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Industrial Relations Behind Bars: Human Resource Problems and D Issues in the Management of Civilian and Convict Employees in Correctional Institutions

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INDUSTRIAL RELATIONS BEHIND BARS:
HUMAN RESOURCE PROBLEMS AND ISSUES IN THE MANAGEMENT
OF CIVILIAN AND CONVICT EMPLOYEES IN CORRECTIONAL
INSTITUTIONS

By

Irwin B. Horwitz

A Thesis Submitted to the Faculty of the Graduate School
of Loyola University of Chicago in Partial Fulfillment
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CHAPTER I

INTRODUCTION

Isolated behind gray cement walls and barbed wire fences, more than half a million prisoners are incarcerated in the United States. Of this convict population, over one-third are employed in some capacity by their state or federal prison systems. Despite this large number of working prisoners, convict labor remains an enigmatic segment of the American workforce. While a plethora of literature by sociologists and penologists has been devoted to documenting the internal social problems of prisons, such as violence and overcrowding, little attention has been focused on the role of labor within these institutions. Moreover, those works which have concerned themselves with convict labor have generally excluded the civilian personnel who are employed to manage these facilities from the scope of their analysis. To truly understand the dynamics of employment under the exceptional condition of involuntary confinement, prisoner and civilian work systems must be examined both independently and interactively, for not only does such employment present special problems for each group, but the relationship between the convicts and those who supervise them often breeds conflict.

This expository provides a comprehensive overview of prison work systems using the framework of industrial

relations. Such an approach is a more appropriate forum to address the special workplace issues which arise than the traditional approaches taken by sociologists and penologists. Indeed, the myriad of issues encompassed in this non-traditional approach, including the application of labor laws to inmate and civilian employment, private sector involvement with prison industries, labor relations between convict and prison employees, establishing effective job training programs, as well as quality of worklife concerns all fall within the specific realm of human resource administration.

The first section of this paper traces the development of convict labor systems in the United States from their establishment in the earliest American prisons to their use in modern correctional facilities today. By doing so, insight into the rationale behind many of the current laws and regulations that influence modern correctional labor policy is provided. Chapter III is divided into two parts. The first examines the scope and application of three of the most important areas of labor law affecting prisoner employment: The application of the Fair Labor Standards Act (FLSA); state Workmen's Compensation Acts; and the Occupational Safety and Health Act (OSHA) to present convict employment programs. The second section then examines various types of prisoner employment systems with an emphasis on the rehabilitative value that these programs

also exposing the prison to claims of inmate privacy violations.

This paper attempts to provide a comprehensive overview of the various human resource management issues which confront modern prison administrators. It provides a thorough and succinct analysis of the problems encountered in managing prison inmate and professional populations as well as identifying the need for greater participation and integration of modern theories and practices of industrial relations into the American penal system.

CHAPTER II

A HISTORICAL OVERVIEW OF CONVICT LABOR

1750-1900

Early Colonial Americans had little tolerance for criminal offenders. Strongly influenced by medieval European traditions, most towns and villages established codes which prescribed severe penalties for even minor infractions of law. For example, community gossips and outcasts might find themselves sitting on the "dunking stool," a chair with locking harness which was repeatedly dunked into a pool of water.¹ Culprits guilty of more serious crimes such as drunkenness, adultery, or sabbath-breaking, would often spend time in the stocks and pillory (a wooden frame confining the head, hands and feet) and were subject to occasional whippings from passersby. It was not uncommon to see husband-beaters being placed in the "dames bridle" - a cage which locked over the head and forced a unique apparatus into the wearer's mouth, thereby making speech a difficult if not impossible task.²

Yet, in spite of the severity of these punishments, as American society grew, so did the number of lawbreakers. Because it was impractical to apply these individualistic penalties on a large scale, and since they generally failed

to deter crime, communities sought other methods of dealing with criminals. Moreover, an increasingly widespread ideology, which argued that crime was more effectively remedied with punishment designed to reform habitual offenders, began to take root in the United States. Originating with a new philosophical movement in Europe, these late eighteenth century concepts laid the foundation for what has come to be known as, "The Classical School of Criminology."³

French philosophers Montesquieu and Voltaire were among the first to condemn the cruel and inhumane use of torture as societal instruments of justice. This belief gained popularity quickly throughout Europe, as was exemplified in an expose, "The State of the Prisons", written by an English sheriff, John Howard, during the mid 1770's. This work led to the passage of England's Penitentiary Act of 1779, and subsequently, the construction of a penitentiary which incorporated many of these ideas of prison reform.⁴ Another Englishman, Jeremy Bentham, (whose writings would later have a significant influence on the philosopher John Stuart Mill), devised a crude, "hedonistic calculus" based on Utilitarian ideology.⁵ Bentham postulated that the role of punishment was to negate the pleasure derived by criminals from their acts by making the ultimate consequences of those acts more unpleasurable. In addition to his new penological philosophy, Bentham

conceived the "Panopticon" plan for prison design.⁶ Originally an idea to facilitate industrial supervision, the Panopticon design was a circular structure with cells located around the circumference. A guard stationed in the center of the structure could monitor every cell on a given level simply by making a 360 degree turn.⁷ This concept was soon widely accepted. Stateville Prison, constructed in Illinois in 1919, was based on Bentham's design and is still in use today.

America's first penitentiary was built in Philadelphia by the Quakers of Pennsylvania. Named the Walnut Street Jail, it opened as a prison and workhouse in 1790. At this facility hardened offenders were segregated from the rest of the inmate population and kept in solitary confinement cells measuring six by eight feet. Those doing time in solitary confinement were not used as laborers in the prison workforce. Less serious offenders, however, were housed together and during the day labored at such jobs as shoemaking, carpentry, tailoring and nailmaking.⁸ Complete silence was maintained in the shops. Women in the prison worked on such tasks as weaving, washing and mending. However, unlike the male prisoners who were paid the prevailing wage for their work (minus court costs, maintenance and fines), the women received no pay. By the end of the nineteenth century, the Walnut Street Jail was plagued by overcrowding, discipline problems, escapes and

riots, thereby making it an impossible environment in which to manage a workforce.⁹ While attempts were made at building other prisons, it was not until John Haviland redesigned a penitentiary in Pittsburgh and designed a new Philadelphia prison that the first organized prison system came into being. These new penitentiaries placed increasing emphasis on structures that helped prevent escapes.¹⁰

In 1816, Auburn Prison was constructed on a fourteen acre rectangular spread of land, about thirty miles north of New York City. Its cells were smaller than any of those in the Pennsylvania system and had thick walls with poor ventilation. The aim of this design was to minimize contact between prisoners. By 1821, Auburn had instituted a three tier system of inmate classification.¹¹ Those guilty of the most serious offenses and the most difficult to control were held in solitary confinement. Prisoners classified as "reformable" were allowed to congregate for labor during the day but were kept in solitary confinement during the night. A third class of prisoners was considered in-between the extremes of the other two groups and labor was used as a means of reward.

By 1823, the "Auburn System" had evolved...Reflecting capitalistic notions arising from the industrial revolution that prisoners should be self-supporting, and religious conceptions about solitariness and self revolution, the men were supposed to have the benefits of labor and meditation. The motivating idea was to assure maximum industrial production and prevention of contamination and plotting. The men were provided industry, but kept in a state of submission devoid of

any human intercourse that would corrupt them. A strictly imposed rule of silence was imposed upon them when they worked.¹²

While hard labor was a tenet underlying the rehabilitative paradigms of both the silent system of Auburn and the solitary system of the Pennsylvania prisons, neither system noticeably reduced recidivism.¹³ Because these programs demanded inflexibly strict conditions, they led to a great deal of tension between inmates and guards. As a means of maintaining their authority and compliance to prison rules, the guards would frequently resort to methods even more severe than those employed by their colonial predecessors. Prisoners caught breaking rules might be subject to such inventive punishments as "flogging" which consisted of a severe lashing with a whip made of wire strands, or the "douche" in which ice water would be dumped onto their bodies from heights of several stories above.¹⁴

Despite a growing penological philosophy emphasizing more humane punishment for wrongdoers, the makeshift disciplinary procedures enacted by the guards effectively circumvented the implementation of any qualitative reforms. In many cases, the actions of the guards were officially and unofficially sanctioned by upper level prison administrators. The warden of Auburn Prison articulated the prevalent attitude of prison management when he stated that reform could not take place, "unless you break the spirit of

the prisoner first."¹⁵ For the next several decades penal institutions failed miserably at reforming criminals.

From the 1830's on, the two systems, silent and solitary - Auburn and Pennsylvania - fought for supremacy in American penology. Yet, almost from the start, it was clear that neither worked. Both were destructive to the prisoners' personalities and neither one produced penitence or prevented recidivism...Work programs quickly degenerated. Either no work was available, or prisoners were forced to labor at pointless and back-breaking jobs, such as smashing rocks.¹⁶

Using labor as a means of rehabilitating criminals continued declining in importance as other more urgent penological needs arose; specifically, the high cost of prison maintenance became burdensome to many states. As a solution, increasing emphasis was placed on convict labor as a means of making the prison an economically independent entity. Changes were made in prison policy to facilitate convict labor production such as the abolition of the perpetual silence rule.¹⁷ With the gradual realization of the untapped profit potential resting in their large convict workforces, prisons quickly developed various types of organized industries.

The earliest forms of prison industry utilized contract labor and the piece-price system.¹⁸ Contract labor was a system which, as the name implies, leased the labor of convicts to an outside contractor. Under this agreement, the only duty of the prison was to guard the convicts, while the contractor supplied the materials and machinery for the work. The piece-price system differed from the contract

system in that the contractor would supply the raw materials and the prison would be responsible for the production of the goods. Compensation was calculated by the amount of goods produced. Prisoner exploitation under these systems was rampant. Quite often, convicts would work extremely long hours under poor and hazardous conditions while taking abuse from both the guards and contractors. In return, the inmates would receive little or no pay for their labor.¹⁹

Prison industries also took the forms of public-account and state-account systems whereby goods produced by the prisoners were sold on the open market.²⁰ Production occurred under the auspices and direction of the prison authorities themselves, and in some cases, the prisoners would actually partake in some of the profit. Under the state-account system, sale of the inmate goods produced would be solely limited to other state institutions, such as mental institutions, schools, etc., while the public-account system employed inmates in road construction, public streets and other types of public construction. In addition, prison agriculture expanded as a means of providing food for inmates (as well as hard labor), thus reducing prison expense.

But perhaps the most cruel of the emerging prison industry programs were convict lease systems. Under these systems the contractors would assume total control over the inmates, including their maintenance, supervision and

discipline.²¹ Often, the convicts were leased out to the highest bidders, and in some cases subcontracted to a secondary company. One type of this system later became popular with the owners of southern plantations following the Civil War. In need of cheap labor, owners saw inmates as the perfect replacement for the newly freed slaves.²²

During the 1860's, states were preoccupied with the Civil War and attempts to reform the prison system came to a standstill. However, shortly after the end of the war, the ideology which originated in the Classical School of Criminology made a significant resurgence. In October of 1870, a convention of one-hundred and thirty elite members from the international corrections community met in Cincinnati, Ohio. Under the name of the Prison Congress (later to evolve into the National Prison Association and then the American Correctional Association), the attendees participated in lively discussions leading to a strong endorsement for rehabilitative prison orientations, as expressed in their subsequent declaration of principles:

Society is responsible for the reformation of criminals; education, religion, and industrial training are valuable aids in this undertaking; discipline should build rather than destroy the self-respect of each prisoner...the responsibility of the state extends into the field of preventative institutions and to the aid and supervision of prisoners after discharge; a central state control should be established so as to secure a stable, non-political administration, trained officers and reliable statistics.²³

Present at the Conference was Zebulon Brockway, an ardent supporter of the reformation movement and warden of the Detroit House of Correction. Brockway asserted that the goal of incarceration should be, "the protection of society by the prevention of crime and reformation of criminals."²⁴ Six years later, in 1876, Brockway was given the opportunity to institute his radical concepts at the new Elmira State Reformatory in New York. Within months after taking control, Brockway had implemented significant new programs in the institution.

The reformatory began offering educational classes, athletic activities, job training and religious instruction to members of the inmate population. In addition, many judges were replacing fixed or determinate sentences with indefinite sentences which considered a prisoner's personal improvement as a major criterion for parole.²⁵ This latter program quickly became questionable as prisoners found that faking enlightened attitudes could lead to an early discharge. While the Elmira experiment did have some success, it was no penological panacea; recidivism remained high, conditions worsened, and a shortage of capital severely affected the quality of educational classes and other rehabilitative programs. Yet, while all these problems contributed to the eventual demise of the Elmira system (as well as other "reformatories" which had been built), the primary cause of inefficiency was the same

problem that thwarted such idealistic attempts in the past: the harsh realities of life in confinement.

...the biggest cause of the reformatories failure to live up to expectations was a matter of attitude. Despite the enthusiasm reformers felt for indeterminate sentencing and for prison education and job-training programs, despite Brockway's stirring call for an end to vengeance in criminal justice, the people inside each prison - inmates and guards alike - never stopped seeing prison as a place of retribution. Just as ideals about meditation and penitence had earlier been transformed into the thinly disguised cruelties of the solitary and silent systems, so plans for putting aside punishment and concentrating instead on reforming and training soon came up against the old realities of prison life.²⁶

Ironically, it was during this era of prison reformation that prison industries began receiving strong opposition from the civilian labor force. As labor outside the prisons began to organize, it perceived the use of convict labor as an economic threat to the civilian workers they represented. Because convict labor was so cheap, industries utilizing prisoners in their production processes gained a competitive advantage over those industries having to pay workers market wages. In 1869, when the Knights of Labor created their original constitution, a demand for the abolition of convict labor was included.²⁷

1900-1970

For some years the increasing opposition from organized labor had little, if any effect on the growth of prison industries. With the Industrial Revolution proceeding at full speed, and substitution of machinery for handicraft

production, large prison workforces became an attractive source of labor to many contractors.²⁸ The reformers who had at one time vehemently opposed the exploitive system of contract labor began to side with the contractors against organized labor, rationalizing that contract work was a better alternative than idle time. Then, in the midst of the growing controversy, prison reformists received support from an 1886 report released by the United States Labor Commissioner, Carroll D. Wright. The conclusion of the Commissioner's study argued for moderate regulation of convict labor as opposed to the complete abolition of contracts. Because of the political ammunition supplied to advocates of prisoner labor by the report, and the declining power of the Knights of Labor during this same period, prison industries for the most part operated as usual until the turn of the century.

The controlling factors in the convict labor problem of the nineties were thus local rather than national in character. Only in such states as New York, Pennsylvania and Massachusetts, were the interests sufficiently organized to secure their full desires...Organized labor, strong throughout the north in the mid-eighties, lost much of its political influence after the decline of the Knights...When the strength of the Knights declined, this plank of their platform was eagerly taken over by the rising Federation of Labor, but the cautious political activity of the subsidiary state federations prevented them from attaining the influence of their predecessors over prison development.²⁹

With the decline of organized labor's influence over general penological policy, the humanistic philosophies of

the reformers enjoyed a resurgence in popularity. The "Elvira System" of Brockway became the standard modus operandi of industrial prisons of the time.³⁰ Perhaps one of the most material of these reforms was the incorporation of the indeterminate sentence into judicially prescribed punishments. Originating in Ireland, this new system allowed for the selection of particular inmates for early release based on their behavior within prison.

