument would be based on the maxim: \textit{expressio unius est exclusio alterius} (the expression of one is the exclusion of another). In the case of exceptions, exclusions, provisos, and other negative statutory provisions, the maxim operates as a double negative to produce the opposite of its normal exclusionary effect. "The enumeration of exclusions from the operation of a statute indicates it should apply to all cases not specifically excluded." 2A C. Sands, \textit{Statutes and Statutory Construction} § 47.23 at 123 (4th ed. 1972). \textit{See also} Herzberg v. Finch, 321 F. Supp. 1367 (S.D.N.Y. 1971); Hagsen v. Servovation-Ajax Co., 323 F. Supp. 1047 (N.D. Miss. 1971).
special problems of granting prisoners all the collateral benefits of state employees. A related problem, if prisoners are given the right to form unions, is whether they should be treated as other government employees and denied the right to strike. Such a blanket prohibition has always been questionable when imposed on government workers who, like prisoners, do not perform services which are crucial to the public's health and safety. Further, prisoners do not now have the indirect means of pressure enjoyed by other government employees (e.g., sick call, picketing, rule-book strikes). If prison work strikes were made illegal, it is probable that these indirect forms of pressure would be frequently employed. It would be unwise, however, to encourage resort to these quasi-illegal practices in a prison setting, because they are a less visible and therefore less controllable form of pressure than a full strike.

The primary objection of correctional officials to proposals for unionization is based on the fear that it would empower prisoners to engage in unruly and dangerous challenges to authority. This fear is, in part, based on the manner in which prisoners now operate, since a form of arbitrary bargaining is now prevalent in which the outnumbered correctional agents yield some power to the toughest prisoners in exchange for their agreement not to incite trouble. Such informal and unspoken bargains, however, have obviously not been successful in recent years. Therefore, a new form of explicit, controlled, and hopefully more democratic bargaining is in order.

III. CONCLUSION

The premise of this article is that while the traditionally distinct and dissimilar treatment of prison labor and free labor has rested on irrationalities, contradictory policies, and unenlightened assumptions, there are many sound reasons for treating these two types of labor, which involve essentially identical behavior, in a similar manner. In every appropriate way prisoners should be accorded the same rights as other workers and integrated into the general work force. New and special legislation may be needed to effect this reform for the prisoners'
It is time to realize that the isolation of the prisoner ought to be kept to the absolute minimum required for public security. It is precisely this type of isolation from the positive, supportive experiences of others, especially including the work experience, that is an impetus toward criminal activity. A prison may be a peculiarly inappropriate place to start the integration of a person into the regular life of the community, but if that is where it must start for some individuals, then at least all the artificial and unnecessary legal barriers to that process should be removed.

The state-use system of prison labor should be ended so that prisoners can learn skills and work in jobs they can perform upon release. Similarly, the many arbitrary disqualifications of prisoners from certain employment upon release should be eliminated. Enlightened labor union leadership should end the shortsighted demand that the prisoner be excluded from the labor market—the demand should be for full employment for everyone, as a matter of legal right. Creating short term security for one group at the expense of a more vulnerable group of workers should be ended as a matter of principle, and also as a practical matter, since the exclusion of the prisoner from the work force creates other social and economic costs, which are ultimately borne by the free worker.

These suggestions will meet opposition because we are in a period of recession/depression much like the one which created the first demands for removal of prisoners from the labor force. Legislation authorizing prisoner unions, therefore, is the paramount need since the demand for integration into the work force will probably have to come from the prisoners themselves. If prisoners begin to bargain for working conditions which preclude their use as cheap "scab" labor, the general labor union leadership may begin to see them as a group to be organized rather than as illegitimate competitors with free labor.