

## How to Create American Manufacturing Jobs

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COMMENTARY

**HOW TO CREATE AMERICAN MANUFACTURING JOBS**

*By John Dewar Gleissner*<sup>1</sup>

In *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith wrote that a nation's prosperity depends upon "the skill, dexterity, and judgment with which its labour is generally applied," and upon the proportion of the population employed in useful labor.<sup>2</sup> Economists watch measures of productivity and employment closely. The unemployment rate is today the single most prominent measure of economic health. By these basic criteria, the incarcerated, approximately 2.24 million able-bodied Americans,<sup>3</sup> more idle prisoners than any other nation, constitute a gigantic drain on the economy. Very few prisoners produce marketable goods or services.<sup>4</sup> Most inmate labor is simply "prison housework"

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<sup>2</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* I (Edwin Cannan & George J. Stigler eds., Univ. of Chi. Press 1976) (1776).

<sup>3</sup> LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2011, 8 (2012), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4537>.

<sup>4</sup> OFFICE OF THE INSPECTOR GEN., AUDIT DIV., U.S. DEP'T OF JUSTICE, *FEDERAL PRISON INDUSTRIES, INC. ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2012*, 5 (2012) ("FPI has industrial and service operations

(i.e. helping operate the correctional institution) or the making of selected goods for the government; only a small fraction of prisoners work in factories or on farms, ranches, or roads. Very low employment and productivity in federal and state prisons is invariably proven by dividing total annual correctional industry revenue by the particular prison population. Prison industries often operate at a loss and inefficiently utilize prison labor.<sup>5</sup> What prisoners might be earning under full employment in the private sector equals or exceeds the direct costs of maintaining more than two million prisoners.

Prison problems are not new. Prominent political leader and diplomat William Eden, Baron Auckland, wrote as follows in his 1771 treatise *Principles of Penal Law*: “Imprisonment, inflicted by law as a punishment, is not according to the principles of wise legislation. It sinks useful subjects into burdens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature secluded from the eye of the people.”<sup>6</sup> When American prisons began, it was immediately recognized that prisoners should work.<sup>7</sup> The vastly increased negative economic impacts brought about by massive incarceration are relatively new in

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at 81 factories located at 63 prison facilities representing approximately 8% of the work eligible inmate population as of September 30, 2012.”  
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<sup>5</sup> Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 890 n.144 (2008).

<sup>6</sup> WILLIAM EDEN, *PRINCIPLES OF PENAL LAW* 44-45 (1771).

<sup>7</sup> GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 23 (Francis Lieber trans., Carey, Lea & Blanchard 1833) (“Labour gives to the solitary cell an interest; it fatigues the body and relieves the soul.”).

historical terms and have not yet been adequately addressed by legislation.

A predicate for prison reform today is a thorough understanding of the economic and social costs caused by the current inefficient incarceration regime. No one has successfully computed all the various direct, indirect, social, and collateral costs of massive incarceration. The value of moving offenders back into the workforce, restoring manufacturing jobs, and reducing government expenses and recidivism cannot be denied.

**Brief History of U.S. Prison Industries and Labor.** “The earliest forms of prison industries work programs date back to the late 1700s. Interestingly, many of the dilemmas we face [t]oday, also challenged our predecessors: the elimination of inmate idleness, program self-sufficiency, the overall safety and security of our prison system, and productive inmate employment without undue impact upon private sector jobs.”<sup>8</sup>

In the 1800s, several state prison systems were self-supporting, ran at a profit, and informed their legislatures that further appropriations would not be necessary. Productive prison labor under the draconian Auburn System created profits during three generations of the remarkable Pilsbury family. Moses C. Pilsbury, Amos Pilsbury, and Louis D. Pilsbury successfully managed prisons and prison systems in New Hampshire, Connecticut, and New York. The Pilsbury System, a type of Auburn System, paid the cost of running a prison and, in addition, paid money to the state treasury. Prison labor made a profit to offset the costs of confinement, saving the taxpayers money. Zebulon R. Brockway, the father of

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<sup>8</sup> FED. PRISON INDUS., INC., FEDERAL PRISON INDUSTRIES, INC. ANNUAL REPORT 2008, 4 (2009), *available at* [www.datachieve.com.php5-6.dfw1-1.websitetestlink.com/wp-content/uploads/2009/09/CATAR2008.pdf](http://www.datachieve.com.php5-6.dfw1-1.websitetestlink.com/wp-content/uploads/2009/09/CATAR2008.pdf).

rehabilitative penology and an admirer of the Pilsburys and Andrew Maconochie, produced profits more than four times greater than the entire cost of running a penal institution.<sup>9</sup> In 1888, the reformatory run by Brockway claimed that 78.5% of its parolees were living orderly and self-supporting lives.<sup>10</sup>

In his 1912 book *Fifty Years of Prison Service: An Autobiography*, Zebulon Brockway outlined an ideal prison system. Brockway said prisoners should support themselves in prison through industry in anticipation of supporting themselves outside prison; outside businesses and labor unions must not interfere; indeterminate sentences were required, making prisoners earn their release with constructive behavior, not just the passage of time; and education and a Christian culture should be imparted. Brockway opposed releasing prisoners who would clearly poison the outside world. Zebulon Brockway's ideal prison system followed the procedures of Wethersfield Prison in Connecticut when Amos Pilsbury was its warden. Brockway believed prisoners would work effectively to defray the expenses of their penal institutions if given a share of the profits. The profit motive makes people work much harder and smarter than if they are forced to work.

Everyone agreed prisoners would be better off if they worked usefully while in prison.<sup>11</sup> In 1886, the

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<sup>9</sup> REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941*, 177-79 (2008).

<sup>10</sup> ZEBULON REED BROCKWAY, *FIFTY YEARS OF PRISON SERVICE: AN AUTOBIOGRAPHY* 297 (Patterson Smith 1969) (1912).

<sup>11</sup> This is still the case. MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 8:1 (4th ed. 2013) (“The value of productive prison work and its relationship to rehabilitation are widely accepted.”); Stefanie Evans, *Making More Effective Use of Our Prisons Through Regimented Labor*, 27 PEPP. L. REV. 521 (2000).

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Second Annual Report of the U.S. Commissioner of Labor stated that “[i]t is universally conceded that convicts should be employed at some useful labor.”<sup>12</sup> “Certainly no thoughtful, humane person, and most assuredly no trade unionist, wants the inmates of our prisons to remain idle,” labor leader Samuel Gompers wrote a century ago.<sup>13</sup> American prison labor systems through the years have included lease, contract, piece-price, public account, state use, and public works labor systems, none of which were wholly private or agreed to by the convicts.<sup>14</sup>

From their inception, affected businesses and labor fought prison industries. Legislation and constitutional provisions were aimed at the discredited convict leasing and convict contract labor systems opposed by progressives.<sup>15</sup> Private industries and labor feared low-cost prison labor and successfully pushed for debilitating legal restrictions upon private prison industries. State and federal laws began prohibiting and restricting the sale of prison-made goods. In 1890, for example, the State of Washington prohibited private employment of prison labor in its constitution and mandated such labor for the benefit of the state.<sup>16</sup> Opponents of prison industries and labor

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<sup>12</sup> BUREAU OF LABOR, U.S. DEP’T OF THE INTERIOR, SECOND ANNUAL REPORT OF THE U.S. COMMISSIONER OF LABOR, 1886: CONVICT LABOR (1887).

<sup>13</sup> SAMUEL GOMPERS, LABOR AND THE COMMON WELFARE 110 (1919), quoted in Stephen P. Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 369 (1998).

<sup>14</sup> EDWIN H. SUTHERLAND ET AL., PRINCIPLES OF CRIMINOLOGY 503-07 (11th ed. 1992).

<sup>15</sup> Wash. Water Jet Workers Ass’n v. Yarbrough, 90 P.3d 42, 61 (Wash. 2004).

<sup>16</sup> *Id.* at 45, 58 (Even though “[t]he benefits of providing employment opportunities for convicts [were] not in dispute,” a state constitutional provision, article II, section 29 of the Washington state constitution, prohibited employment of prisoners by private enterprise.: “After [Jan. 1, 1890], the labor of convicts of this state shall not be let out by

made the valid point that government-supported industries are not fair competition. The U.S. Supreme Court agreed that “[f]ree labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.”<sup>17</sup>

Private prison industries came to a screeching halt at the time of the Great Depression. The Hawes-Cooper Act of 1929, “[a]n Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases,” took away the interstate commerce status of prison-made goods, allowing states to bar them from sale.