The newly emerging trend of indeterminate sentencing was readily endorsed by the National Prison Association. However, it is safe to say that its overall effect extended much further than as a tool to encourage specific inmate behaviors; rather, it strongly encouraged flexible prison programs aimed at rehabilitating as opposed to punishing the criminal.³¹ Institutions were designed around fulfilling many of these humanistic proposals, and by about 1900 these changes had resulted in qualitative improvements in prison conditions:

At the turn of the century, the political progressive movement reinforced a revived interest in prison reform...These changes brought modernized heating and toilet facilities and some other improvements in physical structures. More attention was given to health services, especially to the detection of tuberculosis. Libraries, recreation, athletics and sports were included in daily activities...Vocational training again was emphasized in word if not in deed. However, the prison and reformatory remained primarily an industrialized facility and the major problem continued to be the use of prison labor in an overcrowded institution.³²

It was not long before the weakened forces of organized labor regrouped and once again became an impediment to major prison reform. Previous defenders of prison contract labor, such as Carroll Wright, began to rethink their old positions as more statistical data indicating the existence of unfair competition became available. In 1900 the United States Industrial Commission expressed sympathy with critics of prison contracts and stated that, "...the most desirable system for employing convicts is one which provides primarily for the punishment and reformation of the prisoner and the least competition with free labor, and secondarily for the revenue of the state."³³ The report was shortly followed by another in 1905, issued by the United States Commissioner of Labor. The report concluded that prison contractors often entered industries that were ailing in the outside economy. Some manufacturers who were victimized by competition with prison industries included broom and brushmakers, garment makers and certain areas of the shoemaking industry. Subsequent research indicated that due to low labor costs, prison products caused a lowering of the price levels in these industries.

In response, the AFL and small labor organizations began aggressive lobbying against many industries operating in prisons.³⁴ Unlike the short-lived campaign of the Knights of Labor, however, organized labor's movement against prison industries steadily gained support. By the mid-nineteen

twenties, the Secretary of Commerce, Herbert Hoover, began to advocate the use of federal legislation as a means of closing the open market to prison made goods.³⁵ Such legislation came to pass as the stock market crash of 1929 motivated Congress to enact greater economic regulations.

The Hawes-Cooper Act of 1929 was Congress' first major piece of legislative effort to regulate prison made goods. Exercising its authority under Article 1, Section 8 of the United States Constitution to regulate interstate commerce, Congress gave individual states authority to prohibit the sale of any prison made goods once the product was within their own borders.³⁶ When the Act was passed, only four states (New York, New Jersey, Pennsylvania and Ohio) had laws forbidding the open market sale of prison made products. Shortly after Hawes-Cooper went into effect in 1934, the Supreme Court upheld the constitutionality of the Act in Whitfield v. Ohio and declared:

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with enforced and unpaid or underpaid convict labor of the prison.³⁷

While the Hawes-Cooper Act did not close the floodgates on prison made goods, state and federal legislation continued to chip away at prison industry. In the wake of Hawes-Cooper, thirty-three states adopted statutes prohibiting the sale of prison made goods on the open market.³⁸

In 1935, a second law was enacted. Congress passed the Ashurst-Sumners Act which declared the shipment of prison made goods into a state with laws prohibiting the receipt, sale, possession and use of such goods, a federal offense.³⁹ In 1940, the Act was amended so that the interstate transportation of prisoner made goods for private use was a felony, regardless of individual state laws. Finally, in 1936, Congress succeeded in closing off the open market to prison industries with the passage of the Walsh-Healy Act.⁴⁰ While generally concerned with public contracts, this act forbade contractors from using convict labor in the manufacture, production or furnishing of any "...materials, supplies, articles or equipment used in government contracts where the amount thereof exceeds \$10,000."⁴¹ By the early 1940's, the cumulative laws of Congress and the states had their desired effects, and the supply of prisoner made goods on the open market were substantially curtailed.⁴²

It was not long afterwards, however, that World War II led to a temporary revival of prison industries as wartime necessities mandated the use of all available manpower. On the recommendation of the Director of the United States Bureau of Prisons, James V. Bennett, and the Prison Industry Section of the War Production Board, President Roosevelt issued Executive Order 9196 on July 9, 1942. The order allowed prisoners to manufacture goods for the war; by the time the war concluded, about 138 million dollars of goods

had been produced in American prisons.⁴³ This temporary revival of prison industries was short-lived as in 1947, immediately following the end of the war, the Executive Order was rescinded and prior laws restricting prison industries went back into effect.

The cancelling of the war contracts lowered the curtain on ...the industrial prison. No longer would the state or federal prisons focus their efforts on the maintenance of productive industries and no longer could state officials rely on the returns of prison labor to maintain or render large support to their penal institutions. A few southern states with fertile plantations, and a few northern states with lucrative industries...were the exceptions that proved the rule. Even there, the prison officials had to pay modest wages to insure production, and elsewhere they had to develop activity programs to take the place of the vanishing industrial assignments.⁴⁴

It is important to note that the restrictions placed on prison industries during the 1930's and 1940's did not eliminate the industries themselves, but instead changed their emphasis. Prison good manufacturing for outside sales, or performing work for private companies was virtually eliminated; nevertheless, convict labor within the institutions themselves continued. In many cases, convicts were put to work staffing the penitentiaries, performing such duties as kitchen or janitorial detail. Using inmates to fill these roles reduced the cost to the states of having to import outside labor to perform them. Convict labor was also used to produce goods for use by the state. Groups of "chain gangs" were not an uncommon sight at many state road construction sites during this time.

Accompanying this change in prison industries was a slow but consistent deterioration of penological reforms which reached their apex in the late 1930's.⁴⁵ Indeed, the prison environments of the 1950's closely paralleled those of the early 1800's -- authoritarian and repressive. Centralized authority was bestowed on a single figurehead, usually the warden, who would organize the prison into a rigid hierarchy. Inmates were generally secluded, and formal association with other inmates was kept to a minimum. Communication with the outside was severely restricted. Conditions were dreary and depressing, made worse by arbitrary punishments often inflicted by sadistic guards. The earlier paradigms of rehabilitation and reform were quickly being superseded by ideologies emphasizing retribution and deterrence. Repugnant prison conditions were thought useful as a means of decreasing crime by instilling a fear of incarceration.

These intolerable conditions led to a significant outbreak of prison riots. Many authorities concur that the 1950's was the most tumultuous and violent decade in American prison history. Between 1952-1953 over twenty major prison riots erupted in fifteen states leading to a significant amount of property damage and loss of life.⁴⁶ In most cases, these riots broke out spontaneously with the leaders of the riots and their demands evolving after the initial insurrection. Nevertheless, the causality

connecting the riots to prison conditions became apparent in the emerging theme of inmate demands which typically included: improved lighting and ventilation systems, revision of segregation systems, more humane treatment by the guards, improved medical treatment and no reprisals against inmates participating in the revolt. James W. C. Park, Associate Director of San Quentin Prison, delivered a paper to the California Department of Corrections in the late 1950's explaining his understanding of the genesis of prison disturbances:

A typical prison insurrection occurs when enough inmates are sufficiently discontented with their personal situation so that vocal and aggressive leaders are encouraged to agitate action. Usually a list of housekeeping complaints including food, sanitation, physical handling, housing or privileges is presented as the cause of the rebellion. The grievance list may not be compiled until well after the disturbance starts.⁴⁷

The trend of prison riots which began in the fifties continued into the sixties. Interestingly, however, the motives behind these prisoner uprisings began to change significantly. The Civil Rights movement, the Vietnam War and quickly emerging national and ethnic movements infused a new consciousness among inmates, who quickly became as agitated over political issues as with institutional issues. Exacerbating the growing prisoner's movement was a demographic shift within the composition of the prison population itself.⁴⁸ Many individuals with solid middle class backgrounds and advanced educations had decided to

illegally ignore orders for conscription and were consequently sentenced to federal prison. The infusion of these individuals into the general prison community led to a dissemination of idealistic philosophies concerning individual rights and a growing polarization of prisoners of different races and/or nationalities. Many Black and Chicano inmates, caught up in the movement, formed organizations (occasionally ganglike) which exemplified the fermenting unity between large segments of inmates.

1970-Present

Evidence of the newly evolving inmate psyche is clearly illustrated by contrasting the riot demands of the late sixties and early seventies with the earlier prisoner demands of the fifties. Whereas the latter demands focused almost exclusively on living conditions, the former's emphasized political and economic reforms.⁴⁹ A good case in point of this occurred during the infamous riot which occurred at California's Folsom Prison in 1970. During the uprising, almost all of the prison's 2,400 inmates refused to leave their cells or participate in running prison duties for 19 straight days, during which time they submitted to authorities a list of demands which has become referred to by penologists as, "The Folsom Manifesto." Characteristic of those demands which were of a political nature was demand number 7 which called for, "...an end to political

persecution, racial persecution and the denial of prisoners to subscribe to political papers or other educational and current media periodicals that are forwarded through the U.S. mail."⁵⁰ The economically oriented demands were specifically aimed at changing the prisoners relationship in their role as laborers:

Demand No. 11 We demand that industries be allowed to enter the institutions and employ inmates to work eight hours a day and fit into the category of workers for scale wages...Those industries outside who desire to enter prisons should be allowed to enter for the purpose of employment placement.

Demand No. 12 We demand that all institutions who use inmate labor be made to conform with the state and minimum wage laws.

Demand No. 21 We demand updating of industry working conditions to standards as provided under California law.

Demand No. 22 We demand establishment of an inmate insurance plan to provide compensation for work related accidents.⁵¹

Although most of these demands were not met, the inmates did succeed in establishing the first American prisoner's organization. Understandably, the organization was not warmly received by the guards or prison administrators and was thus short lived. However, several months later, it was reorganized in San Francisco by ex-prisoners who had previously served time in Folsom prison. The organization expanded quickly and by 1975 had a membership of approximately 20,000 inmates and ex-convicts (with the ex-convicts attempting to act as prisoner

representatives).⁵² Although this organization (officially called the California Prisoners Union) was larger than its predecessor, its overall positions were more conciliatory. However, when state officials began to actually discuss the possibility of officially recognizing the prisoners new "union", the state's Correctional Officer's Union threatened to strike, and thus aided in persuading the state to ignore the prisoner's union as a legitimate bargaining agent.⁵³

The next attempt to form a prisoner's labor union occurred shortly after the California uprisings at the Green Haven State Prison in Stormville, New York. The movement evolved in 1972 largely from legal work performed by the Prisoners Rights Project of the Legal Aid Society.⁵⁴ The union notified Commissioner Russel Oswald that it wanted to be considered the exclusive bargaining agent of the prisoners, but no agreement of any sort was ever reached. Since 1972 over twenty prisoner unions have formed. The median prison with a union contains between 1000 to 1250 inmates; of these the average sentence of the inmates is almost three years. Not surprisingly, some of these prisoner unions have led to violent inmate disturbances.

Walpole (Massachusetts Correctional Institution) represented what is thought to be the only officially sanctioned inmate union in this country; it was called the National Prisoners Reform Association (NPRA). Correctional officers and some disgruntled prisoners have charged that NPRA would be better described as a ruthless gang whose leadership literally terrorized both inmates and staff. Five prisoners were murdered and hundreds of inmates and guards were stabbed and

assaulted during the period from 1972 until January, 1975, when the NPRA was in power.⁵⁵

Reaction by prison administration to the formation of such unions has been hostile. In the past, inmate solidarity had frequently led to violence against prison administration and personnel. The attitude articulated by one state corrections director summed up the general reaction of administration officials when he stated, "These men are convicted felons - convicted of breaking the laws of society. Under no circumstances will I recognize their so-called union."⁵⁶ In a nutshell, this may explain why no collective bargaining agreement has been consummated with a prisoner union. Interestingly, however, it may be possible that a labor strike conducted by prisoners under peaceful conditions may theoretically qualify as a "concert of action" and therefore be subject to mandatory bargaining under the landmark ruling issued in NLRB v. Washington Aluminum Co.⁵⁷ For such a circumstance to legitimately arise, it must be a non-violent protest to qualify under the protection of Taft-Hartley. Given the tense prison environment, such non-violent protest is rare. This question has not as of yet been specifically addressed by the NLRA, or through interpretive decisions by either the Board or courts. Obviously, a decision finding a prisoner strike to be concerted action would have wide ranging implications.

During this period of the 1970's, as prisoners became more involved in seeking reform through asserting rights, the courts became an increasingly important conduit for securing such gains. Such was the case for prisoner unions. While the issue of "concerted action" did not arise as the result of a labor dispute, other cases did raise serious questions as to the legitimacy of prisoner's unions. For example, in 1974 the case of Paka v. Manson, arising in the state of Connecticut, addressed the First Amendment rights of free assembly for prisoners versus the security risk allowing such rights would entail.⁵⁸ In this case, the court decided against the union, though suggesting several alternatives, including selective interviews by authorities and hiring full-time ombudsmen. When weighing the civil rights of prisoners against the inherent restrictions suffered as a condition of incarceration, the courts have looked to the standards of "reasonableness" and "legitimate penological interests" as articulated in the case of Procunier v. Martinez, which holds that censorship of prisoner's mail was subject to Deminimis efforts to accommodate the inmates minimal rights to privacy.⁵⁹ In 1976, a North Carolina district court in North Carolina Prisoners Union v. Jones held a prisoner's union to be legitimately curtailed after it was proven that the union had become a reasonable threat to the security of the penitentiary.⁶⁰ Shortly afterwards, however, in the case of

Goodwin v. Oswald, a federal court interpreted the Supreme Court decision as to only limit prisoner unions when they represent a threat to penological security, and are not inherently taboo in themselves.

There is nothing in federal or state constitutional or statutory law of which I am aware that forbids prison inmates from seeking to form, or correctional officers from electing to deal with, an organization or agency or representative group of inmates concerned with prison conditions and inmate's grievances. Indeed, the 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 experiences, the wisest course for correctional officials to follow.⁶¹

Unquestionably, the legal system proved fruitful for prisoners attempting to assert various kinds of rights during the sixties and seventies. However, in the area of unionization, prisoners found the courts generally unsympathetic, and hence made no significant gains at union legitimacy. Conversely, inmates did have some success in the formation of various "associations." For example, in July of 1974, prisoners in Virginia established the Incarcerated Veterans Assistance Organization (IVA0). This association attempted to assure that convict veterans received their minimum G.I. benefits, and that offenders be permitted to serve their time in military services with the time credited toward parole. Other associations formed, including one in a Rhode Island penitentiary that publishes

a prison newspaper covering items about the prisoners and prison events.

Other areas of prison law were also brought under scrutiny. Although it was as early as 1949 when the landmark federal case of Coffin v. Reichard held that, "a prisoner retains all rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law,"⁶² it was not until almost twenty-five years later that the courts would use this standard in establishing the parameters of penological regulations as illustrated in the forthcoming chapters. Indeed, one of the most important changes to emerge from this era was a historical shift toward the recognition of prisoner rights.

Coinciding with the increase in prisoner litigation were greater attempts to incorporate treatment personnel into the prison community as part of the correctional process.⁶³ California was at the forefront of making such changes and added a large number of doctors, dentists, nurses, psychologists and chaplains to their staffs. Many institutions went so far as to change job titles, such as from "prison guards" to "correctional officers", as a means of illustrating this shift to progressive prison administration. It was not long before such programs proliferated throughout the penal community and the treatment officers took an official place in corrections.

Under the bold-faced rubric of "correctional treatment and training" may be found almost every brand of therapy, counseling and education intended to change the criminal into a law abiding citizen; from pastoral counseling to programmed instruction and operant conditioning, as well as stocked libraries, fully equipped gymnasiums and recreation yards...in California...research divisions within the organization, maintain computerized statistical information on their prisoner population, and publish research reports.⁶⁴

Counterintuitively, the statistics which were collected from prisons utilizing such diverse correctional techniques showed no evidence that a reduction in recidivism occurred as a result of using of these techniques. This type of data was not good news for advocates of continued prison reform - especially when failing programs in California had operating expenses of one-hundred million dollars.⁶⁵ While on one hand the penal system can generally be commended on exploring these various innovative reforms, on the other it was financially burdensome and produced no concrete results. Numerous reasons explain the failure of these new correctional initiatives. First, during the 1970's, there was a tremendous proliferation in the number of sentenced offenders that went unmatched by increases in facilities to house them; hence, overcrowding became a major obstacle for creating an atmosphere conducive to rehabilitation.⁶⁶ Second, the age old dilemma of retributinal vs. rehabilitational penal administrations led to conflicting goals which, in effect, circumvented effective reform.

Prisons address multiple, often contradictory goals. The conflicting goals of custody and treatment are

perhaps the most significant examples of this phenomena. However, neither of these goals takes account of the central fact that prison is a disruptive, stressful, often crisis-engendering experience. The failure of correctional systems to define as a principle task the identification and amelioration of inmate adjustment problems and crises may partially explain the prevalence of custodial problems and dismal showing of rehabilitational efforts.⁶⁷

A third persuasive explanation for the failure of these rehabilitational programs lies in the effect that overcrowding had on the prison industries themselves. With the great influx of prisoners coupled with the severely restricted markets, prison work programs quickly became overstaffed, both in terms of workers and correctional supervisors, thereby creating increased inefficiency in prison workshops as well as greater inmate idleness. Rehabilitational goals soon took a back seat to commercial thinking as both public and prison officials began to see these industries as means of generating much needed revenue.

Increasingly, the inclusion of private industry into prison work programs seemed to be an attractive solution. Thus, in 1976 the United States Department of Justice's agency, the Law Enforcement Assistance Administration (LEAA) implemented a private-sector model prison industry program in seven states.⁶⁸ The program made direct contributions of over two million dollars to improve industrial and administrative systems within these various industries. Officially named the "Free Venture" system, the program emphasized five central elements: A full days work for

prisoners; wages based on production, with the base wage significantly higher than traditional payments to prison industry workers; productivity standards comparable to free world industry; final responsibility for hiring and firing industry workers resting with industrial (not prison) management; and self-sufficient to profitable shop operations within a reasonable time after start-up.⁶⁹ When the experimental program was eventually terminated in 1980, those states which had participated were generally pleased with its viability.⁷⁰

The popularity of the Free Venture program in combination with growing popular support for private-sector participation in prison industries led to the passage of "The Prison Industries Enhancement Act" (P.L. 96-157 sec. 827) in 1979. This act, also referred to as, "The Percy Amendment" after its sponsor, Senator Charles Percy of Illinois, exempts up to twenty pilot projects from the restrictive provisions of the Walsh-Healy Act and Ashurst-Sumners Act. Central to the passing of this legislation was the consideration of how workers in outside labor markets would be affected, especially the vocal and influential members of organized labor unions. To accommodate their justifiable concerns, Congress added stipulations to reduce their inherently competitive advantage:

*that wages paid are "not less than that paid for work of a similar nature in the locality in which the work was performed."

*that prisoner workers are not deprived, solely by their status as prisoners, of employment benefits.

*that prisoners participate voluntarily.

*that organized labor be consulted before the initiation of any project.

*that the project does not displace employed workers or enter areas in which there is a surplus of available gainful labor or impair existing contracts for services.

*that deductions (totalling no more than eighty percent of gross wages) may be taken from inmates wages for taxes, room and board, family support, and victim's restitution, and only for those purposes.⁷¹

With the enactment of this legislation, the doors of the prison were open to private industry once again. Yet, unlike the times of the late nineteenth century, when private industry's use of convict labor went virtually unregulated and possessed a lucrative market edge, the Percy Amendment imposed limits on industry's authority over the inmates and balanced its position with outside industries. Moreover, not all states are receptive to private-sector involvement, with fourteen currently prohibiting the contracting of prisoner labor to private firms, and six states banning private industry involvement altogether.⁷² In many cases, training costs and turnover rates in prison are also higher than on the outside, thereby deterring many corporations from seriously considering a prison as a base of operations. On the other hand, state tax incentives,

low-cost space, strong inmate support of private industries and corporate altruism all factor into the continuing growth of these industries.

On December 31, 1984 there were twenty-six prison based businesses. These businesses operate inside seventeen prisons in nine states and in connection with nineteen private firms. Located in prisons ranging from small community-based facilities to large, rural maximum security institutions, they employ almost 1,000 prisoners, or 0.2 percent of the total prison population of the United States. Since the first of these projects began in 1976, these businesses have paid more than \$4.4 million in wages to their prison workers, and workers have paid over \$775,000 in taxes and \$470,000 for room and board.⁷³

With the exception of those corporations that enter the prison for purely philanthropic satisfaction, the majority of private sector industries which choose to employ a convict workforce do so with the expectation of reaping a worthwhile profit. Unfortunately, many businesses myopically focus only on labor cost and production estimates in making such decisions, and ignore critical human resource factors which often create problems for companies that are not used to managing their operations in a prison environment.

Accompanying the growing involvement between prisons and corporations is an increasingly prominent role for human resource administrators in the formulation and execution of sound strategic policies. It no longer works for the warden and CEO to simply meet and chart out idealistic plans for the course of the operation. Experience demonstrates that large cultural differences between business managers and

correction officials often leads to conflict which impedes smooth coordination of programs in the absence of personnel managers trained in dispute resolution.

Private sector businesses based in prisons will be successful only if both the department of corrections and the private company devote talented professional staff full time to the project...A full time project coordinator is a necessity for the department because of the continuous need for coordination and communication between the prison and the company because of the politically sensitive nature of private sector work projects with such interest groups as organized labor and trade associations...Businesses and prisons are fundamentally different in nature, the former requiring constant flexibility for success and the latter demanding predictable routines...This lack of understanding, coupled with an inability to communicate, has directly contributed to the failure of some projects.⁷⁴

The human resource function in the design and regular operation of prison industries is becoming indispensable for maintaining employment policies consistent with the law. While many employment statutes have been enacted, both on federal and state levels, in many cases the question of how they apply to convicts has been ignored. Subsequently, the applicability of these laws and other statutes regulating convict employment are interpreted through the courts. In some cases, the rules governing prisoner employment are quite clear; in others, the law is dynamic and evolving, hence mandating careful attention by the human resource department in establishing employment policy.

It should be clear by now that the American penal system has typically been characterized by frequent shifts between

the polar philosophical tenets of retribution and rehabilitation. Yet, in spite of the philosophy at any given time, American prisons have continued to deteriorate. Plagued by repressive conditions, severe overcrowding and hostile guards, the general prison environment is antithetical to programs aimed at rehabilitation. However, newly developing programs of private-sector industrial involvement in the prison community offer some hope at improving the quality of corrections.

For those inmates involved in private sector job programs...there are opportunities for a realistic work experience, enhanced post-release employment, and increased ability to compensate victims, reimburse the state, and provide family support. Private sector employment is one important tool in the arsenal of corrections officials for combating prisoner idleness and defraying some prison costs.⁷⁵

Optimally, the best system would be one in which the company, guards and treatment personnel would work together in a concerted attempt to integrate rehabilitative programs with effective prison security. Unfortunately conflicting roles, lack of communication and general hardened cynicism currently act as barriers to the establishment of a unified corrections team. Given the complex legal issues accompanying prison industries, and the hostilities among those in charge, the newly emerging role of human resources in prison employment will be a pivotal factor to the efficacy of prison industries in the 1990's.

CHAPTER III

PRISONER EMPLOYMENT IN CORRECTIONAL FACILITIES

Laws Regulating Prisoner Employment

FLSA Regulation

In 1865, Congress ratified the Thirteenth Amendment declaring the abolition of involuntary servitude. However, in so doing, Congress specifically excluded convicts from the broad protection of the Amendment by qualifying its universal coverage with the clause, "except as a punishment for a crime." The meaning of this exclusion was subsequently elaborated upon in the 1871 case of Ruffin v. Commonwealth.⁷⁶ In this case, the Court interpreted the Thirteenth Amendment exclusion to mean that prisoners were technically "slaves of the state" and thus not entitled to any compensation for their labor while in captivity.⁷⁷ For the next seventy years, no legislative or judicial modification of the convict "slave labor" doctrine occurred.

Following the onset of the Great Depression, the Roosevelt Administration began lobbying Congress to enact various new laws to regulate the employment relationship between employers and employees. One of the most significant pieces of labor legislation to emerge was the Fair Labor Standards Act (FLSA) of 1938.⁷⁸ Created in part

to spread the available work and in part to eliminate the exploitation of unorganized labor at the time, the FLSA established minimum wage standards, overtime penalties and child labor regulations. The Act also excluded specific categories of employment from coverage; however, the special case of prison labor went unmentioned. Consequently, the duty of interpreting Congressional intent and applicability of the Act to convict laborers fell to the courts to decide.

The first federal case to address the question of FLSA jurisdiction over inmate employment occurred during 1948 in Huntley v. Gunn Furniture.⁷⁹ In this case, labor, which was subcontracted to Gunn Furniture by the State Prison of Southern Michigan at Jackson for the production of shell casings, sued the defendant for minimum wages and overtime compensation which they claimed was due to them as employees covered under the FLSA. The prisoners alleged that the requirements of Section 3(e) of the Act, which defines "employee" as, "any individual employed by an employer," and Section 3(g) defining "employ" as, "to suffer or permit to work," were both fulfilled by the nature of their employment.⁸⁰ However, the Court did not agree with the prisoners' interpretation of themselves as "employees"; rather, the Court viewed convict labor as did their legal predecessors when they held that:

Labor of inmates of state prisons belong to the state and they can be lawfully employed only by the state... 'suffer or permit to work' within provision of

Fair Labor Standards Act defines "employ" as including to "suffer or permit to work" does not permit inclusion as an employee of one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages.⁸¹

For over two decades following this decision, judicial philosophy regarding prisoner non-employee status went unchanged. Then, in 1971, an interesting shift occurred in Sims v. Parke Davis and Company.⁸² The plaintiffs, again prisoners from the State Prison of Southern Michigan, sued the Parke Davis and Upjohn drug companies on the grounds they were entitled to recover the difference between the compensation they received for participating in clinical research experiments and that which would be due to employees covered by the FLSA. The court rejected the plaintiffs' claim using the "economic reality" criterion commonly used to test outside industry as a means of determining FLSA coverage.⁸³ Although the court failed to recognize the prisoners as covered employees, the decision suggested a significant change in judicial thought. The Sims decision recognized for the first time that prisoners could be covered by the FLSA if they satisfied the "economic reality" test. The impact of Sims upon subsequent cases was to place a greater burden on outside contractors to prove they were not the inmate's employer, or be obligated to pay federal minimum wages.

Not long afterwards, in 1974, Congress amended the Fair Labor Standards Act by extending its minimum wage

requirements to state employees. Like the original legislation, no specific mention was made concerning its applicability to convicts, who as "slaves of the state" were in effect state employees. This question was addressed by the courts in the 1977 case of Wentworth v. Solem.⁸⁴ Robert Wentworth was an inmate employed in the South Dakota State Penitentiary's bookbinding shop, and claimed the prison had violated both the Fourteenth Amendment's equal protection clause and the 1974 FLSA amendments by failing to pay the minimum wage for work performed in the bookbindery. The United States Court of Appeals for the 8th Circuit affirmed the district court decision clarifying congressional intent omitted in its new amendments.

We are doubtful that Congress, by the 1974 amendments, intended to extend the coverage of the minimum wage law to convicts working in state prison industries. Moreover, any attempt to so extend the coverage would be void under the Supreme Courts...holding that Congress may not constitutionally prescribe a minimum wage for state employees where to do so would, 'operate to directly displace the state's freedom to structure integral operations in areas of traditional government functions'...Wentworth's claim that the failure to pay convict workers a minimum wage violates the equal protection clause and also lacks merit.⁸⁵

Between the two decisions in Sims and Wentworth, the status of prisoners as "employees" became more difficult to reconcile. On the one hand, private employers became increasingly committed to circumventing various elements within the employment relationship which could lead courts to find FLSA applicability in the context of the "economic

realities" test; on the other hand, the statute alone provided a means by which private employers could use the prison as a subcontractor, which as an entity of the state, was exempted from the usual obligations of paying federal minimum wage. A partial resolution to this dilemma was the focus of Alexander v. Sara Inc.,⁸⁶ in which prisoners in a Louisiana state prison sued the defendant claiming they were entitled to the minimum wage for labor performed in establishing a plasma pheresis program within the prison complex. In this case, the company, Sara Inc., had contracted for the inmate labor from the Louisiana Department of Corrections (LDC), and paid the prisoners' \$3.00 a day wage to the LDC which then deposited the amount in prisoner accounts.

Central to the district court's rationale to find in favor of the defendant was the issue of "ultimate control." Here, it was the LDC and not Sara which both screened and vetoed convicts to be employed. Moreover, the court noted that the FLSA's intent to address the "standard of living" of American employees was not aimed at including inmates. Although the Court of Appeals affirmed the lower court's ruling, it did not do so without reservation. In its decision, the Court stated

Under the contract, although the state agency reserved the right to veto the assignment of work in the plasma laboratory, the inmates were engaged by Sara and worked under its direct supervision, with the agency responsible only for security at the facility. The

inmates so engaged worked at sanitation and clean-up, helped to prepare donors and extract blood, and performed clerical duties...On the surface, at least, Sara's relationship with the inmates appears to have all the characteristics of an employment relationship, even though the state agency has the ultimate authority over the inmates."⁸⁷

Interestingly, the court's criterion of "ultimate control" was not widely accepted by other courts. Specifically, within a year following Alexander, courts began returning to the more holistic idea of pursuing the "economic reality" of the employer-employee relationship with respect to convicts. This was the recent focus in the 1984 case of Carter v. Dutchess Community College.⁸⁸ In this case, the defendant instituted an educational program in the Fishkill Correctional Facility in New York. The college established the criterion for hiring inmate teaching assistants, and while the prison made the final selection, payment to the inmate assistants was made directly by the college. In his original complaint, the plaintiff, who was an inmate teaching assistant, sued both Dutchess Community College and the New York Department of Corrections, alleging violations of his Fourteenth Amendment rights of Due Process and of his Thirteenth Amendment protections from involuntary servitude on the basis of being denied the federal minimum wage for his work performed.⁸⁹

At first, the district court found in favor of the defendant on the basis that the "ultimate control" test, in this instance, indicated the true employer to be the prison

and not the college. However, the Court of Appeals rejected the lower court's decision on the rationale that it overextended the "ultimate control" criterion in determining the "economic reality" of the situation. Thus, in subsequently reapplying the economic reality test, the Court reversed the lower court's decision and, even more importantly, noted that prisoners were not inherently exempt from FLSA coverage.