That all goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon

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contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.”).

<sup>17</sup> *Whitfield v. Ohio*, 297 U.S. 431, 439 (1936).

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arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.<sup>18</sup>

Many states prohibited the sale of those goods. In *Whitfield v. Ohio*,<sup>19</sup> the Supreme Court upheld the conviction of an Ohio seller of prison-made work shirts shipped to Ohio from an Alabama prison, noting that “the sale of convict-made goods in competition with the products of free labor is an evil” recognized by states and the federal government.<sup>20</sup> There was no discrimination because Ohio barred its own prisons from selling such goods on the open market.<sup>21</sup> The Wisconsin Supreme Court invalidated a Wisconsin statute that discriminated

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<sup>18</sup> Hawes-Cooper Act of 1929, ch. 79, 45 Stat. 1084 . This provision is no longer explicitly codified as written to make the goods “subject to the operation and effect of the laws of such State” (words borrowed from the Wilson Act regarding liquor), but the general structure of discouraging interstate commerce remains in somewhat confusing structure.

<sup>19</sup> 297 U.S. 431.

<sup>20</sup> *Whitfield*, 297 U.S. at 439.

<sup>21</sup> *Whitfield*, 297 U.S. at 437.



against convict-made goods from out of state by not similarly barring sales of Wisconsin convict-made goods.<sup>22</sup>

In this depressed era of super-high unemployment, Congress was in its damaging, protectionist Smoot-Hawley mood.<sup>23</sup> The Ashurst-Sumners Act of 1935, as amended in 1940, limited interstate shipment of prisoner-made goods.<sup>24</sup> In *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, the Supreme Court upheld the Ashurst-Sumners Act, saying that “[t]he Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor.”<sup>25</sup> In 1936, the Walsh-Healey Act banned convict labor on federal procurement contracts.<sup>26</sup> While these restrictive statutes were passed by perceiving evil, valid exercises of Congress’s power to regulate interstate commerce and were passed in a time of high unemployment, they were directly contrary to the letter and spirit of provisions mandating unencumbered interstate commerce in the U.S. Constitution,<sup>27</sup> nearly every other law Congress passed

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<sup>22</sup> State v. Whitfield, 257 N.W. 601 (Wis. 1934).

<sup>23</sup> The Tariff Act of 1930, the Smoot-Hawley Tariff, raised U.S. tariffs on imported goods, brought retaliatory tariffs, reduced American exports and imports, and infamously increased the severity of the Great Depression. See Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Monetary Policy and the Global Economy (Mar. 25, 2013) (transcript available at <http://www.federalreserve.gov/newsevents/speech/bernanke20130325a.htm>).

<sup>24</sup> 18 U.S.C. §§ 1761-62 (2006).

<sup>25</sup> 299 U.S. § 334 (1937).

<sup>26</sup> 41 U.S.C. § 6502 (2006) (“(3) INELIGIBLE EMPLOYEES.—No . . . incarcerated individual will be employed by the contractor in the manufacture or furnishing of materials, supplies, articles, or equipment under the contract, except that this section, or other law or executive order containing similar prohibitions against the purchase of goods by the Federal Government, does not apply to convict labor that satisfies the conditions of section 1761(c) of title 18.”).

<sup>27</sup> U.S. CONST. art. I, §§ 9-10.

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regarding the scope of interstate commerce, and free trade principles expressed in later treaties with foreign nations.

“Prison labor, once viewed as indispensable for restoring a healthy relationship between the criminal and society, was made literally a federal offense.”<sup>28</sup> These trade barriers in the form of criminal statutes are still codified, with changes through the years, in state and federal law. 18 U.S.C. § 1761(a) now states as follows:

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.<sup>29</sup>

In other words, manufacturing was limited to the prison; each state could bar private businesses from their prisons, which most did; and each state could ban the sale of prison-made goods, which many did. Congress also

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<sup>28</sup> David Frum, *Working for the Man*, AM. SPECTATOR, Aug. 1995, at 49 (quoting Arizona Assistant Attorney General Andrew Peyton Thomas).

<sup>29</sup> 18 U.S.C. § 1761(a) (2006).

made it a crime to ship prisoner-made goods without obvious labeling and provided forfeiture as a penalty.

(a) All packages containing any goods, wares, or merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.<sup>30</sup>

(b) Whoever violates this section shall be fined under this title, and any goods, wares, or merchandise transported in violation of this section or section 1761

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<sup>30</sup> 18 U.S.C. § 1762(a) (2006).

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of this title shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.<sup>31</sup>

In 1934, at the time private businesses were effectively excluded from prison industries, Congress created a government-owned monopoly over the federal prison industries and labor, Federal Prison Industries, Inc. (FPI), which uses the trade name UNICOR. FPI's mission is to provide employment and training opportunities to inmates confined in federal correctional facilities and to provide market-priced, quality products and services to other federal agencies. By law, FPI minimizes competition with private industry and labor.

(a) Federal Prison Industries shall determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions or for sale to the departments or agencies of the United States, but not for sale to the public

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<sup>31</sup> 18 U.S.C. § 1762(b) (2006).

in competition with private  
enterprise.<sup>32</sup>

Statutory passivity requires that FPI diversify its activities and avoid obtaining excessive market shares.<sup>33</sup>

Many state-sponsored correctional industries live by the mandatory source preference requirements of their respective governments, which restrict the purchasing options of the sponsoring governments. When faced with a similar situation at the federal level, private businesses complained about the U.S. government's mandatory source preference requirement in favor of FPI. Congress took away FPI's status in several steps.<sup>34</sup> The procurement law was changed. Now federal agencies do not always have to buy from FPI.<sup>35</sup> But FPI can only sell to federal agencies,<sup>36</sup> which greatly limits the types of products it can make. As a result of losing its mandatory source preference, FPI is losing money and prison jobs. Meanwhile, FPI does not allow private companies to make goods in federal prisons, blocking the exceptions in 18 U.S.C. § 1761(a) and 18 U.S.C. § 1762(a).

In testimony before Congress, FPI claimed that it employed 25% of the federal prison population in 1998.<sup>37</sup> FPI said that it provided jobs to 17% of the eligible federal

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<sup>32</sup> 18 U.S.C. § 4122(a) (2006).

<sup>33</sup> 18 U.S.C. § 4122(b)(1)-(3) (2006).

<sup>34</sup> NATHAN JAMES, CONG. RESEARCH SERV., FEDERAL PRISON INDUSTRIES (2011).

<sup>35</sup> 10 U.S.C. § 2410n (2006).

<sup>36</sup> 18 U.S.C. § 4122(b) (2006).

<sup>37</sup> *Prison Industry Reform Legislation: Hearing on H.R. 4100 and H.R. 2758 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 58-66 (1998) (statement of Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons, and Chief Executive Officer, Federal Prison Industries), available at [http://commdocs.house.gov/committees/judiciary/hju57231.000/hju57231\\_0f.htm](http://commdocs.house.gov/committees/judiciary/hju57231.000/hju57231_0f.htm).

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prison population in 2008 and 8% in 2012.<sup>38</sup> Thus, as the prison population was skyrocketing, the percentage of federal prisoners working dropped markedly. The outsized, negative impact of the Great Recession on UNICOR reflects a connection between prison industries, government budgets, and, of course, the economy and general labor market.<sup>39</sup>

UNICOR claims that “[s]ince 1934, [UNICOR] is *one* government program that *truly works* in every sense of the word.”<sup>40</sup> UNICOR’s very limited success under the legal and economic impediments it faces<sup>41</sup> proves the enormous economic and social boost a fully employed prison force that operates freely in interstate and international commerce while making profits and paying taxes could provide. From 1934 to 2013, this federal government monopoly, in terms of potential workers under its control, grew exponentially.<sup>42</sup> “The federal budget for

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<sup>38</sup> FED. PRISON INDUS., INC., *supra* note 8, at 6, 16; OFFICE OF THE INSPECTOR GEN., *supra* note 4, at 5 (“FPI has industrial and service operations at 81 factories located at 63 prison facilities representing approximately 8% of the work eligible inmate population as of September 30, 2012.”).

<sup>39</sup> During major wars, prisoners generally are worked much harder and more often than in peacetime, and releases from prison are more common.

<sup>40</sup> FED. PRISON INDUS., INC., *supra* note 8, at ii.

<sup>41</sup> 18 U.S.C § 4122 (2006); *Coal. for Gov’t Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435 (6th Cir. 2004) (detailing the limitations imposed on Federal Prison Industries and prison industries generally).