...DCC made the initial proposal to "employ" workers; suggested a wage as to which there was "no legal impediment"; developed ineligibility criteria; recommended several inmates for tutorial positions; was not required to take any inmate it did not want...While perhaps not the full panoply of an employer's prerogatives, this may be sufficient to warrant FLSA coverage...We hold only that Carter has demonstrated genuine issues regarding material facts as to whether he is covered by the FLSA, and we emphatically hold that the fact that he is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA.⁹⁰

The overall effect of these legal changes on the human resource function of prison industry operations is quite significant. No longer can private industry enter the prison and use convicts as laborers without considering the possibility of being obligated to meet FLSA minimum wage and overtime provisions. While courts still favor the philosophy originally articulated in Ruffin v. Commonwealth, the growing involvement of private industry within prison coupled with greater judicial sympathy toward prisoner employees, signals a changing climate in which FLSA applicability is increasingly uncertain. Hence, to insure

compliance with the newly emerging changes in federal wage regulations, human resource planners are becoming urgently necessary for prisons in developing and maintaining their business operations. To date, only twelve states require payment of either prevailing wage or minimum wage to prisoners working in private-sector based industries, leaving industries in over three-quarters of the United States exposed to potential prisoner litigation. While the area of FLSA jurisdiction remains questionable, familiarity with both general employment law and specific evolving court precedents regarding prisoner employment are essential to the successful establishment of prison industries.

Workmen's Compensation

In the outside world, when occupational injury occurs, the employee can seek compensation from either state workmen compensation plans or through tort proceedings in civil court. The primary difference between workmen's compensation and tort remedies is that for the former, recovery is limited to statutorily prescribed levels based upon the relationship of the injury to the job as opposed to the relative fault of the parties; while the latter offers the potential of large damage awards, and is based upon the negligence of the employer. These courses of action are mutually exclusive. When workers compensation is the appropriate remedy for injuries suffered in the workplace,

the employer is generally insulated from further liability. Presently, approximately ninety percent of American workers are covered by workmen's compensation programs.⁹¹

The application of state workmen's compensation to prison employment is unresolved. Generally, courts have held that prisoners are exempt from workers compensation coverage. Central to this rationale is the "contract of hire" requirement of workmen's compensation laws. This requirement implies "a voluntary relationship between the two parties, payment of some kind, and at least two parties capable of giving their consent to enter the relationship."⁹² Applying this requirement, many courts have accepted that prisoners are not "voluntary" laborers because there is no freedom of contract in acceptance or choice of work, and therefore convicts do not satisfy the requirement of having a voluntary contractual arrangement between employer and employee. A case which typifies this line of reasoning is Keeney v. Industrial Commission.⁹³

In Keeney, the inmate petitioner suffered an eye injury from an electrical explosion which occurred as he was working in the prison's license plate manufacturing facility. The accident occurred when the plaintiff was receiving "two-for-one" time served and twenty-five cents per hour compensation for his work. Keeney sued, claiming that the fact he was paid by the prison was proof that he was an "employee" and thus eligible for workmen's

compensation under the Arizona workmen's compensation act. Affirming the lower court's denial of the prisoner's claim, the Arizona Court of Appeals' decision was reminiscent of the Ruffin ideology.

Absent election or appointment, there must exist a "contract of hire" to establish an employee-employer relationship. An inmate of the State Prison who is confined there as the result of conviction for a crime cannot be said to have entered into a "contract of hire" with the state. A.R.S. 31-254 allows a prison inmate to be paid from two to thirty-five cents per hour if funds are available for such payments...We do not consider it a "voluntary" decision on the part of the inmates to decide to work or face twenty-four hour confinement in their cells with no chance for the above mentioned "compensation."⁹⁴

Since this landmark 1975 case, many other state courts have adopted this same rationale in deciding the eligibility of convicts for workmen's compensation in their own states. For example, in Holman v. Hilton, the the United States Court of Appeals held that inmates are entitled to a cause of action against the state for injuries sustained during the course of prison employment under New Jersey's Tort Claims Act and not through state workmen's compensation remedies.⁹⁵ In a similar instance, the Supreme Court of Rhode Island in Spikes v. State rejected workmen's compensation coverage for prisoners because work assignments are involuntary, and in such, prisoner labor does not constitute a "...true contract for hire."⁹⁶ Indeed, the same reasons were given by a New Jersey appellate court in the 1983 case of Drake v. Essex County, when it denied a

prisoner workmen's compensation for an injury sustained during the course of his labor in prison.⁹⁷ But, in denying the prisoner's claim, the court clearly noted that the injured inmate was free to seek remedy under tort procedures. However, because workmen's compensation is developed and applied on a state (not federal) basis, in some states, like Iowa, injured prisoners are entitled to seek reparation for on-the-job injuries under their state workmen's compensation laws.⁹⁸ As of 1985, nineteen states authorized workers compensation payments to inmates injured on the job.⁹⁹

Prisoners' rights to pursue tort actions against employers creates a serious dilemma for both the prison and outside industry. Outside businesses wish to profit from economical convict labor but want to avoid the associated costs of liability for work-related accidents. Wanting to attract outside business, prisons may agree to assume liability to encourage businesses to leave the outside workforce which is protected by workmen's compensation regulations. Cases in which prisons and the business community attempt to share such liability may appear better on paper than in practice when faced by the plaintiffs' council who eagerly sues each and every party involved. As a solution, some states have included convict laborers under the umbrella of worker compensation programs. In the private sector, workman's compensation is seen by employers

as preferable to tort liability because uncertainty is reduced. Workman's compensation is somewhat mechanistic with relatively specific awards, while tort liability is unlimited and uncertain. In states permitting tort suits, common law principles of negligence including the corollary defense of contributory negligence apply. In such cases inmate fault contributing to the accident may act to limit or bar their ability to recover any damages at all.

It is important to note, however, that in spite of judicial reluctance to give prisoners full rights as employees, courts have afforded inmates liberal due-process protection. While not technically "employed", prisoners injured on the job must be provided with the same procedural due process as those clearly falling under the category of "employees." For example, in Davis v. United States a former federal prison inmate sued the United States alleging his Fourteenth Amendment due process rights were violated when his prison employer, the Federal Prison Industries, Inc., failed to provide an evidentiary hearing to challenge the prison physician's diagnosis used to process his workmen's compensation claim.¹⁰⁰ Finding for the plaintiff, the court held that if a state has a workers compensation program, inmates must be afforded the procedural due process right to assert such claims, including the right to a hearing and an attorney to represent them at such a hearing.¹⁰¹

Yet, the opportunity for a fair hearing does little to solve the question of eligibility or ineligibility of inmates for workers compensation. Absent coverage under a state workmen's compensation program, the avenue of relief is a tort claim against the negligent employer. In many tort cases, the state asserts common law or sovereign immunity thereby making the prisoners' recovery problematic. Nevertheless, many courts have upheld the right of prisoners to pursue traditional tort actions against the state. In Wells v. Southern Michigan Prison, the Michigan Court of Appeals ruled that a prison industry engaged in work of a proprietary nature cannot escape liability on the grounds of statutory immunity.¹⁰² Decisions in other cases have also extended the right of inmates to sue for injuries sustained during employment to impairment lasting beyond the term of incarceration on the basis that it violates the Eighth Amendment protection from cruel and unusual punishment.

One question unique to prisoner compensation is what to award those prisoners injured on the job who have been receiving payment in the form of time off for good behavior. In Thompson v. United States Federal Prison Industries, the United States Court of Appeals for the Fifth Circuit noted that "good time" credits were a legitimate form of compensation to be considered in determining lost pay to injured convicts.¹⁰³ Because inmates are often not paid in money but rather in good time credit, only upon release does

the injury create a compensative condition covered by workmen's compensation. The tension arises between workmen's compensation systems and employee recovery since the loss of good time credit cannot be made up following the termination of the sentence.

In Baldwin v. Smith, an inmate challenged the policy of the Vermont State Prison which gave prisoners a choice between receiving monetary compensation (up to ten cents per hour) or five days off the sentence for each month worked. Prisoners could elect only one form of compensation.¹⁰⁴ Originally, the District Court found that such a policy violated the Equal Protection clause of the Fourteenth Amendment since the indigent prisoner was left with no meaningful choice but to take the money; whereas prisoners who were more financially secure, and thus free of the coercive influence of poverty, were free to elect the "good time" option.¹⁰⁵ However, the Second Circuit Court of Vermont, in reversing the lower court's decision, ruled that even indigent prisoners had the ability to choose their own form of compensation.

...if indigent persons were forced to accept longer terms in order to continue to maintain a minimum standard of prison living or in order to "work off" a fine which they did not have the means to pay, the situation might be different...Furthermore, the choice between time off from work and more money is a choice that the average person in society is often forced to make. The choice between time off from prison and more material goods afforded to prisoners presents the prisoner with no different dilemma.¹⁰⁶

Baldwin thus offered prison industries covered by their state workmen's compensation acts full coverage of the acts without incurring the traditional wage costs of participation. By offering good time compensation, claims of injured workers could be "paid" without any monetary expense to the prison or company. Prisoners would lose the motivation to promote false claims or revive long-gone injuries upon release as a means of obtaining extra income since it would be difficult (if not impossible) to spend vouchers for time-off credit in open society. More importantly, such a program would still motivate prisoners to perform well, as the Baldwin court recognized in its decision.

In addition to alleviating the financial hardships of indigent inmates this law...clearly serves the ends both of rehabilitation of prisoners and of motivating prisoners to perform work in a "meritorious manner." As all courts and judges know, people respond to various motives. For some, one inducement may be effective; for other, another. Here, the one who determines which inducement to accept is not the judge nor the warden but rather the inmate himself.¹⁰⁷

Since the cost of maintaining a workers compensation program in prison is a fixed cost to the prison and/or industry, it is an attractive alternative to civil methods of settling injury claims because labor costs would still be less than paying outside wages. In establishing such programs, human resource planners must take great care to insure the inmates' due process rights by promulgating well defined procedures, including formal evidentiary hearings to

administer injury claims. The use of good time incentives as payment for labor performed may offer both low cost compensation in the event of injury as well as an important motivational tool for enhancing performance. However, it may not be in the best interest of society to pay habitual sociopaths with time off for work well done. Yet, if executed properly, workmen's compensation programs can be quite valuable for encouraging companies to enter the prison and maintaining economically stable prison industries.

Workplace Conditions

One need not look long or hard in a standard history textbook to find repeated examples of miserly and exploitative employers exposing workers to hazardous and inhumane conditions. Literature such as Upton Sinclair's, "The Jungle" are a dismal testimony to the potential consequences which may occur in unregulated workplaces. Prisons are no exception. Already notorious for their substandard living conditions, it is not surprising to find many instances of poor and dangerous working conditions in these institutions. For example, a 1977 investigation of a Rhode Island correctional facility revealed:

The industrial shops were...in a general state of disorder. The floors showed no evidence of recent sweeping. Dirt and grime were spread over machines. A public health expert noted numerous safety hazards, and concluded that no attempt is made to keep the shops either orderly, clean or safe. There is no safety

instruction for working in the shops, nor are there any safety signs.¹⁰⁸

In 1970, Congress enacted the Occupational Safety and Health Act (OSHA) as a means of regulating job safety and health conditions. The Act's coverage is quite extensive, reaching all states and over seventy-five million employees.¹⁰⁹ Acting under the auspices of the Department of Labor, the Occupational Safety and Health Administration enforces the safety standards of the Act through the use of Compliance Officers authorized to inspect worksites. Exclusions to the Act are limited to employees whom, "other state and federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."¹¹⁰ Similar to other labor legislation, OSHA makes no mention of its application to state and federal prison systems, and its coverage has become increasingly litigated.

In Watson v. Ray, the District Court for the Southern District of Iowa entertained a class action suit brought on by the prisoners of the Iowa State Penitentiary.¹¹¹ The suit sought equitable injunctive relief from alleged inhumane conditions of confinement rather than specific monetary damages. The court's subsequent investigation found the conditions as bad as the prisoners alleged, and ordered prison authorities to make immediate improvements. The order specifically prescribed the changes to be made and

charged the State Fire Marshall and Commissioner of Health with oversight responsibilities. The court noted, however, that conditions of the workplace were most appropriately addressed by the Occupational Health and Safety Administration.

The industrial facilities at the Iowa State Penitentiary are currently inspected by OSHA officials. Such facilities shall be maintained according to applicable OSHA standards, and the defendants shall take the necessary steps to remedy deficiencies cited by OSHA. All deficiencies cited by OSHA shall be reported to the Court, and copies will be made available to counsel for the parties.¹¹²

One year later, in French v. Owens, prisoners of the Indiana Reformatory at Pendleton brought an action against the Indiana Department of Correction alleging that the poor prison conditions violated their Eighth Amendment rights of freedom from cruel and unusual punishment.¹¹³ In assessing the prisoners' claim, the Court looked at various conditions of the prison, which in whole constituted the "totality of circumstances" upon which the prisoners' claims were based. In making such an assessment of the workplace, the Court used OSHA guidelines as their criterion and took due notice that, "Industrial safety and hygiene are poor with most shops and factories out of compliance with Occupational Safety and Health Administration's minimum standards."¹¹⁴ These OSHA violations were an important factor influencing the court's ruling in favor of the plaintiffs.

OSHA is not, however, the only authority to which inmates can turn to redress poor workplace conditions. State-established guidelines and standards created by regulatory agencies are, in some cases, legitimate requirements for minimum environmental standards. For example, in Battle v. Anderson, the court used standards by the American Public Health Association's Life Safety Code and the American Correctional Association's Standards for Accreditation in issuing an order for change.¹¹⁵ In some instances, courts themselves can address such problems by reinforcing their own standards and remedies upon the institution. In Ramos v. Lamm, the United States District Court of Colorado articulated a long and detailed list of changes to be made in the prison, including ordering the facility to act on the recommendations of a qualified engineer to reduce noise levels below 60 dB during the day and 55 dB at night.¹¹⁶ Subsequently, in the 1986 case of Udey v. Kastner, a federal district court in Texas held that a state prison had to comply with the established state guidelines regulating inmate health and safety.¹¹⁷

The important benefits of maintaining a safe work environment for prisoners should not be overlooked. Because prisons often wait until courts impose orders requiring adherence to specific standards before they initiate an action to remedy the situation, the rehabilitative effect of the labor itself may be lost as inmates become bitter and

resentful over the conditions of their employment. This consideration was of particular interest to the judge presiding over Palmigiano v. Garrahy.