<sup>42</sup> In 1934, the federal prison population was about 12,000; in 2013, it was 218,864. *Compare Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, [www.bop.gov/news/quick.jsp](http://www.bop.gov/news/quick.jsp) (last visited Oct. 8, 2013), with *BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PRISONERS IN STATE AND FEDERAL PRISONS AND REFORMATORIES 1934*, 3 (1934) (about 12,000); see also *A Brief History of the Bureau of Prisons*, FED. BUREAU OF PRISONS, [www.bop.gov/about/history.jsp](http://www.bop.gov/about/history.jsp) (last visited Oct. 8, 2013) (In 1930, there were “just over 13,000” federal prisoners.).

FY 2010 contained \$6 billion for the Bureau of Prisons, an increase of 1,712% since 1980.”<sup>43</sup> Since the 1970s, state prison populations have grown more than 700%.<sup>44</sup>

In 1979, Congress authorized a limited exception through the Prison Industry Enhancement Certification Program (PIECP), a federally sponsored program to develop partnerships between private enterprise and prison labor. PIECP has proven successful in reducing recidivism.<sup>45</sup> Under the program, which was created in 1979 and continued in 1990, prisoners must receive “wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed.” Because PIECP participants must pay the prevailing wage in the area and meet seven other requirements, only a tiny handful of offenders are involved. However, this program merely “exchanges one debilitating limit on prison labor for another.”<sup>46</sup> PIECP inflexibly requires employers to pay prevailing wages to a workforce that, as a whole, is substandard in education, job skills,

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<sup>43</sup> THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION (2011), [asca.net/system/assets/attachments/2811/inc\\_FederalPrisonFactsheet\\_March20112.pdf?1304452236](http://asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236) (citing FED. BUREAU OF PRISONS, BUDGET AND PERFORMANCE SUMMARY—FEDERAL PRISON SYSTEM (2011), available at [justice.gov/jmd/2011summary/html/fy11-bop-bud-summary.htm](http://justice.gov/jmd/2011summary/html/fy11-bop-bud-summary.htm)).

<sup>44</sup> CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2 (2012), [http://www.vera.org/sites/default/files/resources/downloads/Price\\_of\\_Prison\\_updated\\_version\\_072512.pdf](http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prison_updated_version_072512.pdf).

<sup>45</sup> Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison ‘Real Work’ Programs Work?*, NAT’L INST. JUST. J., June 2007, at 32, 32-36.

<sup>46</sup> Stephen P. Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 373 (1998); see also *Coal. for Gov’t Procurement*, 365 F.3d 435 (dealing with multiple statutory restrictions on Federal Prison Industries (UNICOR)).

mental and physical health, sobriety, morality, human relationships, industriousness, intelligence, security risk, and general life experiences. “Paying prisoners the federal minimum wage is economically unrealistic.”<sup>47</sup> The prevailing wage requirement put on private businesses is particularly onerous compared to what FPI pays its workforce: “Inmates earn from \$0.23 per hour up to a maximum of \$1.15 per hour, depending on their proficiency and educational level, among other things.”<sup>48</sup>

Historically, most prison authorities in America did not work prisoners efficiently at hard labor in the now-predominant “state-use” system. The state-use system employs a small fraction of all prisoners. The indeterminate sentence was effectively squashed because, at the time, there was little by which to encourage and judge the productivity or rehabilitation of prisoners. State ownership of prison industries invariably decreases burdens on the taxpayers. But those government industries do not *pay* taxes and usually require subsidies or preferences.

Modern reform efforts must address the unfairness issue caused by state-supported prison labor. The solution will be through the private sector, which more often creates social good, by avoiding, minimizing, or eliminating unfair competition with labor or businesses and by recognizing the more menacing threat of foreign competition.

**Economic Costs of Massive Incarceration.** The direct costs of massive incarceration include food, clothing, shelter, transportation to and from detention, health care—including mental health care, suicide watches, and medicines—and extra legal expenses for about 2.25 million people in or for the federal government and states, counties,

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<sup>47</sup> Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage?*, 67 TEMP. L. REV. 295, 333 (1994).

<sup>48</sup> JAMES, *supra* note 34, at 3.



and cities. Managing this high-risk population twenty-four hours per day, every day, incurs enormous expenses for correctional salaries, training, equipment, health care, legal representation, real estate, insurance for high-risk environments, utilities, and escapes. Direct costs build and maintain a full-ride welfare state of 2.25 million prisoners and the correctional personnel and property to manage them. In fact, the direct costs encompass the largest group of full-ride welfare recipients in the world. The average prisoner costs the government about \$30,000 annually in direct costs. Direct costs may nominally be doubled to account for indirect, collateral, and social costs.

“Prison costs are blowing holes in state budgets but barely making a dent in recidivism rates.”<sup>49</sup> The total cost exceeded \$49 billion dollars in 2007, and in 2005 showed a national per prisoner operating cost of \$23,876.00 per year.<sup>50</sup> The Vera Institute of Justice calculated that the annual per prisoner cost to the American taxpayers in 2010 was \$31,286.51. One study pegged the total annual costs at more than \$60 billion.<sup>52</sup> That figure is still rising, taking ever-larger shares of state general funds and crowding out other priorities.<sup>53</sup> The State of California paid \$49,000 per prisoner per year according to its governor at mid-year 2009, who also said the national average was then already

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<sup>49</sup> THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, 3 (2008), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/one\\_in\\_100.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf).

<sup>50</sup> *Id.* at 11.

<sup>51</sup> HENRICHSON & DELANEY, *supra* note 44, at 10.

<sup>52</sup> COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 1 (2006), *available at* [http://www.vera.org/sites/default/files/resources/downloads/Confronting\\_g\\_Confinement.pdf](http://www.vera.org/sites/default/files/resources/downloads/Confronting_g_Confinement.pdf).

<sup>53</sup> THE PEW CTR. ON THE STATES, *supra* note 49, at 11-16.

\$32,000 per prisoner per year.<sup>54</sup> Incarceration costs continually increase due to rising health care expenses for older convicts. “[W]ith one in 100 adults looking out at this country from behind an expensive wall of bars, the potential for new approaches cannot be ignored.”<sup>55</sup> Forward-thinking criminologists, recognizing the lack of good answers in penology, actively seek new evidence-based techniques from other disciplines.<sup>56</sup> The nation may, at long last, *after taking on an additional 1,800,000 current prisoners since 1980*,<sup>57</sup> be hitting a bottom.

It is not just the prisons that are overcrowded and expensive. Officers supervising parole and probation often have more cases to handle than earlier thought optimal.<sup>58</sup> “At yearend 2011, there were about 4,814,200 adults under community supervision.”<sup>59</sup> Each of those probationers and parolees costs thousands of dollars per year to supervise. Direct expenditures on police and the judicial system increased by several hundred percent over the last thirty years.

Both Republicans and Democrats thought that the nation had ended “welfare as we knew it” when work was required of welfare recipients, but Americans forgot the

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<sup>54</sup> Arnold Schwarzenegger, Office of the Governor, Speech (June 12, 2009), [www.gov.ca.gov](http://www.gov.ca.gov). Jails are even more expensive than prisons on a per prisoner basis.

<sup>55</sup> THE PEW CTR. ON THE STATES, *supra* note 49, at 21.

<sup>56</sup> MICHAEL DOW BURKHEAD, *THE TREATMENT OF CRIMINAL OFFENDERS: A HISTORY 173-75* (2007).

<sup>57</sup> WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, *PRISONERS IN 2006* (2007); JUSTICE POLICY INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1* (2000). The total incarcerated population has declined slightly over the last two years.

<sup>58</sup> NAT’L RESEARCH COUNCIL, *PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION 35* (2008).

<sup>59</sup> LAURA MARUSCHAK & ERIKA PARKS, U.S. DEP’T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES, 2011* (2012).

biggest group of unemployed welfare recipients.<sup>60</sup> The millions of what can be considered social parasites that the nation fully supports in prisons and jails went almost undetected during welfare reform. And their numbers have increased markedly. Very few prisoners pay for more than a tiny fraction of their upkeep, with most paying zero. In addition to the “welfare costs” of supporting idle prisoners, actual welfare payments outside prison increase when wage earners leave families.

Incarceration simultaneously creates more unemployment because prisoners are vastly underemployed. Foreign workers regularly fill labor shortages outside prison. Massive incarceration broadens widespread unhappiness and societal disruption. The 2010 Census arguably counted a couple of million prisoners “in the wrong place.” The blockage of normal human development and education are significant economic and social costs.

Contrary to what judgments in criminal cases recite, imprisonment “to hard labor” barely exists anymore. Most prisoners are sidelined from strenuous, productive work by restrictive legislation. While the Thirteenth Amendment<sup>61</sup> means or implies that the state owns the value of the prisoners’ labor,<sup>62</sup> Congress and most states do not allow

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<sup>60</sup> ROBERT D. ATKINSON, PROGRESSIVE POLICY INST., PRISON LABOR: IT’S MORE THAN BREAKING ROCKS (2002), *available at* [www.dlc.org/documents/prison\\_labor\\_502.pdf](http://www.dlc.org/documents/prison_labor_502.pdf).

<sup>61</sup> The Thirteenth Amendment to the United States Constitution states as follows: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.”

<sup>62</sup> *See Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (“Indeed, the Thirteenth Amendment’s specific exclusion of prisoner labor supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment.”);

themselves or private businesses to use the full value of that labor, despite the benefits of jobs for prisoners and all directly concerned interests.<sup>63</sup>

Prison industries and labor achieve the pinnacle of imperfect economic competition. With rare exceptions, only the prison system can employ any of its inmates. There is only a single seller of any goods produced, the state. One type of buyer, a governmental entity, is the purchaser, but the state does not necessarily have to buy its goods from prison industries.<sup>64</sup> Criminal and correctional systems exclusively control entry into prison industries and all eligibility for work therein. The transportation across state lines and labeling of prison-made goods is restricted or prohibited. Governments control the supply of and demand for prison-made goods while holding all of their manufacturing workers hostage. This creates a double or triple monopoly over a system of punishment that has always failed in its original purpose of rehabilitation. These government monopolies—by no means simple ones—create substantial economic inefficiencies, an enormous deadweight loss. If the U.S. government and states were subject to antitrust laws, their monopolies over prison industries would clearly violate the Sherman Antitrust Act in multiple ways.<sup>65</sup> In the prison industry

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Ali v. Johnson, 259 F.3d 317, 317 (5th Cir. 2001) (“[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”).

<sup>63</sup> Garvey, *supra* note 46, at 373.

<sup>64</sup> 18 U.S.C. § 4124 (2006).

<sup>65</sup> 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”); 15 U.S.C. § 2 (2006) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . .”).

context, the entire set of employment laws, including those passed without prisoners in mind, is precisely the type of social rigidities associated with the long-term decline of nations.<sup>66</sup>

The American public would benefit if prisons produced lower-cost goods. “In every country it always is and must be the interest of the great body of the people to buy whatever they want of those who sell it cheapest.”<sup>67</sup> Instead of deriving economic benefit from prisoners, federal law constructs impediments and uses their resources without urgency. “The Attorney General may make available . . . the services of United States prisoners under terms, conditions, and rates mutually agreed upon, for constructing or repairing roads, clearing, maintaining and reforesting public lands, building levees, and constructing or repairing any other public ways or works . . . .”<sup>68</sup> Due to added security costs, low skill levels, and the importance of heavy equipment, using prisoners to work outside prison is the least efficient way to utilize their labor.

Prisoners, even if they work, enter a government-controlled organization, monopoly, and welfare state. The high unemployment and underemployment caused by incarceration reduces tax revenues and greatly increases government expenses. Economic disadvantages are greatly exacerbated by the demographic changes wrought by incarceration. Most of the 2.25 million prisoners in the

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<sup>66</sup> See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS—ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982); see also Zatz, *supra* note 5 (discussing a litany of prison labor considerations under the Fair Labor Standards Act and other employment-related statutes). Some prisoners today work in inconspicuous prison-located call centers, a commercial service business not mentioned in the protectionist statutes.

<sup>67</sup> SMITH, *supra* note 2, at 493.

<sup>68</sup> 18 U.S.C. § 4125 (2006).

United States are able-bodied, and the majority of them enter prison as young people. As the number of productive workers shrinks in relation to retirees, the incarceration regime locks up two million workers and keeps them inactive most of the time. Workers that are not in prison then have to support this dependent population. In a nation of aging retirees, the subtraction from the labor force of this many workers has a harmful economic effect as it skews the labor force.

For decades, the economic effects of idle prisoners remained modest compared to the growing American population that supported those prisoners, the growing economy, and the growing technological achievements. During major wars, prisoners were more often released or put to work. Harmful economic effects increased as the American prison population multiplied, manufacturing jobs fled overseas, and demographic trends reduced the percentage of workers in the total population. Historically, society has not subjected the criminal justice system to cost-benefit analysis.<sup>69</sup>

As a result of incarceration, commercial activity declines, but government expenses, inside and outside of prison, increase. The private sector spending continues to lose ground to public sector spending, with all the inefficiencies that public spending entails. Payment of child support, for example, declines as a result of incarceration. Therefore, public assistance to the families of those dependent prisoners increases. Transportation expenses to and from prison visitation increase. Homeless people commit crimes for the support advantages of incarceration. And even some homeless people try to commit federal crimes to enjoy the better conditions in federal prisons.

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<sup>69</sup> Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 338-39 (2004).

Numerous monopolies inhibit prisons, including monopolies over prison industries, labor, labeling, and the transportation of prison-made goods, along with a failed monopoly over the process of rehabilitation. Instead of rehabilitating and producing goods or services, prison systems are an expensive way to make bad people worse. The only demonstrable economic benefit derived from incarceration is that the incapacitation of 2.25 million prisoners who cannot commit crimes outside the prisons and jails while incarcerated prevents injuries to others. However, crimes continue behind bars.

Government controls eligibility for work, hiring, firing, and all of the wages, terms, and conditions of employment. Security costs and risks, plus the low skill and literacy levels of prisoners, make prevailing wage requirements difficult to overcome. In addition, governments own and operate most prison industries and decide which private companies can operate a business or industry in prison or with prison labor. All purchases, sales, and transportation of raw materials and prison-made goods are made by or tightly controlled through the government.

Federal and state laws concerning prison labor are the strongest racially and gender-based discriminatory employment barriers in the country today, adversely impacting African-Americans and men. Each state is free to restrict the sale of prison-made items, and many do. Various private sector efforts showed promise in the later twentieth century, but none of them ever worked for more than a relative handful of prisoners.<sup>70</sup>

Prisoners are not accurately reflected in unemployment statistics because the Bureau of Labor

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<sup>70</sup> SUTHERLAND, *supra* note 14, at 305-07.

Statistics only counts non-institutionalized people.<sup>71</sup> To be accurate, unemployment statistics should count about 90% of prison inmates as unemployed rather than subtracting them from the workforce. If the unemployment rate was so calculated, then the official unemployment rate would go up approximately one half of 1%.

While the United States harms its own economy with massive incarceration, Chinese prison-made goods enter the United States against federal law<sup>72</sup> with impunity, often as components. Today, China incarcerates an estimated three to five million dissidents, slackers, and criminals in a vast network of reform-through-labor or Laogai camps.<sup>73</sup> Despite international agreements and U.S. statutes, products made by unpaid forced labor find their way to the United States, and they are not labeled as prison-made goods as called for under 18 U.S.C. § 1762. Product components made in Laogai camps pass undetected. Many internet sales that are conducted in English link to the Chinese Ministry of Commerce.<sup>74</sup> According to the Laogai Research Foundation, prisons produce large profits for the Chinese government.<sup>75</sup>

**“Making Bad People Worse.”** Prisons are typically thought to house predatory societies populated with profoundly selfish people. Stress and fear of assault

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<sup>71</sup> *Labor Force Statistics from the Current Population Survey*, U.S. DEPT LAB. BUREAU LAB. STAT. (Apr. 5, 2013), <http://www.bls.gov/cps/lfcharacteristics.htm#laborforce> (“The labor force is the sum of employed and unemployed persons. The labor force participation rate is the labor force as a percent of the civilian noninstitutional population.”).

<sup>72</sup> 19 U.S.C. § 1307 (2006).

<sup>73</sup> See LAOGAI MUSEUM, [www.laogaimuseum.org](http://www.laogaimuseum.org) (last visited Oct. 8, 2013).

<sup>74</sup> LAOGAI RESEARCH FOUND., NOT FOR SALE: ADVERTISING FORCED LABOR PRODUCTS FOR ILLEGAL EXPORT 10-11 (2010), [laogai.org/sites/default/files/pdf/lrf\\_enterprise\\_ads\\_report.pdf](http://laogai.org/sites/default/files/pdf/lrf_enterprise_ads_report.pdf).