The court was particularly struck by the testimony of one expert who had directed the prison systems in both Minnesota and Delaware for a number of years..In common with other witnesses, he found every evidence of a management overwhelmed by the problem of managing a population of prisoners in a building with so many problems, and a staff so accustomed to conditions of deterioration that they had become inured to what they lived with. These conditions and this attitude have a devastating impact on inmates, reinforcing their low self-esteem and making rehabilitation impossible.¹¹⁸

In many cases, court orders to reform conditions in the prison go unheeded because the institutions lack the funds to implement such changes. Outside industries may thus present a welcome conduit to achieve compliance with such orders since they can provide both money and expertise to the prison factories to comply with OSHA and other regulatory standards. However, the strict regulation of workplace conditions may be a double-edged sword, as the expense for the clean-up of prison work areas may deter some industries from becoming involved. The human resource function can be invaluable for establishing and implementing changes, insuring the health and safety conditions of the workplace while satisfying the strategic interests of private industry. As opposed to other labor legislation, such as the FSLA whose applicability is ill-defined, the application of OSHA and other state statutes have clearly been endorsed by the courts, making the job of the human

resource administration less theoretical and more practical than in other areas of prison employment.

Rehabilitational Work Programs in Correctional Institutions

Not all prison work programs are designed to achieve the same ends. Some simply aim to reduce prisoners' idle time; to this extent, such meaningless labor as breaking rocks with a sledgehammer accomplishes the objective. More often, however, modern prison work systems have more sophisticated goals, such as reimbursing the state for the costs of incarceration and providing restitution to victims of the convicts. In such cases, it is necessary to look at the net profit from the inmate's labor to determine whether or not the work program is successful. However, unlike human resource administrators outside the prison who generally emphasize financial data to assess the effectiveness of their policies, correctional human resource administrators are faced with an added dimension to consider in establishing and maintaining workplace policies: the rehabilitational efficacy of the program.

Rehabilitation is one of the most important purposes of correctional institutions. This is because most of those who enter the prison are someday released, and thus provided with the opportunity to perpetrate their acts against society once again. Currently, only sixteen percent of all

prisoners ever serve out their full sentences.¹¹⁹ While the prison itself is to serve as a deterrent to crime, it is necessary to consider that for those leaving the prison, it did not work as a deterrent the first time around. Rehabilitation and not deterrence remains society's best possibility for preventing further criminal activity by convicts leaving the institution. Unfortunately, recent statistics indicate a general failure of correctional institutions to correct. Over half the inmates currently incarcerated in American prisons are repeat offenders.¹²⁰ Thus, when assessing whether or not most prison work programs are successful, it is essential to look beyond the financial spreadsheet and to the recidivism rates of convicts leaving the institutions.

Before examining the various types of rehabilitation oriented work programs, it is necessary to point out that the evaluation of these programs should not be based solely on recidivism rates alone. In many instances, high recidivism rates by themselves are not enough to provide a solid causal link between the prison work program under examination and failure of rehabilitation. The difficulty in making such assessments is that the reasons behind a prisoner's recidivism might or might not stem from failure of the work program itself. For example, a convicted rapist may rape again after release because of deeply rooted psychological problems unrelated to work, whereas another

prisoner convicted of armed robbery who continues such activity after release may do so because of a failure to provide him with practical and relevant job training in the prison work program. In many cases reasons for recidivism overlap, such as an impoverished ex-convict who is also a drug addict. To fully make a comprehensive evaluation of rehabilitative prison work systems it is important to consider the subjects themselves.

One important finding has been that the ability for convicts to perform "meaningful" work upon release affects dedication and commitment to keeping a job. As work becomes more meaningful, there is less inclination to regress back into crime. Phillip Cook tracked 325 men who were released from various Massachusetts prisons and found that those who found a "satisfactory job" (not just any job), had fewer parole revocations during the year and a half follow-up period than those who did not. This finding was consistent for all groups including race, intelligence, education, marital status and prior occupations of ex-convicts. Additionally, these results were consistent with current psychological data of criminal job attitudes.

For many criminals, work means to sell your soul, to be a slave...Yet, with few marketable skills, they refuse to assume the only positions for which they are qualified; these often involve routine and menial work. Rather than scrub floors, pick up trash or carry luggage, they prefer to remain unemployed. Such labor is not at all in line with their inflated notion of their desired station in life. Rejecting a janitorial job at a restaurant, one young man told his counselor,

'I ain't no peon.' Another criminal, after being dismissed from his tenth job in one year, admitted, 'If the job meant something, I would have been there.'¹²¹

One example of an industry attempting to provide meaningful work training is a vocational computer programming course which was introduced in Massachusetts' Walpole maximum security prison in 1967. The company, Honeywell, Inc., supplied the computers and original training personnel.¹²² In order to qualify for entrance into the program, inmates had to take the same entrance exam given to applicants for the same course on the outside. The program was completely voluntary and its first class began with fifteen inmates.¹²³

Actual classes at Walpole began in 1968 and quickly showed promising results. The inmates first real work experience stemming from their training was to provide various state agencies with free programming services valued at two million dollars between 1968 and 1972. Because of its success, Honeywell loaned (on a long term basis) a Series 50 computer to the programming group at Walpole, and in 1972 extended its training to include courses in computer operating and maintenance engineering. In addition, Massachusetts passed a law (also in 1972) which allowed inmates to receive pay for their work. Soon, the individual groups began working for both private firms and government agencies on a fee basis. Honeywell provided additional support by donating a Series 200 computer to the medium

security prison in Framingham. Between 1968-1978 almost 350 inmates successfully completed the program. In assessing the success of its vocational training program, a Honeywell official noted:

Of the 650 or so who have passed the qualifying examination and entered the program in the last ten years, nearly 400 have become proficient enough to get jobs as beginning programmers or computer operators...The 350 graduates who have been released from prison have distinguished themselves with a number of professional successes and a particularly low recidivism rate - between three and four percent. This compares to national rates that are estimated as high as seventy percent.¹²⁴

The state of Minnesota has also had notable success with implementing vocational training programs in the prison setting. Unlike most states, Minnesota had never enacted legislation prohibiting the sale of prison made goods to the private sector, and consequently has greater involvement with outside industries than most other states.¹²⁵ Of particular significance is the on-going participation of the Control Data Corporation within the Minnesota Correctional Industries (MCI). By acting as the primary project consultant since 1970, and having loaned a company executive to oversee and develop MCI between 1977 and 1979, Control Data helped to improve the quality of inmate work programs in many of Minnesota's correctional institutions. Convicts employed in these various programs successfully developed such skills as computer disk-drive assembly, data-entry (for such clients as B. Dalton) and telemarketing services.¹²⁶

Like Honeywell, the program has been quite popular with prisoners who, after participating in the program, are released from prison with more marketable skills than they had at the time of incarceration.

Some attempts have been made to create a single, well defined industrial system which maximizes the rehabilitational emphasis of convict labor. In 1985, the Training, Industry and Education (T.I.E.) conference, co-sponsored by the Correctional Education Association, the Illinois Correctional Association and Prison Industry Association was held in Chicago.¹²⁷ This conference was the first national convention aimed at integrating the views of correctional educators, vocational instructors and prison industry staff. The overall goal of T.I.E. was to create new training models for enhancing the rehabilitation of offenders and doing so through establishing unified goals and ventures between treatment and administrative personnel.¹²⁸

Unanimous agreement between these three administrative structures is difficult to achieve given each of their roles. But an even greater obstacle is the policy of many states which separate the jurisdictional responsibilities of the agency resulting in uncoordinated delivery of education and industry management. Given the vast disparity between the many administrative structures within any given system, and the realities of dealing with an overburdened

bureaucracy, the recommendations from the conference suggested that a cooperative as opposed to integrated T.I.E. paradigm was the most pragmatic strategy for state agencies.¹²⁹

One of the key starting points to the strategic development of such a model was agreed to be in the area of prisoner classification and job evaluation. In order to place inmates in jobs which they could either maintain or learn to perform, it is necessary to have a means of taking a comprehensive inventory of a prisoner's ability and comparing it to the breakdown of competencies required for any task. By having such a system, a more accurate assessment can be made for determining an inmate's optimum mix of vocational education and/or on the job training needed, while avoiding the common pitfall of underrating the vocational talent of the prisoner.¹³⁰ Overcrowding has been a formidable obstacle to implementing a workable classification system.¹³¹

Another problem facing the development of specialized rehabilitative work programs is a shortage of correctional teachers. The majority of teachers in prison have no specific correctional training and have experience only in public school systems. Given the unique needs of the inmates, and the isolated environment of correctional facilities, teachers without adequate training are almost impotent in their role as educator. Only eight to ten

correctional education degree programs are offered throughout the United States.¹³² Moreover, given the low pay and truculent working conditions, it is not a very sought after degree. Hence, training becomes an important factor to implement an effective education program in conjunction with the training and industrial background of the convicts. The conference emphasized this point in their conclusion:

[The convicts] need, and that of society, is to bring them up to a level of functional competency; and that involves basic academic and life skills, vocational training, and work experience combined. Without such training, the odds of ex-offenders making it on the outside and for society to experience relief from the current, enormous burden of crime, are not very good. The T.I.E. approach may just offer a better and more productive approach than that of the past, where three program areas worked in isolation, even at times in competition or at odds.¹³³

The federal prison system has also taken measures to provide their inmates with rehabilitation-oriented work programs. However, as opposed to the state prison systems which allow private industry to train and employ inmates within their correctional facilities, the federal prison system is the sole employer of its convict population.¹³⁴ Officially recognized under the trade name of UNICOR, Federal Prison Industries, Inc. is owned by the government and sells its products exclusively to other federal agencies.¹³⁵

Training received by the inmates in the federal prisons is superior to that received by convicts in state

correctional institutions. One reason for this is because a greater percentage of federal convicts (33 percent) are employed than state convicts (10 percent). Another reason is that the federal training programs are much more comprehensive; a total of 225 formal training programs are now offered in federal correctional institutions. In addition, most federal prisons maintain an ongoing effort to improve and expand on these various work programs.¹³⁶ Indeed, so comprehensive are some of these programs that many prisoners earn degrees in addition to vocational training.

Occupational training is offered through UNICOR and includes on-the-job training, vocational education, and apprenticeship programs...Although enrollment is voluntary, program options are extensive, ranging from Adult Basic Education (ABE) through college courses...A mandatory literacy program was implemented for inmates in 1983...[and in] 1986, this standard was raised to an eighth grade literacy level...The Adult Basic Education program has been successful. Enrollments exceeded 8,000 in 1986, and there were over 5,000 completions. Certificates for completion of the General Education Development program were awarded to over 3,000 inmates.¹³⁷

It is important to note however, that simply training the convicts while they are in prison is not the only factor which makes these programs valuable rehabilitative tools. Equally as important are the wages prisoners receive when obtaining a job in the open market. In 1984, Professor Samuel L. Meyer, Jr. of the University of Pittsburgh, reviewed the data from the Baltimore Living Insurance for Ex-prisoners (LIFE) program which followed the recidivism

rates of convicts released from Maryland's state prisons.¹³⁸ Meyer's analysis focused on the relationship between expected wages and prior employment to recidivism. The result of this investigation, which included high risk recidivist groups, demonstrated that prisoners who received higher wages following their release had significantly reduced rates of recidivism.¹³⁹ Thus, in explaining the success of the various vocational training programs in reducing recidivism, it is equally as material to understand that the amount of wages an ex-convict receives when released is as important a factor as the "meaningfulness" of the task for which they become trained to perform.

Unfortunately, much of the work provided to inmates within the prison setting develops less marketable skills (and are thus lower paying) than in vocational and industrial training projects. Indeed, the majority of employment within prisons are tasks performed for the maintenance of the institution itself.¹⁴⁰ These jobs include such tasks as kitchen detail, laundry services and painting. In many cases, the worst jobs are reserved for unpopular inmates or as a form of punishment, while a majority of the unskilled inmates are placed into a general "labor pool" which subsequently assigns them to fulfill any one of numerous menial chores.¹⁴¹ Prisons have developed classification programs to sort out skilled or educated inmates and place them in jobs requiring greater ability.

In many instances, competition arises between prisoners over jobs, as those which go to the skilled over the unskilled are often the most desirable. For example, the job of clerking is often sought after because with it comes increased authorization to move freely through the prison and many times leads to better treatment by prison administrators. In such cases, those prisoners with education and skills are caught between pursuing rehabilitative programs which offer opportunity for a good job upon release and more immediately rewarding but less rehabilitative jobs for the present. While currently undocumented, it is feasible that a consequence of this may be to drain some of the more talented prisoners away from programs which could lead to better odds for their future rehabilitation.

The current trend of private-sector involvement with prison industries may offer a solution to this precarious dilemma. Prior to the enactment of the Percy Amendment, prison-run industries were limited in their ability to provide relevant work experience to convicts prior to their release.¹⁴² However, following the enactment of the Amendment and subsequent change in FLSA application as discussed in the previous section, private-sector based prison industries now not only provide job-relevant work for prisoners, but have increased the pay for participants to almost minimum wage. Presently, the average pay for jobs

given to convicts working in prison industries is five to ten times higher than the pay received for performing other non-industry jobs available in the same facilities, thereby creating a strong incentive for attracting those inmates who would previously opt for the "cushier" prison positions.¹⁴³

An important question which has arisen is this issue of pay disparity between inmates. Theoretically, it would seem that because of the large differences in pay, conflict between inmates over slots available in these programs might arise, thereby adding to the already tense environment within prison and possibly acting to reduce the rehabilitative aim of the projects. Fortunately, this does not seem to be the case according to extensive interviews with prison officials.

Private sector involvement in prison industries often introduces significant wage disparity into the prison environment, since in most cases prisoners who work in private sector projects are paid much more than those who do not...There has been considerable speculation about the practical implications for prison administrators of such income differentials, with much concern centering on the possibility that wage disparities might cause hostility among prisoners. However, every prison superintendent interviewed by the CSA study indicated that this has not been a significant or widespread problem.¹⁴⁴

In addition to simple private sector involvement, prisons themselves are beginning to experiment with different models of work programs (with and without private industry) that act to enhance the rehabilitative value of convict labor. Perhaps the most significant of these experiments

was conducted eight years ago by the Law Enforcement Assistance Administration (LEAA), which funded a study with the purpose of identifying "...short and long term strategies for changing prison industry systems into self-supporting labor systems promoting the rehabilitation of prison inmates."¹⁴⁵ As a result of this investigation, a new prison work system, deemed the "The Free Venture Model", was introduced. The Free Venture Model attempted to establish prison workplace conditions which mirrored outside job world conditions as closely as possible. In this manner, the Free Venture system aimed to establish a realistic framework for providing convicts with the abilities to obtain similar jobs following their release from prison. The Free Venture Model centered around of six basic tenets:

1. A realistic work environment (with a full workday, wages based on work output; productivity standards comparable to outside business, hire and fire procedures within the limits of due process rights; and transferable training and job skills).
2. Partial reimbursement by inmates for custody and welfare costs, as well as restitution payments to victims.
3. Graduated preparation of inmates for release.
4. Fixed responsibility - with financial incentives and penalties - for job placement on release.
5. Financial incentives to prison industry for successful reintegration of offenders.
6. Self-supporting or profit-making business operations.¹⁴⁶

Connecticut was used for the preliminary testing ground for market, sales and production projections. However, no type of specific industry (public, private or joint venture) was ever selected. Shortly before the first of these Free Venture projects were to be established, the LEAA modified the model dramatically, and the actual change of these new programs from the status quo was negligible.¹⁴⁷ Following the changes, no financial incentives remained for post release job placement, the graduated-release requirement was excluded and rewards for successful reintegration were withdrawn. In short, the organizational and individual incentive plans, which was necessary for the Free Venture to significantly encourage motivation, were removed.¹⁴⁸ As a result, the program was short-lived and generally viewed as a failure.