<sup>75</sup> *Id.* at 16-17.



are common. Prisoners often feel threatened by their own cellmates. The best current method of controlling assaults in prison is to prosecute offenders, thereby lengthening their sentences. Mentally ill prisoners forget to take their medications; require complicated cell extractions using protective gear, force, and pepper spray; and end up in segregation.

Prisons daily affront human dignity. Prisoners suffer from violence, fear of violence, self-mutilation, gang influence, and racism. Many prison inmates suffer rape, sexual and physical assaults, or death while incarcerated. Congress passed the Prison Rape Elimination Act in 2003, which set up a Prison Rape Elimination Commission. Prisoners who complain about sexual assaults risk retaliation by their rapists or other prisoners and are then at much greater risk of future assaults for being known as both “punks” (rape victims) and “snitches” (informants).<sup>76</sup> Rape victims can contract sexually transmitted diseases. On July 31, 2008, the National Prison Rape Elimination Commission said, regarding juvenile correctional facilities, “It is particularly striking that fully 43 percent of those incidents were reported to involve misconduct or harassment by correctional staff—the very people who are responsible for protecting these most vulnerable inmates.”

Prisons readily breed infections, and diseases multiply in prison. The Commission on Safety and Abuse in America’s Prisons found

[h]igh rates of disease and  
illness among prisoners,  
coupled with inadequate  
funding for correctional

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<sup>76</sup> HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 20 (2009), <http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf>.

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health care, endanger prisoners, staff and the public. Much of the public dismisses jails and prisons as sealed institutions, where what happens inside remains inside. In the context of disease and illness, which travel naturally from one environment to another, that view is clearly wrong.

The suicide rate for American prisoners is five to 15 times greater than it is for the general American population.<sup>77</sup> Possessions are removed, family excluded, and sexual desire frustrated. Gender segregation prohibits normal sex. Sexual deviancy increases. Life is unpleasant. Sanity depends upon mental toughness. Worries remain. Most prisoners are unhappy. Many are unhappy all of the time. Pagan, satanic, racist, and occult religious texts are more popular in prison than outside. Fewer programs for inmates exist than in prior years. Most prison cells are not air-conditioned, which can be a medical problem, especially in warmer climates.<sup>78</sup>

The nation takes every prisoner away from his or her spouse, family, and friends. The free world isolates and abandons prisoners with long sentences. Many prisoners do not receive any visits from friends or family.<sup>79</sup> Solid

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<sup>77</sup> ALISON LIEBLING, *SUICIDES IN PRISON* 24 (1992).

<sup>78</sup> Climate helps explain in part why (1) prisons began and were more common in the North, (2) northern states today have the highest incarceration rates of African-Americans, indicating hot Southern prisons might be a crime deterrent in the age of air-conditioning, and (3) Arabians disfavor incarceration over other punishments.

<sup>79</sup> GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 65 (1958).

barriers separate the prisoner and visitors during visits. Gangs successfully recruit members in prison, spreading their anti-social ideas and breeding virulent bigotry. By being in prison, prisoners take on the penitentiary's sick underclass values, codes, and dogma. The longer the prison sentence, the more the values and codes affect the prisoner. The closed environment of prison is kept from view because prisons severely restrict the media's access, routinely prohibit press interviews, and monitor and censor mail and telephone communications.<sup>80</sup> Dreadful things often do not receive investigation or publicity. Through the centuries, lack of communication between prison and the outside world allowed abuses to go undetected inside the closed prison environment. Prisons harm people in several ways but do not make enough of them penitent. Incarceration teaches depravity, affects minds adversely, and then releases prisoners into the free world on their mandatory release dates or on parole. Criminals learn better how to commit crimes but not how to be productive in the free world.

In the last twenty years, the use of segregation or solitary confinement has increased markedly, worsening outcomes and significantly increasing expenses for the prison system. Solitary confinement—known as isolation, punitive segregation, disciplinary segregation, segregated housing, and other names—causes psychiatric harm in manifold ways, especially to those with previous mental illnesses. Solitary confinement can cause psychotic disorganization, self-destructive behavior, delusions, panic attacks, paranoia, and an inability to adapt to the general prison population. Hypersensitivity, rage, aggression, memory problems, concentration problems, and impulse-control problems can also stem from segregated housing units. Intolerance of social interaction is one of the more

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<sup>80</sup> HUMAN RIGHTS WATCH, *supra* note 76, at 44-45.

common results. With respect to the ill effects of solitary confinement, Harvard psychiatrist Stuart Grassian said, “The laws and practices that have established and perpetuated this tragedy deeply offend any sense of common human decency.”<sup>81</sup> Prisoners requiring solitary confinement are more frequently those who cannot obey prison rules but are not usually the worst offenders in terms of criminal convictions. Solitary confinement is on the rise for disciplinary and security reasons and creates additional expenses.

Prisons are therefore on a different planet compared to employment-related legislation regulating free labor. Those advocating employment rights for prisoners ought to consider the employer’s potential regulatory and legal compliance costs. How many manufacturers would place their operations in a prison, employ problematic prison labor at prevailing wages, and then face numerous frivolous lawsuits? There is no general federal or state right to air-conditioning in the free world, but Southern prisoners would naturally love air-conditioning. Prisoners live in “sweatshops” as it is. There is no law for or against boredom either, but boredom naturally makes prisoners want real jobs. Federal and state legislation creates approximately a 90% unemployment rate, exclusive of prison housework, while bored prisoners stay overheated in the summer. Reforming incarceration requires an entirely new way of conducting business.

**Recidivism.** Prisons are revolving doors for recidivists. The number released is about equal to the number imprisoned. Every year, a large and poorly disciplined American army of released prisoners—about 700,000 ex-cons—goes back to the streets. Released convicts face many re-entry obstacles, most do not make

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<sup>81</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 355 (2006).

the transition successfully, and huge numbers are returned to the prison system. Prisons are, as Jens Soering's 2004 book title reveals, *An Expensive Way to Make Bad People Worse*.<sup>82</sup> In 2007, 725,000 prisoners were released from jail or prison. Their suicide risk is very high in the first few weeks and months after release. Carrying the "felon" or "ex-con" stigma, prisoners often leave without much job training, substance abuse counseling, or education. Released prisoners replicate the trauma of slave emancipation every day: they have trouble finding homes, work, and food. A huge percentage of convicted felons are unemployed when arrested and when released are often unemployed again, immediately and several years after release. Finding and keeping employment is one of the biggest barriers to re-entry.<sup>83</sup>

Offenders usually lack job skills and work habits, and when they are released, they encounter a shrinking number of low-skill jobs. Offenders cannot easily comply with the terms of their probation or parole unless they hold a job. Many prisoners are illiterate or only semi-literate. One good thing that prisons often do is educate prisoners to the GED level, but the public opposes paying for college degrees. Some prisoners, especially young ones, have never held regular jobs. Collateral sanctions bar convicted felons from employment, positions, welfare, housing, student loans, food stamps, voting rights, the right to keep and bear arms, jury service, and other benefits. Their post-release status injects them into a New Jim Crow regime,

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<sup>82</sup> JENS SOERING, *AN EXPENSIVE WAY TO MAKE BAD PEOPLE WORSE: AN ESSAY ON PRISON REFORM FROM AN INSIDER'S PERSPECTIVE* (2004).

<sup>83</sup> LIOR GIDEON, *SUBSTANCE ABUSING INMATES: EXPERIENCES OF RECOVERING DRUG ADDICTS ON THEIR WAY BACK HOME* 68 (2010).

where they are second-class citizens by operation of law.<sup>84</sup>  
As Emma Goldman wrote years ago,

Year after year the gates of  
prison hells return to the  
world an emaciated,  
deformed, will-less,  
shipwrecked crew of  
humanity, with the Cain mark  
on their foreheads, their  
hopes crushed, all their  
natural inclinations thwarted.  
With nothing but hunger and  
inhumanity to greet them,  
these victims soon sink back  
into crime as the only  
possibility of existence.<sup>85</sup>

Danger increases even more when convicts  
go from solitary confinement directly to the streets.

Certain categories of released prisoners have a  
problem staying out of trouble in the first three years of  
their new freedom; many do not make it six months.  
Released inmates typically end up back in trouble, jail, or  
prison, having been unable to cope in the free world. Every  
year, approximately 300,000 parolees return to prison due  
to parole violations alone, usually because they committed  
new crimes.<sup>86</sup> In addition, the United States incarcerates  
many thousands of probationers every year for violating the

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<sup>84</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>85</sup> Emma Goldman, *Prisons*, in *THE CRY FOR JUSTICE: AN ANTHOLOGY OF THE LITERATURE OF SOCIAL PROTEST* 147-48 (Upton Sinclair ed., 1915).