Unfortunately, many of the new rehabilitative programs introduced into prisons over the last decade have been limited almost exclusively to male facilities. Because there is a significantly lower amount of incarcerated females in proportion to males (about 4 percent), female correctional facilities tend to be quite small; even the largest of women's prisons house a maximum of only five-hundred inmates at a time.¹⁴⁹ As a consequence, many of the limited resources available to prisons are allocated to larger all-male penitentiaries over smaller female institutions. Additionally, the stereotypical view of women

oriented jobs is still quite pervasive among correctional personnel, and has led to job training programs which confine skill development to only these select vocations.

Correlated with size is the problem of resources. Studies have shown that prisons for women suffer from inadequate facilities, insufficient staff, limited programs, and inappropriate inmate training programs, consisting largely of sewing and cooking lessons. Of course it is also true that male prisons suffer similar problems; however, women's prisons have been criticized for not addressing the current needs of women by failing to provide programs to help them learn job skills instead of domestic skills and for not providing them even the minimal vocational programming which is available in prisons for men.¹⁵⁰

It should be evident that the many areas which are essential to making a prison work program rehabilitative fall within the realm of the human resource function. Because of the limited spaces available to convicts in advanced vocational training programs, the establishment and maintenance of well run selection processes are necessary to insure that such projects yield the maximum possible benefits to its participants. Equally as important is establishing motivational reward systems which attract and keep inmates who are both capable and committed to performing the tasks demanded of them by the given industrial endeavor. Human resource administrators who are involved in running such projects must also be sensitive to the problems which may arise under the unique conditions of an involuntarily confined workforce, such as succession

planning to accommodate the inevitable turnover which occurs as "employees" are paroled.

CHAPTER IV

CIVILIAN EMPLOYMENT IN CORRECTIONAL INSTITUTIONS

Selection and Training of Correctional Officers

The role of human resources in the correctional setting is not exclusively limited to prisoner work programs. Correctional institutions are an important source of employment for many outside civilians. In 1985, for example, over one hundred and seventy thousand persons were employed in state correctional institutions alone.¹⁵¹ Of these, the vast majority were hired to function as correctional officers. With the exception of visitors, service people, a few specialists, and treatment personnel, inmate contact with outside civilians is usually limited to the guards. Because they are the ones directly controlling the inmates, correctional officers have a great deal of influence over the efficacy of prison programs, as noted by the President's Commission on Law Enforcement and Justice in 1967:

[Correctional officers] may be the most influential persons in institutions simply by virtue of their numbers and their daily intimate contact with offenders. It is a mistake to define them as persons responsible only for control and maintenance. They can, by their attitude and understanding, reinforce or destroy the effectiveness of almost any correctional program.¹⁵²

When viewing the correctional institution as an instrument through which society can attempt to rehabilitate deviants, it may be helpful to visualize the prisoner as the "product" of the institutional process. Beginning with 'raw materials' of destructiveness and malevolence, the institution aims to produce a useful citizen characterized by constructiveness and benevolence. While this is not always true, as in the cases of inmates known as "lifers" (nob-paroleable within a reasonable estimate of life expectancy), death-row residents and exceptionally violent and incoragable inmates, the rehabilitation of prisoners remains a paramount and attainable goal of corrections. Because of their position, correctional officers can make significant contributions to facilitate convict rehabilitation or be formidable impediments to such an end. With such a pivotal role, the human resource function becomes critical, as the selection, training and managing of correctional officers can greatly affect how the prisoners are influenced.

Unfortunately, the methods used for selecting correctional officers have not changed much over the last century. Personal traits such as size and strength are often more important criterion for selection than education and experience.¹⁵³ One reason for this has been a slow change in defining what the role of correctional officers should be; the myopic stereotype of the "custodial" guard has been

persistent and hard to overcome. In this view, the role of the guard is seen as one limited to simply maintaining order and compliance to institutional rules by the inmates.

The officer's formal training consists primarily of instruction in the skills and mechanics of security procedures and the handling of inmates to maintain order and prevent trouble. The real learning (training) occurs on the job under inmate testing and manipulation attempts. At the same time, officer subculture pressures the trainee to conform to established security attitudes and behaviors. The primary measure of a correctional officer's success on the job is the degree to which authority is established in the management of inmates.¹⁵⁴

Problems stemming from the lack of education are often exacerbated by inadequate pre-and-in-service training programs. Because of the shortsighted understanding of correctional officers as custodians, most training programs focus on building physical agility skills (ie: needed for subduing violent prisoners) rather than on personal attitudes and qualities. Many screening procedures ignore traits such as temperament altogether. Frequently, guards develop animosity towards the prisoners as they see inmates receiving better job training than themselves.¹⁵⁵

A second reason for the stagnation in correctional selection policy has been an underdeveloped role of human resource departments in the establishment of selection and training criterion for new correctional officer recruits. Moreover, because of tight budgets and remote locations, human resource departments have a great deal of difficulty recruiting desired personnel into the correctional facility.

The consequence of this problem has been the staffing of many underqualified personnel throughout the ranks of correctional officers.

Of the 100,000 men and women in custodial jobs, over 42,000 are in state operated correctional institutions. Although many of these persons are untrained, unskilled, and have less than a high school education, they end up in correctional facilities because many of the correctional facilities are so isolated that no other personnel can be found...Only half the states now require a high school diploma or GED (high school equivalency) as a minimum entrance requirement for officers.¹⁵⁶

Disdained by the inmates, and often put down by members of the outside community, prison guards often feel ostracized and bitter. The anger and frustration experienced by the guards intensifies as they spend a great deal of their time, or even come to live, on the prison grounds; in many cases, these feelings are taken out on the prisoners. Additionally, scrutiny of their actions by upper level officials who are sensitive to prisoner grievances lead guards to perceive an erosion of their authority; this also adds to their sentiments of worthlessness and resentment. Studies on correctional officer job satisfaction have found many guards to suffer "...lack of clarity of work roles, fear and boredom, confusion concerning relationships with prisoners, perceived lack of opportunity to provide meaningful input into management's decisions, or low self esteem."¹⁵⁷

Quite frequently, the uniform disdain and cynicism of the guards results in the development of informal, but very influential subcultures among custodial personnel.¹⁵⁸ These subcultures are almost exclusively centered around maximizing the ability to control inmates, and in most cases, serve to fuel the already hostile environment between the keepers and residents. Indeed, it is not difficult to see how such a climate can impede attempts to integrate prison guards into the rehabilitational programs of the correctional facilities.

The officer subculture...encourages officers to use intimidating behavior to establish authority over inmates. Interaction with the inmates in other than a custodial and managerial capacity is discouraged...If reformation is to occur in the prison, dynamic change must focus on the officer subculture, which has the most direct contact with the inmates. The old system of corrections must change. The old concept of the 'guard' must be replaced by a new concept of correctional counselor, well trained in modern correctional techniques. The only way this new officer will come into being is through a specific commitment to professional training and excellence.¹⁵⁹

It is important to understand that the development of a correctional staff committed to facilitating the rehabilitation process depends upon the implementation of comprehensive training programs as much as it does on effective personnel screening. As a result, many authorities examining the problem have concurred that innovative techniques should be developed and employed to better train the guards in dealing with the stress of their

jobs, as well as more sophisticated means of eliciting desired behaviors from the inmates.

After the selection of personnel who are qualified for the work, attention must turn to providing adequate training, in order that those individuals understand the nature of their role and develop the necessary skills required to satisfactorily supervise inmates. While most institutions do provide some preparatory training for prison officers, course content is overwhelmingly oriented toward specific techniques and procedures applicable to custodial care...[Of] greater fundamental importance is the need to focus on the attitude of officers toward inmates and the development of interpersonal relationship skills.¹⁶⁰

Given the intense job dissatisfaction and resentment of the guards, it comes as little surprise to find that many individuals who accept jobs as guards often make considerable effort to remove themselves from all possible contact with the inmates. This is apparent in the growing demands of "job bidding" by senior prison guards for the right to select their positions within the custodial structure; in most cases the jobs bid for by the senior officers are the ones furthest from the inmate population. Jack Van De Car, director of manpower management for the New York Corrections Department, has conceded

[Job bidding] causes officers to bid away from contact jobs. As a result, junior officers, the least experienced, have to deal with inmates. We have a lot of officers who bid jobs who don't meet the qualifications. It takes a lot of balls to say, 'You can't have this job because you can't do it.' Then they file a grievance. It is said that before bidding, all the plum jobs went to friends of the superintendent, but now we are unable to pick the right man for the job or remove a poor one.¹⁶¹

The immense dissatisfaction of the guards becomes manifested in an extremely high rate of turnover. In 1989, the national average turnover rate for correctional officers was 14.9 percent.¹⁶² This high incidence of turnover presents a formidable challenge to human resource administrators in the correctional setting. On one hand, recruiting and training costs for new correctional employees are considerable. Several weeks of training for newly hired correctional officers costs between five-hundred and a thousand dollars per employee.¹⁶³ Likewise, the participation costs of managing the posts of new recruits while they are training, overtime fees and lost productivity which occurs in the training process, all contribute to significant increases of the initial overall expenses. On the other hand, the reduction of employee attrition rates leads to a long-run savings, thereby offsetting many of the disadvantages of the higher costs incurred during the selection and training process..¹⁶⁴

While there are no pat answers to this vexing dilemma, correctional administrators concur that reducing turnover is the most desirable option, both in terms of cost and for maintaining a stable prison environment. However, reducing turnover of prison employees will require more than simple pay raises or increased training. Human resource administrators can make valuable headway through initiating programs aimed at improving the quality of worklife for

prison personnel beginning with a thorough job analysis of job content.

Some employees may find certain aspects of correctional work are highly unpleasant. To the extent that many employees share these perceptions, such tasks may initiate unnecessary attrition. If these types of tasks can be identified, and alternative work processes developed that are effective, yet less aversive, this source of employee attrition can be reduced. Therefore, research and evaluation should be taken at the agency and national level to identify specific job designs or tasks associated with attrition, and possible alternative work methods to reduce these effects.¹⁶⁵

Quite often, however, gains made through the implementation of such programs are offset by poor correctional management and lax prison administration. The lack of human resource impetus into such areas as job placement and succession planning has led to the institutionalization of management recruitment systems based on seniority and cronyism as opposed to education and talent. Consequently, even when the correctional facility provides sufficient job training and personnel support systems, little reason exists for guards to extend themselves beyond their minimally required duties for the sake of the prison or inmates. In addition, frustration with incompetent management may fuel feelings of job dissatisfaction and circumvent attempts to improve the attitudes of the guards.

It is almost universally recognized today in industry and the higher levels of government that management is a science as well as an art, and that the field of management is rapidly approaching the status of a profession...The field of corrections, in contrast is characterized by a virtual absence of professionally trained managers. Often advancement is through the

ranks, with little thought to the more difficult and professional demands placed on higher management levels...Seniority and cronyism have proved grossly inadequate as a selection and advancement criterion.¹⁶⁶

Recently, growing attention has been devoted to the possibility of expanding the privatization of correctional facilities to include private sector management of prison operations. While prison industries are the predominant area in which private corporations have become involved, other areas like food and laundry services, have become the target of private involvement. The argument asserted by interested businesses is that prisons can be more effectively managed by private companies than state or federal agencies. Those opposed to the idea are quick to point out that only the state should maintain control over inmate management, as it is the state which ultimately compromises the constitutional rights of the prisoners.¹⁶⁷

While there are only a few examples of private sector run correctional departments today, there is growing momentum towards such operations in the future. One of the most promising areas of private sector involvement is in using private managers to manage prison personnel. By introducing private management professionals into areas such as human resource administration, many believe the current problems of recruitment, training and retention of correctional employees can be significantly improved.

...there is considerable motivation for the private-sector manager to recruit well, train personnel

for truly necessary skills, and treat employees decently. When this happens, staff will stay because they like the job, not because they expect a state pension if they just hang on. This approach means that a private-sector organization will not retain the poorly performing correctional officer or vocational training instructor whose program no longer prepares inmates for marketable employment.¹⁶⁸

For now, however, the management of prisons is almost fully entrusted to state and federal agencies. Changes to meet the challenges of adequately staffing correctional institutions must begin with increased commitment by these agencies to human resource development. The staffing problems which currently exist in these correctional facilities will inevitably lead to further problems as the American prison system continues its current trend of expansion. It is thus crucial for both prisoner rehabilitation and cost-effective maintenance of correctional institutions that comprehensive plans for employee selection, training and retention be developed and implemented; continued policy along the lines of the status quo can only inhibit more innovative methods of correction in the future.

Sex and Supervision

Prior to 1970, the ranks of correctional officers in all male prisons were characterized by a virtual absence of women. However, following the adoption of the 1972 Amendments to Title VII of the 1964 Civil Rights Act, the

sexual composition of prison guards quickly began to change. In 1989, 70,675 (28.33%) of the 249,482 total state correctional employees were female.¹⁶⁹ As of 1986, women held about 6 percent of guard positions in men's prisons nationwide.¹⁷⁰ Yet, in spite of this dramatic shift, change has not come easily. Even today, while many of the vexing issues which challenged the applicability of Title VII to the prison context have been resolved by the courts, correctional human resource departments find this to be a most difficult area of personnel administration.

Congress' enactment of Title VII was an attempt to remedy widespread employment discrimination on the basis of race, religion, sex and national origin.¹⁷¹ Subsequent executive orders, such as Executive Order 11375 (1967) which prohibited sexual employment discrimination by employers with federal contracts and Executive Order 11478 (1969) prohibiting the federal government from engaging in discriminatory hiring practices based on gender, supplemented the coverage of the Civil Rights Act. The 1972 Amendment to Title VII extended the Act's protection to public sector employees as well as increasing the authority of the Equal Employment Opportunity Commission (EEOC) by giving it the power to initiate prosecution against noncompliers. These additions to the Civil Rights Act were generally to the disdain of prison administrators who clung to their traditional beliefs that only men could adequately

guard other men. Consequently, they made considerable effort to circumvent the new employment requirements.

Correctional administrators turned to Section 703(e) of Title VII as a basis for excluding prisons from coverage. Section 703 (e) establishes an exception which allows for discrimination "in those certain instances where religion, sex or national origin is a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of that particular business or enterprise."¹⁷² Using this rationale, prisons attempted to justify policies of intentional discrimination as necessary because women were deemed incapable of controlling the larger violent inmates. However, the EEOC had made clear it's intention that bfoq exceptions would be prescribed narrowly, and could not be used "...because of assumptions about the characteristics of women in general or the preferences of the co-workers, the employer, clients or customers."¹⁷³ This counterrationale proved fruitful for several women who took action against prisons practicing employment discrimination; however, these successes were short-lived as the Supreme Court held in the 1977 case of Dothard v. Rawlinson that a bfoq exception may be legitimately applied to the prison setting.¹⁷⁴

In Dothard, a female was denied employment as a prison guard in an all male maximum security prison because she failed to meet the minimum physical requirements of being 5

feet 2 inches tall and weighing over 120 pounds. These requirements, as established by the Alabama Board of Corrections, had a discriminatory effect on the hiring of women; a point Rawlinson was able to prove with a statistical breakdown of the prison workforce. The prison did not deny the discriminatory effect of this rule, but rather argued that it was a necessary bfoq, as the dangerous inmates could not be controlled by anyone less in stature.¹⁷⁵ In concurring with the prison's position and finding a legitimate bfoq exception, the Supreme Court considered both the dangerous penitentiary conditions and difficulties that placing a woman in such an environment might engender.