<sup>86</sup> NAT'L RESEARCH COUNCIL, *supra* note 58, at 10.

terms of their probations, for new offenses, or for other reasons.<sup>87</sup> Substantial recidivism keeps America's jails and prisons full.

Returning parolees increase crime rates in their neighborhoods.<sup>88</sup> Offenders on probation or parole commit a prodigious number of crimes, enough to turn the public against these "alternative sentences." A study by the Bureau of Justice Statistics of the U.S. Department of Justice found that in the year 1991, 162,000 probation violators were sent to prison and those violators—with almost half using illegal drugs daily—had committed 6,400 murders, 7,400 rapes, 10,400 aggravated assaults, and 17,000 robberies.<sup>89</sup> With statistics like these, states and the federal government eliminated or tightened the requirements for parole and "good time." Over half the states enacted truth-in-sentencing laws, which require completion of most of the original sentence. The very best modern treatment programs, cognitive behavioral therapies, have a small but statistically significant impact on recidivism rates, but these therapies cost money and are not commonly used.<sup>90</sup>

Civil rights activists decry the New Age slavery of prison followed by a New Jim Crow regime that has

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<sup>87</sup> LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 15-16 (2007).

<sup>88</sup> John R. Hipp & Daniel K. Yates, *Do Returning Parolees Affect Neighborhood Crime? A Case Study of Sacramento*, 47 CRIMINOLOGY 619 (2009).

<sup>89</sup> ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991 (1995).

<sup>90</sup> BURKHEAD, *supra* note 56, at 165-73; Mark W. Lipsey et al., *Effects of Cognitive-Behavioral Programs for Criminal Offenders*, CAMPBELL COLLABORATION (Aug. 9, 2007), [www.campbellcollaboration.org/lib/download/143/](http://www.campbellcollaboration.org/lib/download/143/); Paul Gendreau & D.A. Andrews, *Tertiary Prevention: What the Meta-Analyses of the Offender Treatment Literature Tell Us About "What Works,"* 32 CANADIAN J. CRIMINOLOGY 173, 173-84 (1990).

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created a new pariah class in our supposedly color-blind society.<sup>91</sup> While work is considered critical to rehabilitation and re-entry into society, most employers refuse to hire convicted felons or former prisoners. This dilemma forces many released prisoners back into a life of crime, continuing the cycle of recidivism. As a result, correctional populations are huge. “Adult correctional authorities supervised about 6,977,700 offenders at yearend 2011 . . . which includes probationers, parolees, local jail inmates, and prisoners in the custody of state and federal facilities.”<sup>92</sup>

A large Bureau of Prisons study, Post-Release Employment Project (PREP), found job training programs in prison substantially reduce recidivism.<sup>93</sup> Another study indicates job training in prison may benefit minorities more than other prisoners.<sup>94</sup> Other studies found little significant effect,<sup>95</sup> but no studies find that prison labor and job training increase recidivism. Hard work in a position more closely approximating a real job in the competitive private sector, allowing prisoners to accumulate savings,

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<sup>91</sup> ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003) (using the term “New Age Slavery” for the first time); ALEXANDER, *supra* note 84 (coining and explaining “New Jim Crow Regime”).

<sup>92</sup> GLAZE & PARKS, *supra* note 3.

<sup>93</sup> William G. Saylor & Gerald G. Gaes, *Training Inmates Through Industrial Work Participation and Vocational and Apprenticeship Instruction*, 1 CORRECTIONS MGMT. Q. 32 (1997).

<sup>94</sup> See WILLIAM G. SAYLOR & GERALD G. GAES, THE DIFFERENTIAL EFFECT OF INDUSTRIES AND VOCATIONAL TRAINING ON POST RELEASE OUTCOME FOR ETHNIC AND RACIAL GROUPS (1999), *available at* [http://www.bop.gov/news/research\\_projects/published\\_reports/recidivism/orepreprep\\_s1.pdf](http://www.bop.gov/news/research_projects/published_reports/recidivism/orepreprep_s1.pdf).

<sup>95</sup> See WILLIAM G. SAYLOR & GERALD G. GAES, COMMENTARY ABOUT THE SCIENTIFIC MERIT OF THE POST RELEASE EMPLOYMENT PROJECT (PREP) (2002), *available at* [http://www.bop.gov/news/research\\_projects/published\\_reports/edu\\_training/saylor\\_gaes\\_commentary.pdf](http://www.bop.gov/news/research_projects/published_reports/edu_training/saylor_gaes_commentary.pdf).



conditioning prisoners to a long work week, and enforcing pro-social work environments under powerful management is bound to reduce recidivism more than existing government vocational training programs not focused on profitability. A prisoner conditioned to work sixty hours per week will easily work forty hours per week in the free world.

### **Social Consequences of Massive Incarceration.**

Given the social consequences of massive incarceration, the questions become whether the United States deserves the developments brought on by massive incarceration and whether the country can benefit by putting its prison population to profitable work. Macroeconomic disadvantages, the expansion of big government, public debt, a huge increase in the welfare state, social costs, and the decline in personal liberty all prove that enormous incarceration is harmful to the nation as a whole.

The economic and social inefficiencies and disadvantages of incarceration are surpassed only by the ineffectiveness of the punishment itself. From the perspective of a behaviorist, prison is a poor form of learning because the punishment is delayed too long from the commission of the criminal behavior sought to be controlled. Further, the behavior most often taught in prison is to follow prison rules, not behavior for success on the outside.

*Massive incarceration is a social disaster.* Indirect and human costs of incarceration probably equal direct expenditures. Child support payments virtually stop once a prison sentence starts. Collateral social costs include increased welfare payments and social services for the children and families of the incarcerated. Increased suicide and mental illness among prisoners and the stunted development of human capital affect most prisoners. The majority of prisoners do not perform much useful labor,

and their earnings, job skills, education, and entrepreneurship opportunities suffer or disappear. The destruction of families and the imbalance in sex ratios outside prison, particularly in African-American communities, have long-term harmful social effects. Families of incarcerated persons frequently have to drive long distances for visitation. Overrepresentation of African-Americans in this new pariah class also increases the racial divide on economic, social, and educational dimensions. Lowered rates of fertility result. Incarceration breaks up families, marriages, and communities. The children of the incarcerated grow up without parents and are then more prone to criminal activity themselves. Marriage prospects decline, resulting in less opportunity for stable home environments that would otherwise decrease crime. Correctional expenses crowd education funding out of state and local budgets.<sup>96</sup> Barriers to geographic mobility are erected, not just for prisoners but for their families.

**“Nothing Works:” The Failure of Government Regulation.** *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* evaluated 231 different studies and found very little in the way of prisoner rehabilitation that had any positive impact on recidivism.<sup>97</sup> A simplistic summary of this survey arose: “Nothing works.” This sound bite sprung up based on a 1974 article by one of the co-authors of *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation*

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<sup>96</sup> See NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE—EXCESSIVE SPENDING ON INCARCERATION UNDERMINES EDUCATIONAL OPPORTUNITY AND PUBLIC SAFETY IN COMMUNITIES (2d ed. 2011), available at [http://naacp.3cdn.net/ecea56adeef3d84a28\\_azsm639.wz.pdf](http://naacp.3cdn.net/ecea56adeef3d84a28_azsm639.wz.pdf).

<sup>97</sup> See DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

*Studies*.<sup>98</sup> A decade later, Congress “recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.”<sup>99</sup> The Sentencing Reform Act of 1984 abolished parole in the federal system, sought to eliminate huge sentencing disparities, basically made all federal sentences determinate, said “punishment should serve retributive, educational, deterrent, and incapacitative goals,” and found that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”<sup>100</sup> From 34,263 federal prisoners in 1984, the federal prison population grew to 214,774 in 2011, over a six-fold increase,<sup>101</sup> and this does not count growth in state prison systems and jails in all fifty states.

Congress and state legislatures effectively sabotaged rehabilitation in prison by eliminating the indeterminate sentence, destroying the market for prison-made goods and labor, and passing other ill-considered legislation. At the same time, Congress and state legislatures established state monopolies over prison industries and labor. Prisons became enormously expensive after the prison population proliferated. American incarceration represents in multiple dimensions the utter failure of over-regulation; it achieves the opposite of the intended goal. A system originally designed for rehabilitation actually makes prisoners worse over time. A losing War on Drugs creates casualties but returns POWs to the streets. Sentences to “hard labor” became sentences to forced inactivity. Prison gangs gained power. Sentences were lengthened through various means, though this had

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<sup>98</sup> IAIN MURRAY, MAKING REHABILITATION WORK: AMERICAN EXPERIENCE OF REHABILITATING PRISONERS, *available at* <http://www.civitas.org.uk/pdf/Rehab.pdf>.