The environment in Alabama's penitentiaries is a particularly inhospitable one for human beings of whatever sex. Indeed a Federal District Court has held that the conditions of confinement in the prisons of the state, characterized by 'rampant violence' and a 'jungle atmosphere' are constitutionally intolerable...[An] estimated 20 percent of the male prisoners who are sex offenders are scattered throughout the penitentiaries dormitory facilities...A woman's relative ability to maintain order in a male, maximum-security unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood.¹⁷⁶

While the Supreme Court decision in Dothard appeared to sanction the discriminatory practices of correctional institutions, its application was used quite sparingly by lower courts in subsequent cases. One of the key legal tests of bfoq legitimacy was the issue of the woman's safety within the given correctional setting in question. Although

it was Dothard which first supported a bfoq exception in the case of prison settings, the test which most lower courts chose to apply to each bfoq claim made by the various correctional facilities was based on criterion established in the 1976 Fifth Circuit case of Usery v. Tamiami Trail Tours Inc.¹⁷⁷ This ruling held that for an employer to be exempt from Title VII on the basis of a bfoq, he must demonstrate that

1. the bfoq is reasonably necessary to the essence of his business, and
2. that the employer has reasonable cause, that is, a factual basis for believing that all or substantially all persons within the class would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with the class members on an individual basis.¹⁷⁸

Because the issue of safety was a central tenet to establishing a bfoq for womens' exclusion from correctional jobs in prison, many low to medium security prisons were unable to gain the same exemption as the Alabama prison in Dothard. For example, in the 1980 case of Gunther v. Iowa, the district court noted significant differences in the prison environment which existed between the medium-security reformatory in question and the Alabama prison as the basis for finding against the state of Iowa's bfoq claim.¹⁷⁹

Another issue, equally as important to establishing a bfoq exception that went unaddressed in Dothard, was the question of burden-of-proof. In Harden v. Dayton Human Rehabilitation Center, a female guard brought discrimination

charges against her employer, the Dayton Human Rehabilitation Center, when they would not allow her to serve as a guard in the male section of the prison after closing the female area where she had originally worked.¹⁸⁰ The plaintiff, Harden, was able to demonstrate that she had more seniority than many of her male counterparts who were allowed to retain their positions in the prison. While the defendant argued that their discriminatory actions should have been protected by bfoq status, their assertion was ambiguous and lacked the safety rationale which had proved critical in Dothard. The Southern District Court of Ohio thus found against the defendant and elaborated on the necessary burden-of-proof which prisons must meet to substantiate a bfoq exception based on the criterion of safety.

Clearly, the promulgation of a bfoq is an impermissible act of "overt discrimination", and the employer must consequently bear the burden of establishing that his otherwise unlawful classification falls within 42 U.S.C. 2000e-2(e)'s extremely narrow exception to the general prohibition of discrimination on the basis of sex. Since the nature of a bfoq is in the nature of an affirmative defense, the employer must then prove by a preponderance of the evidence that the occupational qualification is bona fide under 42 U.S.C. 2000 (e)...[T]he essence of the defendant's claims involves the Medium Security Rehabilitation Center, which is designed to assist in the rehabilitation of persons who have been convicted primarily of misdemeanor crimes...Thus, without question, Defendants have failed to prove the validity of the bfoq herein under that portion of Tamiami which relates to safe or efficient performance of job duties.¹⁸¹

It is important to note that the use of a bfoq by correctional administrators is not necessarily indicative of an inherent desire to ban women from the workplace; rather failure to discriminate, when in fact it is necessary for the protection of employees, would be irresponsible on the part of the employer. Because of this precarious situation, caught between intentional discrimination and employee safety, it is important that prison human resource administrators be aware of ongoing legal decisions that define the point at which prison conditions become too threatening for opposite-sex supervisors, and establish selection criterion accordingly.

The use of bfoq exemptions for the protection of security personnel applies only to cases of women guards supervising male inmates. In situations where male officers are assigned to guard female prisoners, it is widely agreed that the males can fend for themselves.¹⁸² However, there is growing sentiment among both penal and legal professionals that a bfoq should be applied in such circumstances, though not for safety of the guards, but for protection of the inmates.¹⁸³ Indeed, the occurrence of sexual assaults by male guards on female prisoners has led to strong arguments in favor of excluding males from positions where they could have the opportunity to perpetrate such acts.

The problem of sexual abuse by male guards in women's prisons should not be lightly dismissed. The desire for consistency and the aspiration for an emerging society in which the sexes can function on an equal footing should not blind us to certain realities based upon experience. There is little doubt that employing male guards to supervise female prisoners creates a higher risk of sexual abuse of prisoners than does employing women to guard men. Therefore courts should be less reluctant to permit a bfoq classification for guard positions in womens prisons.¹⁸⁴

The safety of security personnel and inmates, however, is not the only factor influencing the employment of opposite-sex guards in correctional facilities. Because the duties of correctional officers often include round-the-clock supervisions and body searches, the use of opposite-sex guards raises concerns of the prisoners' right to privacy. Indeed, the Ninth Circuit Court pointed out in York v. Story that, "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from the view of strangers of the opposite sex is impelled by elementary self-respect and human dignity."¹⁸⁵ In 1980, the case of Hudson v. Goodlander was one of the first examples of right-to-privacy claims made against correctional institutions which allowed female guards to freely supervise male prisoners.¹⁸⁶

In Hudson, an inmate brought action claiming that his prison's policy of letting female guards have unrestricted access to areas where nudity was likely to occur, resulted in his frequent exposure to women while naked; hence violating his right to privacy. The prison argued that it

had lifted previous restrictions on female employee access because it was trying to respond to complaints of the female guards who felt such restrictions impeded their opportunity for advancement by limiting their ability to familiarize themselves with all facets of the institution. Deciding for the plaintiff, the Federal District Court of Maryland held that, "the employees' interest in equal opportunities [was not] sufficiently compelling so as to override the inmates' privacy rights."¹⁸⁷ While the court made it clear that certain posts should be off-limits to female personnel, exceptions would be allowable in times of emergency (e.g., riots) or in cases of extreme manpower shortages.

The way in which courts have chosen to remedy the collision between equal opportunity employment and inmate privacy rights have differed substantially. In Forts v. Ward, the court mandated that changes in prison routine be made to accommodate male officers assigned to guard women inmates.¹⁸⁸ These changes included the installation of shower screens and advance announcement of morning roll call so inmates could make themselves presentable. In Iowa Department of Social Services v. Iowa Merit Employment Department, the court approved excluding female officers from positions where their presence would compromise inmate's right to privacy.¹⁸⁹ Some courts, as was the case in Bowling v. Enomoto, have taken a middle-ground approach to solving this dilemma by requiring policy to aim at both

securing prisoner privacy rights and equal opportunity of its employees.

Recognizing, however, that federal courts are "singularly ill-suited to administer the minutia of the daily affairs of the prisons, particularly where state prisons are involved, the court leaves the task of fashioning and suggesting appropriate relief in the first instance to the expertise of...correctional authorities...Defendants are instructed to submit a proposed procedure to this court...regarding a proposed procedure, that will afford plaintiff the minimal privacy to which the court concludes he is entitled while maximizing the equal job opportunities of the female officers."¹⁹⁰

Walking the tightrope between meeting equal employment opportunity requirements and insuring inmate privacy rights is a formidable task for even the most able of human resource administrators. The current lack of clear legislative guidelines and consistent remedy by the courts complicates the ability to establish policies immune from future litigation. However, it is apparent that in trying to do so, correctional human resource departments must include other prison departments in the planning and implementation of such policies if such solutions are to be truly efficacious.

CHAPTER V

CONCLUSION

Only a decade ago, after the passage of the Percy Amendment, prison industries were reestablished as formal work systems in American correctional institutions. This change prompted many questions regarding the application of federal and state labor regulations to this unique workplace setting. The failure to articulate specific guidelines covering convict labor has left the scope and application of state and federal labor regulations to the courts. The interaction of labor regulations, court intervention, and assertive convict and prison employee organizations has forced prison employment systems from their isolated setting and into the mainstream economy. The walls which keep prisoners in can no longer keep federal and state regulators out. Prisons must now learn to operate under and accommodate the same rules and regulations which apply to outside industries. It has become increasingly clear that prisons are ill-prepared to adapt to this new regulatory environment.

Prison human resource professionals are a critical factor in developing and maintaining prison work programs which are compatible with the special needs of the prison

environment while satisfying state and federal laws. This paper has identified four areas in which prison human resource administrators can make significant contributions to correctional policy: (1) Compliance with state and federal employment laws; (2) Development of prisoner job training programs and selection criterion; (3) Selection and training of correctional personnel; and (4) Balancing equal opportunity objectives against a variety of statutory and constitutional protections.

While case law has begun to define the scope and application of these laws, precedent is conflicting and leaves many questions unresolved and uncertain. At a minimum, a uniform set of judicially created guidelines is still far away. For example, while it is quite apparent that prison workplace conditions must conform to the standards set by the Occupational Health and Safety Act, it is still unclear to what extent the Fair Labor Standards Act's minimum wage requirements apply to convict laborers. Court developed criterion such as "the economic reality test" remain ambiguous, with the specific application of such "rules" dependent upon the local court's balancing of each unique circumstances along with it's own interpretations of prior vague standards. The development of legitimate and viable convict labor policies require human resource professionals to keep abreast of the constantly evolving regulations and interpretive litigation affecting prison labor law. The

failure to track and address such changes leads to increased litigation in addition to penalties for violations of such regulations.

The role of human resource administration in the prison setting also carries with it great moral responsibility. Because most individuals sentenced to prison will eventually be released, effective rehabilitation must be an important goal of incarceration. Without effective rehabilitation many ex-offenders will be released and again able to commit acts against society. While no prison program can guarantee a reduction of recidivism, the human resource administrator can maximize the rehabilitative process through establishing high-quality job training programs coupled with proper selection criterion. With the increased interest of outside industries in prison labor as a viable alternative to using outside labor, human resource administrators can greatly assist the integration of outside businesses with convict work programs.

The selection and training of correctional personnel is also a critical function of the prison human resource department. Poor selection and training procedures combined with biased promotional criterion has, in many cases, led to significant job dissatisfaction and high turnover among correctional officers. The lack of officer training also breeds conflict and resentment between prison personnel and inmates, increasing rather than reducing an already hostile

prison environment. While solutions to this problem may be politically difficult to enact, the human resource department can be a valuable conduit for attaining such change through reevaluating selection criterion and developing comprehensive training programs.

Employee selection is also complicated by the need to comply with equal opportunity guidelines. Placing opposite-gender correctional officers in control of large homogeneous inmate populations risks the physical safety of the guards and/or inmates. Such policies may also precipitate invasion of privacy claims by the convicts. Human resource administrators must be at once aware of their obligations to meet equal opportunity employment regulations yet be sensitive to safety and privacy concerns. Because of court opinions attempting to reconcile the goals of equal opportunity employment and guarantees of privacy, correctional human resource administrators must attempt to balance these concerns by closely following the most recent "precedent" from their particular jurisdiction.

The isolated world of prison is quite different than that on the outside. It is a place where populations of convicted criminals are involuntarily detained in close quarters for long periods of time; a place characterized by hostility, violence and oppression. Under these circumstances, the management of employees is understandably quite difficult. In the final analysis, effective human

resource management of laborers within correctional institutions serves not only the best interests of the facility but also the best interests of society by improving the chances for successful reintegration of ex-convicts into the general civilian population. In an era of evolving labor regulations, increasing inmate populations and decreasing budgets, prisons can ill-afford to ignore the insightful approach offered by modern industrial relations, and must begin to embrace comprehensive human resource strategies in the development and maintenance of their correctional employment systems.

Endnotes

¹James H. Inciardi, Criminal Justice, 2d. (Chicago: Harcourt Brace Jovanovich, 1987), 507.

²Ibid.

³Ibid., 511.

⁴Ibid., 510.

⁵Ibid., 510.

⁶Michael Foucault, Discipline and Punish: The Birth of the Prison (New York: Random House, 1977), 200.

⁷Ibid.

⁸Inciardi, 513.

⁹Ibid., 516.

¹⁰Ibid., 518.

¹¹R.L. Goldfarb and L.Singer, After Conviction (New York: Simon and Schuster, 1973), 31.

¹² Ibid.

¹³The term "recidivism", as used in this report, is operationally defined as the repeat of or return to criminal activity following conviction and incarceration for previous criminal offense(s).

¹⁴Inciardi, 517.

¹⁵David Duffee and Robert Fitch, An Introduction to Corrections: A Policy and Systems Approach (Pacific Palisades, California, 1976.), 406.

¹⁶Ann E. Weiss, Prisons: A System In Trouble (Hillside, N.J., Enslow Publishers, 1988.) 27-28.

¹⁷Inciardi, 517.

¹⁸Ibid., 518.

¹⁹Ibid.

²⁰Vernon Fox, Correctional Institutions (New Jersey: Prentice Hall, 1983), 86.

²¹Ibid.

²²Ibid. In some cases, the southern states would lease their own prisoners to the highest bidder, many of whom were companies from the north.

²³Blake McKelvey, American Prisons: A Study in American Social History Prior to 1915 (Montclair, N.J.: Patterson Smith, 1968), 71.

²⁴Weiss, 28.

²⁵Ibid., 29.

²⁶Ibid., 30.

²⁷Foster Rhea Dulles, Labor in America: A History, 4d. (Arlington Heights, Ill.: Harlan Davidson, 1984), 132.

²⁸McKelvey, 94.

²⁹Ibid., 104-105.

³⁰Benjamin Frank, Contemporary Corrections: A Concept in Search of Content (Reston Virginia: Reston Publishing, 1973), 150.

³¹Ibid., 151.

³²Ibid.

³³McKelvey, 105.

³⁴Ibid., 220-221.

³⁵B. J. Auerbach, G. E. Sexton, F. C. Farrow and R. H. Lawson, Work in American Prisons: The Private Sector Gets Involved (Washington, D. C.: National Institute of Justice, May, 1988., 72.

³⁶49 U.S.C. 60 (1929).

³⁷Whitfield v. Ohio, 297 U.S. 431 (1936) at 439.

³⁸Inciardi, 522.

³⁹49 Stat. 494 (1935). It should be noted that this act provided for an exception for goods produced in federal

correctional facilities when it stated, "[n]othing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government."

⁴⁰ 41 U.S.C. 35-45 (1936).

⁴¹ Ibid.

⁴² Subsequent laws were gradually enacted to address specific issues which arose that were not covered by these prior broad-based acts. Three examples include: 1. 23 U.S.C. 114 (b), (1958), which held that inmate labor cannot be used as an integrated part of highway or airport construction, unless the offenders employed in such projects are on parole or probation; 2. 39 U.S.C. 2010, (1960), which held that the Postmaster General is forbidden by law to purchase supplies and equipment manufactured by inmate labor for use in the postal service; and 3. 18 U.S.C. 1762, (1948), which mandated that with the exception of products manufactured by prisoners on parole or probation, all packages that contain goods produced by prisoner labor must be clearly labeled as prisoner-made goods.

⁴³ Fox, 87.