<sup>99</sup> *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

<sup>100</sup> *Id.* at 367; *see generally* 18 U.S.C. § 3582(a).

<sup>101</sup> *United States v. Diaz*, No. 11-CR-00821-2, 2013 WL 322243, at \*10 (E.D.N.Y. Jan. 28, 2013) (citing DOJ statistics).

little effect on deterrence. Additional conduct was criminalized. Paradoxically, most of the law and order voices who favored tougher stances on crime, including the author, were also proponents of private enterprise and smaller government, yet the result ultimately achieved in corrections exponentially increased the size, power, intrusiveness, and expense of government. In 2010, Michelle Alexander expressed great exasperation with the failure of civil rights legislation and advocacy to prevent creation of “The New Jim Crow” in an age of supposed color-blindness. There is plenty of blame to go around in every direction of the political spectrum. The invention of the penitentiary and subsequent growth of incarceration prove the power of unintended consequences. Societies do not legislatively abolish all barbaric human traits because those characteristics always seem to return later in different, concealed, or unexpected places. They operate in a veneer of civilization and only within the tolerances permitted by human nature. Peace treaties can lead to war. Laws intended for good sometimes cause violence and disorder. It is thought that society sees the worst of human nature in criminals, who obviously require extraordinary handling.

The nation’s rejection of rehabilitation was made without reference to the corrective power of thriving prison industries, which teach work skills and discipline. Studies show the ineffectiveness of standard prison sentences compared to the value of work and some alternative sentencing arrangements.<sup>102</sup> History proves prisons can be profitable. Private prison employment would likely be even more reformatory, especially if employers controlled

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<sup>102</sup> Kevin Marsh & Chris Fox, *The Benefit and Cost of Prison in the U.K.: The Results of a Model of Lifetime Re-Offending*, 4 J. EXPERIMENTAL CRIMINOLOGY 403, 403-23 (2008).

the entire prison environment as well as the work itself. Work and crime are opposites.

**Incapacitation: The Value of Incarceration.** The goal that prisons should be self-supporting has been forgotten. The four remaining purposes of prisons are usually said to be (1) punishment or retribution, (2) deterrence, (3) incapacitation or public protection while offenders are incarcerated, and (4) rehabilitation. Scientific research on criminal deterrence fails to find much deterrent value in incarceration.<sup>103</sup> Indefinite prison sentences in the future, to be served in places they may never have seen, are not foremost in criminals' minds when offending. With regard to imprisonment, "there is not a strong relationship between objective sanctions and perceived sanctions."<sup>104</sup> The "dirty little secrets" in crime deterrence research prove that the threat of confinement deters crime very little compared to the massive investment in this punishment; incarceration is simply not certain, severe, or swift.<sup>105</sup>

Even though prisons fail in their goals of deterrence and rehabilitation, there is one way they succeed: incapacitation. When criminals are in prison, they cannot commit crimes in the free world. Studies show great value in temporarily preventing crime with incapacitation. Incapacitation now ranks as the primary justification for prison. A reputable study found that for each convict released due to prison overcrowding litigation, fifteen crimes are committed, at a cost of \$45,000 above the average cost of keeping a prisoner for one year.<sup>106</sup> Dr.

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<sup>103</sup> Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010).

<sup>104</sup> *Id.* at 808.

<sup>105</sup> *See id.*

<sup>106</sup> *See* Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111-2 Q. J. ECON. 319, 319-51 (1996).

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Levitt found four reasons for the marked decrease in U.S. crime, starting in about 1991: the rising prison population, more police, the receding crack cocaine epidemic, and the legalization of abortion.<sup>107</sup> The National Institute of Justice published a widely cited 1987 statistical study by Dr. Edwin W. Zedlewski entitled *Making Confinement Decisions*. *Making Confinement Decisions* found that it costs more to release offenders than to keep them confined; the study computed annual costs of \$430,000 per prisoner released.<sup>108</sup> Dr. Zedlewski's findings utilized a Rand Corporation survey of inmates, which found the average inmate was committing 187 to 287 crimes per year before incarceration.<sup>109</sup>

One advantage of prison is that it gives young men and women time to mature. After lengthy prison sentences, older, more mature offenders are less likely to re-offend violently than when they were younger. Some sober up in prison. The incapacitation effect literally keeps crimes from occurring. The early release of prisoners, brought on by budgetary and financial difficulties, causes crime to increase, especially in the large urban areas to which criminals usually return. While logic and data will instruct authorities as to the least threatening prisoners to release, given current recidivism rates, the early release of multiple prisoners inevitably causes an increase in crime. While incarceration itself is harmful and may increase the propensity of a criminal to recidivate, that increased likelihood is smaller than the decrease in crime brought about by the complete incapacitation of offenders while

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<sup>107</sup> See Steven Levitt, *Understanding Why Crime Fell in the 1990's: Four Factors That Explain the Decline and Six That Do Not*, 18-1 J. ECON. PERSP. 163, 163-90 (2004).

<sup>108</sup> FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 93 (Univ. Chi. Press 1991).

<sup>109</sup> *Id.*

incarcerated. Modern prisons do not rehabilitate or deter crime very well, but prisoners naturally do not deserve to be in the free world, where they would commit many more crimes than they do in prison. The revitalization of prison industries, including putting prisoners to work, is a prime way to reconcile the value of incapacitation with reductions in recidivism brought about by the aging or maturation process. Those serving life without parole and other long sentences make some of the best workers.

**Past Calls for Freeing Prison Labor.** Scholars and some leaders agree about the need to overthrow the protectionist regime. In 1985, professors J. Roger Lee and Laurin A. Wollan, Jr. proposed a “libertarian prison” in which prisoners were free to produce, run businesses, and move inside the walls of prison, subject of course to surveillance and normal legal restraints.<sup>110</sup> The National Center for Policy Analysis in 1996 released *Factories Behind Bars* by economist Morgan O. Reynolds, advocating greater private sector involvement.<sup>111</sup> In 1998, law professor Stephen P. Garvey called for *Freeing Prisoners’ Labor* in a *Stanford Law Review* article with that title.<sup>112</sup> Professor Garvey outlined the strangulation of prison industries over the years and proposed opening the market for prison goods and labor, removing the “embargo.” U.S. Representative Bill McCollum of Florida introduced the Free Market Prison Industries Reform Act of 1998 and conducted hearings before that bill died in House

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<sup>110</sup> See J. Roger Lee & Laurin A. Wollan, Jr., *The Libertarian Prison: Principles of Laissez-Faire Incarceration*, 65-2 PRISON J. 108, 108-21 (1985).

<sup>111</sup> MORGAN O. REYNOLDS, NAT’L CTR. FOR POLICY ANALYSIS, NCPA POLICY REPORT NO. 206: FACTORIES BEHIND BARS (1996), available at <http://www.ncpa.org/pdfs/st206.pdf>.

<sup>112</sup> See Garvey, *supra* note 46.

committee.<sup>113</sup> In 1999, economist Steven D. Levitt contended that inmate labor participation should increase by removing existing legal barriers.<sup>114</sup> After all these writings and hearings, prison and jail populations rose sharply.

**Difficulty of Change.** Prisoners are the least popular segment of modern society considering that society keeps them hidden and concern for them is very low. Many Americans want prison to be worse than it is, and there is a prevailing myth that prisoners have it easy. Politicians lose elections if they appear “soft on crime.” It is possible to see prison as a failed social experiment of the last 200 years, but society now accepts it as the norm and is appalled at some alternatives. Correctional officials working in the civil service are not in a good position to strongly advocate major structural changes. Jails, where prisoners serve shorter sentences and extra space is not often available, are admittedly not typically suitable for industrial operations, but jail prisoners are more easily transported with less risk.