⁴⁴ Blake McKelvey, American Prisons: A History of Good Intentions (Montclair, N.J.: Patterson Smith, 1977), 315-316.

⁴⁵ Ronald Berkman, Opening the Gates: The Rise of the Prisoners Movement (Lexington, Mass.: D.C. Heath and Company, 1979), 38.

⁴⁶ Frank, 154.

⁴⁷ Berkman, 38.

⁴⁸ Ibid., 41.

⁴⁹ Ibid., 62.

⁵⁰ Ibid.

⁵¹ Ibid., 66.

⁵² Fox., 256.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵C. Bartollas and S. J. Miller, Correctional Administration, (New York: McGraw-Hill, 1978), 156.

⁵⁶*Ibid.*, 135-136. Also see R. Huff, "Unionization Behind the Walls", Criminology v. 12, (August, 1974) 184-185.

⁵⁷*NLRB v. Washington Aluminum Co.*, 370 U.S. 9. (1962).

⁵⁸*Paka v. Manson*, 387 F. Supp. 111 (D. Conn. 1974).

⁵⁹*Procunier v. Martinez*, 416 U.S. 369 (1974). It is important to note that there is no Constitutional provision which guarantees any specific rights of privacy. However, the issue of prisoner privacy has been addressed by the Supreme Court on several different occasions and the Court has generally concluded that prisoners do retain some rights to privacy while incarcerated. For example, in Houchins v. KQED, 98 S.Ct. 2588 (1978), the Court stated that, "[i]nmates in jails, prisons, or mental institutions retain some fundamental rights of privacy; they are not like animals in a zoo to be filmed or photographed at will by the public or by media reporters, however 'educational' the process may be for others." (at 2592 n.2).

⁶⁰*North Carolina Prisoners Union v. Jones*, 409 F. Supp. 973 (E.D.N.C. 1976).

⁶¹*Goodwin v. Oswald*, 462 F.2d 1237 (2d Cir. 1972).

⁶²*Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944).

⁶³*Frank*, 153.

⁶⁴*Ibid.*

⁶⁵*Ibid.*

⁶⁶*Auerbach*, 9.

⁶⁷R. Johnson, "Informal Helping Networks in Prison: The Shape of Grass-Roots Correctional Intervention" published in Prison Guard/Correctional Officer: The Use and Abuse of the Human Resources of Prisons Russ R. Ed, (Canada: Bo Herworth Press, 1981), 125.

⁶⁸*Auerbach*, 10.

⁶⁹*Ibid.*

⁷⁰*Ibid.*

⁷¹G. E. Sexton, B. J. Auerbach, F. C. Farrow, R. H. Lawson, J. N. Schuller and M. B. McFadden Private Sector Involvement in Prison Based Businesses: A National Assessment, (National Institute of Justice Research Report, November, 1985), 72.

⁷²Ibid.

⁷³Ibid., 1.

⁷⁴Ibid., 85-86.

⁷⁵Ibid., 81.

⁷⁶Ruffin v. Commonwealth, 21 grat. 760 (Virginia, 1871).

⁷⁷Ibid.

⁷⁸Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.

⁷⁹Huntley v. Gunn Furniture., 79 F.Supp. 110 (W.D. Misc. 1948).

⁸⁰Ibid.

⁸¹Ibid.

⁸²Simms v. Parke Davis and Company, 334 F.Supp. 774 (E.D.Mich. 1971).

⁸³Ibid.

⁸⁴Wentworth v Solem, 548 F.2d 733 (8th Cir. 1977).

⁸⁵Ibid., 775.

⁸⁶Alexander v. Sara Inc., 559 F.Supp. 42 (M.D. La. 1983).

⁸⁷Ibid.

⁸⁸Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984).

⁸⁹Ibid.

⁹⁰Ibid., 15

⁹¹N. A. Rothstein, A. S. Knapp and L. Liebman, Employment Law: Cases and Materials (Mineola, New York: The Foundation Press, 1987) 626.

⁹²Watson v. Industrial Commission, 100 Ariz.327, 414 P.2d 144 (1966).

⁹³Keeney v. Industrial Commission, 535 P.2d 31 (Ariz. App. 1975).

⁹⁴Ibid., 32.

⁹⁵Holman v. Hilton, 712 F.2d 854 (3rd Cir. 1983)

⁹⁶Spikes v. State, 458 A.2d 672 (R.I. 1983)

⁹⁷Drake v. Essex County 469 A.2d 512 (N.J. App. 1983)

⁹⁸Heumphreur v. State, 334 N.W.2d 757 (Iowa, 1983)

⁹⁹Sexton, 61. As of 1985, the nineteen states which currently authorize worker's compensation payments to inmates injured on the job were: California, Connecticut, Kansas, Iowa, Montana, Minnesota, Nebraska, New Jersey, Louisiana, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Virginia, Washington, Wisconsin, and Wyoming. Three states which specifically prohibited worker's compensation for prisoners were: Alaska, Idaho, and New York.

¹⁰⁰Davis v. United States, 415 F.Supp. 1086 (D. Kan. 1976).

¹⁰¹Ibid.

¹⁰²Wells v. Southern Michigan Prison, 261 N.W.2d 245 (Mich. App. 1971).

¹⁰³Thompson v. Federal Prison Industries, 492 F.2d 1082 (5 Cir. 1974).

¹⁰⁴Baldwin v Smith, 446 F.2d 1043 (2 Cir. 1971).

¹⁰⁵Ibid.

¹⁰⁶Ibid., 1045.

¹⁰⁷Ibid.

¹⁰⁸Palmigiano v. Garrahy, 443 F.Supp 963 (D. RI. 1977).

109Occupational Safety and Health Act (OSHA), 29 U.S.C. 651 et seq. This quantification was provided by Rothstein at 510.

110Rothstein, 510.

111Watson v. Ray, 90 F.R.D. 143 (S.D. Iowa 1981).

112Ibid., 156

113French v. Owens, 538 F.Supp. 910 (S.D. Ind. 1982)

114Ibid., 921.

115Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977).

116Ramos v. Lamm, 520 F.Supp. 1059 (D. Col. 1981).

117 Udey v. Kastnor, 644 F.Supp. 1441 (E.D. Tx. 1986).

118Palmigiano, at 964.

119Weiss, 65.

120Ibid., 98.

121Stanton E. Samenow, Inside the Criminal Mind (New York: Times Books, 1984), 89.

122J. N. Full, "Computer Programing Course in Massachusetts", American J. of Corrections, March-April 1978.

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127O. D. Coffey, "T.I.E.: Integrating Training, Industry, and Education", J. of Correctional Education v.37 n.3 Sept. 1986 p.104.

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129Ibid., 106.

130Ibid., 107.

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133 Ibid., 108.

134 Harry E. Allen and Clifford E. Simoasen, Corrections in America (New York: Macmillian Publishing Co., 1989), 585-586.

135 Ibid.

136 Timothy J. Flanagan, "Prison Labor and Industry." In The American Prison: Issues in Research and Policy, ed. Lynne Goodstein and Doris L. MacKenzie, (New York: Plenum Press, 1989), 147.

137 Allen, 586.

138 Samuel L. Meyer, Jr., "Do Better Wages Reduce Crime?" American J. of Economics and Sociology v.32 n.2 (April, 1984), 191-194.

139 Ibid., 194.

140 Fox, 83.

141 Ibid.

142 H. S. Miller and V. A. McArthur, The Role of Prison Industries Now and in the Future: A Planning Study Georgetown Institute of Criminal Law and Procedure (August, 1975), 27.

143 Sexton, 6.

144 Ibid.

145 G. S. Funke, Assets and Liabilities of Correctional Industries. (D.C. Heath and Company, 1982), 35.

146 Ibid.

147 Ibid., 99.

148 Ibid.

149 Weiss, 43.

¹⁵⁰Joycelyn M. Pollock, Sex and Supervision: Guarding Male and Female Inmates. (New York: Greenwood Press, 1986), 20.

¹⁵¹Ibid., 21.

¹⁵²President's Commission on Law Enforcement and Administration of Justice Task Force Report: Corrections (Washington, D.C.: U.S. Government Printing Office, 1967).

¹⁵³Bartollas, 166.

¹⁵⁴Michael J. Shannon, "Officer Training: Is Enough Being Done?" Corrections Today (April, 1987), 173.

¹⁵⁵Bartollas, 166-169.

¹⁵⁶Ibid. 166.

¹⁵⁷James G. Fox, 32. For a more detailed examination into the specific causes of job ambiguity among correctional personnel, see S. Philliber's article, "Thy Brothers Keeper: A Review of the Literature on Correctional Officers." in Justice Quarterly, 4, 1987, 9-37.

¹⁵⁸Shannon, 173.

¹⁵⁹Ibid. The hostile and abusive treatment of inmates by prison guards because of difficulties in maintaining control and lack of training has been widely documented. John R. Hepburn has recently elaborated on this problem in his article, "Prison Guards as Agents of Social Control" in The American Prison: Issues in Research and Policy, ed. Goodstein, L. and MacKenzie, D.L. (New York: Plenum Press, 1989), 192-198, stating that "[w]ith little preparation or training, guards find themselves in a precarious position within the prison organization. Immediately, they confront occupational problems for which there is no ready and standard solution. Together, these occupational problems create an environment of uncertainty and dependency...One response by guards to their perceived loss of control is to resist the dependence relationship [on the prisoners] and (re)gain control by repressive tactics. Guards become more custodial and more punitive toward prisoners, and relationships with prisoners are more detached, contractual and formal as guards strive to lessen their dependence on prisoners. Insults, obscenities and other forms of verbal abuse are commonly used to denigrate the prisoners and assert the authority of guards, but repression is rooted in the guards' willingness to use physical violence."

¹⁶⁰Ibid., 175.

¹⁶¹Potter, 325-326. The area of job bidding by guards for positions removed from the general inmate population has been a growing issue with guard unions. Scott Christianson notes in his article, "Corrections Law Development: How Unions Affect Prison Administration" in Criminal Law Bulletin v.15 n.3 May-June 1979, that, "Despite their paramilitary powers, the ability of prison officials to assign officers to specific shifts or details is often influenced by civil service rules, department regulations and union contracts. The latter may enable employees to select their own job assignments on the basis of seniority. Although this system is criticized by many administrators as an impediment to sound management, most union representatives tend to support it as a necessary incentive...and logical arrangement."

¹⁶²"Juvenile and Adult Correctional Department Institutes, Agencies and Paroling Authorities." American Correctional Association Directory American Correctional Association, 1990.

¹⁶³111th Annual Congress of Correction Proceedings of the American Correctional Association (August 16-20, 1981), 117-118.

¹⁶⁴Ibid.

¹⁶⁵Ibid., 121.

¹⁶⁶E. Neilson, H. Omhard and N. Harlow, Promising Strategies in Probation and Parole U.S. Department of Justice, (November, 1978), 98.

¹⁶⁷One of the most outspoken opponents of prison privatization is the American Civil Liberties Union (ACLU). Mick Ryan and Tony Ward, in their book, Privatization and the Penal System: The American Experience and the Debate in Britain (St. Martin's Press, N.Y., 1989), list 6 points made by the civil libertarians against prison privatization: (1) Prisoners are likely to suffer deprivation because of placement in a private prison; (2) Private prisons are likely to have an adverse impact on various aspects of a prisoner's life or on the factors that affect the duration of his/her confinement; (3) Private prisons are likely to have an adverse impact on substantive and procedural legal rights and remedies of prisoners; (4) It is likely that a private prison will not comply with all the relevant health and safety standards; (5) Private prisons are likely to result in inappropriate confinement or an inappropriate use

of incarceration as a sanction; and (6) While meaningful work opportunities are both necessary and appropriate, private management is likely to cause exploitation of prisoners under poor working conditions without remuneration for the financial benefit of the private entity.

¹⁶⁸James D. Henderson, "Private Sector Management: Promoting Efficiency and Cost Effectiveness" Corrections Today v. 50, n. 6. (October, 1988), 100.

¹⁶⁹ACA Directory. The ACA elaborates on the demographics of the 1990 prison workforce. Of the total of 178,807 males employed in correctional facilities, 134,717 (75.34%) are White, 31,222 (17.46%) are Black, 8,678 (4.85%) are Hispanic and the remaining 4,190 (2.5%) are of a different race. Of the total 70,675 females employed in correctional institutions, 50,115 (70.90%) are White, 16,020 (22.67%) are Black, 2,948 (4.17%) are Hispanic and 1,592 (2.26%) are of a different race.

¹⁷⁰Lynn E. Zimmer, Women Guarding Men (Chicago: The University of Chicago Press, 1986), 1.

¹⁷¹42 U.S.C. 2000 et seq.

¹⁷²42 U.S.C. 2000e-2 (1976), 703(e).

¹⁷³Zimmer, 5.

¹⁷⁴Dothard v. Rawlinson, 433 U.S. 321 (1977).

¹⁷⁵Ibid.

¹⁷⁶Ibid.

¹⁷⁷Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

¹⁷⁸Ibid., 236. In developing this specific criterion, the Court essentially merged the holdings of two cases which preceded this particular decision. See: Weeks v. Southern Bell Telephone and Telegraph, 408 F.2d 385 (5th Cir. 1969) and Diaz v. Pan Am. World Airways, Inc., 442 F. 2d 385 (5th Cir. 1971).

¹⁷⁹Gunther v. Iowa, 612 F.2d. 1079 (8th Cir. 1980).

¹⁸⁰Harden v. Dayton Human Rehabilitation Center, 520 F. Supp 769 (S.D. Ohio 1981).

181 Ibid. Here, the defendant also attempted to claim a bfoq exemption by arguing that the discrimination of female personnel was necessary to insure inmates their right to privacy. However, at the time of this case, no actual claims of invasion of privacy were ever made by any of the inmates; rather, it was based on an observation by the Dayton City Director of Personnel that such occurrences were likely to happen in the future. The Court did not believe this was enough reason to establish a bfoq, and ruled, "...the Court is unconvinced that speculation about potential privacy violations creates a basis in fact for the issuance of an occupational qualification as the one herein." (p.779).

182 The belief that women prisoners are easier to control than their male counterparts was not always held. Over a century ago, some penologists viewed the female as the most difficult sex of captives to manage. An example of this can be found in, Prison Matron: Female Life in Prison (New York: Hurst and Blackett, 1862), which states, "It is a harder task to manage female prisoners than male...They are more impulsive, more individual, more unreasonable and excitable than men; will not act in concert and cannot be disciplined in masses. Each wants personal and peculiar treatment, so that the duties fall much more heavily on the matrons than on the warders; matrons having thus to deal with units, not aggregates, and having to adapt themselves to each individual case, instead of simply obeying certain fixed laws and making others obey them, as in the prison for males."

183 The University of Toledo Law Review v.10 1979
Jerome B. Jacobs.

184 Ibid

185 York v. Story, 324 F. 2d 450 (9th Cir. 1963).

186 Hudson v. Goodlander, 494 F. Supp. 890 (D. Md. 1980).

187 Ibid.

188 Forts v. Ward, 621 F. 2d 1210 (2nd Cir. 1980).

189 Iowa Department of Social Services v. Iowa Merit Employment Department, 261 N.W. 2d 161 (Iowa 1977).

190 Bowling v. Enomoto, 514 F. Supp 201 (N.D. Calif. 1981).

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