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<sup>113</sup> *Prison Industry Reform Legislation: Hearing on H.R. 4100 and H.R. 2758 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 105th Cong. (1998), available at [http://commdocs.house.gov/committees/judiciary/hju57231.000/hju57231\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju57231.000/hju57231_of.htm). Dr. Morgan O. Reynolds testified as follows: “Our current policy is the height of folly. To ban any part of the population from productive employment opportunities creates a string of economic losers. A new study of inmate labor from the American Bar Association’s subcommittee on correctional industries shows that the unemployment problem in prisons is getting worse rather than better. The nation’s inmate population is growing so rapidly that the share of state and federal prisoners with jobs has shrunk from 7.6% to 6.5% since 1990.” *Id.*

<sup>114</sup> See Steven D. Levitt, *The Economics of Inmate Labor Participation* (May 26, 1999) (unpublished manuscript), available at <http://caselaw.org/Files/Levitt%20Paper.doc>.



Many who identify with the plight of prisoners stand in the way of revitalizing prison industries by complaining about the “exploitation” of prison labor or by insisting on rights and wages enjoyed in the free world. These anti-business advocates, known by their use of the term “prison-industrial complex,” do not fully realize that prisoners want to perform useful labor; such employment is good for everyone; prisoners first exploited society to earn their incarceration; big government and a massive legal structure has failed prisoners; private enterprise is the wellspring of economic progress; or the prison workforce necessarily contains many problematic workers. The hard truth is that it is better to be exploited than ignored or marginalized. At the height of exploitation, antebellum slaves were, on average, valued,<sup>115</sup> happier, treated better, and were exponentially more productive<sup>116</sup> than “New Age slaves” in prison.<sup>117</sup>

According to scholars, penal systems in stable nations change very slowly.<sup>118</sup> The principle of less eligibility means that the public wants prison life to be

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<sup>115</sup> A top field hand in today’s money was worth up to \$45,000.

<sup>116</sup> ROBERT W. FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (Univ. Press of Am. 1974), established that antebellum slavery was efficient and as profitable as industrial investments in the North. They found that slaves consumed 88% of their own economic production. *Id.* at 153. This work was and continues to be an eye-opener.

<sup>117</sup> See JOHN DEWAR GLEISSNER, *PRISON & SLAVERY: A SURPRISING COMPARISON* (Outskirts Press, Inc. 2010). Except for educational opportunities, slaves lived better day-to-day and were far happier than modern prisoners; food, clothing, and immediate shelter were comparable; slaves enjoyed their families, co-workers, spouses, friends, festivities, churches, had greater freedom of movement, better health, community peace, worked with animals, pastoral environment, less sexual exploitation, etc.

<sup>118</sup> JOHAN THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* 132 (Elsevier Scientific Publ’g Co. 1976).

worse than the lifestyle enjoyed by the poorest law-abiding citizens. Because modern punishment is hidden, the public remains ignorant and apathetic in many ways. In other words, modern prison life is “out of sight, out of mind.” The public presumably likes to see prisoners picking up trash on the side of the road, but this masks widespread idleness inside jails and prisons. The public presumably does not care much, if at all, whether the lives of prisoners improve. The interplay between state and federal governments compounded the difficulty of remedying the protectionist regime. When the federal government gave the states power to ban the sale of prison-made goods, at a time when most states sought to do just that, the anti-free trade and pro-government monopolies took root and grew in their insidious yet anemic ways. The monopolistic regime was never wiped away, even though the Smoot-Hawley Tariff and similar laws were repealed in favor of international trade.

Prison labor law is now inextricably bound up with other restrictive or expensive legislation and tort law. This includes mandatory source preferences and the complications of federal and state procurement laws, international, interstate and intra-state transportation and sales barriers, labeling, required employee benefits, the Fair Labor Standards Act, Title VII, Prison Litigation Reform Act, and the Inmate Accident Compensation Act. Change in this area must also address the concerns of the public, political constituencies, and affected businesses and labor. Bureaucracies resist change.

The greatest drivers of prison reform today will be budgetary, economic, and financial problems, some of which bring on judicial denunciations and prisoner releases. Because elected officials presumably do not favor prisoners, unelected officials, namely federal judges, act

when conditions violate the Constitution, a debatable yet necessary standard.

In *Brown v. Plata*,<sup>119</sup> the U.S. Supreme Court called California's severely overcrowded correctional system, exacerbated by "an unprecedented budgetary shortfall," unconscionable, unsafe, harsh, toxic, criminogenic, violent, unsanitary, chaotic, disease-ridden, violent, and suicide-inducing, all resulting in torture, lingering deaths, and a culture of cynicism, fear, and despair.<sup>120</sup> The federal courts over several years forced California to drastically lower its prison population. From December 31, 2010, to December 31, 2011, California's prison population decreased by 15,493, more than the U.S. prison population as a whole.<sup>121</sup> Thus, forced prisoner releases in California fully and statistically explain the entire 2011 decline in the U.S. prison population, which is not a clear sign of progress, especially if, as predicted by some, it causes an increase in crime.

**Legal and Structural Changes Needed.** State-run correctional industries do not have one clearly defined goal; several missions are in their mission statements. Is their primary goal to help the prisoner train for work after prison and reduce recidivism, or do they intend to save the state money? Are they supposed to create peaceful prison conditions or provide goods to other divisions of government? Do they produce the highest quality at the lowest price? If they are really helping the taxpayer, why do they often lose money?

Most prisoners do not work, prison industries cannot usually sell goods in the private sector, and

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<sup>119</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1927 (2011).

<sup>120</sup> *Id.*

<sup>121</sup> E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, 3 tbl.2 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

prisoners generally do very little to offset the enormous costs of their own incarcerations. When prison systems made profits, they worked prisoners very hard under the Auburn System in the private industrial setting. Industrial work avoids the extra security costs and inefficiencies of roadwork and other tasks prisoners are allowed to do today but which chores are not nearly as productive as organized manufacturing work in secure facilities.

Changes in the legal and economic structures of prisons can be made without reducing the benefits of incapacitation. The primary vehicle for revitalizing prison industries and benefiting the American economy will be private prison industries operating in secure prison environments free of wage and hour laws and almost all employment-related legislation and tort claims, thereby imposing greater discipline on prisoners. The nation must get government-owned-and-operated prison industries out of the business of losing money and force them to transition to a market economy. Far from being exploitation of prison labor, prisoners would naturally welcome the paying jobs. Putting hundreds of thousands of people to work would help revitalize the American economy and bring manufacturing jobs back to the United States. To overcome the previously unfair competition presented by unpaid or poorly paid prison labor, prison industries might be restricted to making goods now made exclusively overseas.<sup>122</sup> In this way, all Americans would benefit, even those in organized labor.

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<sup>122</sup> Federal Prison Industries, Inc. (UNICOR) is trying to jump on this bandwagon by taking advantage of a program designed for *private* businesses (“During fiscal year 2012, FPI received legislative authority to participate in the Prison Industries Enhancement Certification Program (PIECP) and to manufacture products that would otherwise be produced outside of the United States, as approved by FPI’s Board of Directors. With the passage of these authorities, FPI’s Board has approved 14 pilot programs for repatriated products. FPI anticipates

According to free market economists, prohibiting mutually beneficial exchanges harms the economy. Protective legislation at the federal and state levels greatly limits prison industries and labor. The modern prison regime suffers because it cannot participate freely in an open market. Prison-made goods are about the only legal products in the whole country not allowed to be sold freely in the market. Stifling economic production in prison drained the economy more as prison populations rose. It is time to repeal those protectionist statutes, the last relics of the Smoot-Hawley legislative era, to create a more open market for prison-made goods.

Society remembers labor exploitation by private enterprise during the Industrial Revolution, slavery, and serfdom, but none of those labor regimes were as bad as the current incarceration regime. The current prison regime oppresses the punishers along with the punished and helps foreign manufacturers. Private enterprise would create a better working environment without coercion. Prisoners would have to live and work without any sense of entitlement. The more exacting requirements of private employers under a competitive employment-at-will regime would impose upon inmates the discipline that has ever been associated with rehabilitation.

## CREATING AMERICAN MANUFACTURING JOBS—8 STEPS

**1. Repeal Restrictive Federal and State Trade Statutes.** The federal government made a fundamental mistake when it allowed interstate commerce to be regulated in fifty-one different places, and that mistake can best be corrected by federal preemption now. Federal and

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these pilot projects will assist in further reducing its losses.”). OFFICE OF THE INSPECTOR GEN., *supra* note 4, at 2. This action merely compounds bureaucratic impediments in an attempt to stop red ink.

state statutes prohibiting and limiting the manufacture, purchase, sale, and shipment of prisoner-made goods should be repealed or preempted. Prisoner-made goods should be allowed to move in interstate commerce to the same extent as any other product, without special labeling requirements. Mandatory source requirements could be eliminated on a government-by-government basis as state-run correctional industries competed with private businesses. Existing prison industries for the sake of efficiency would adapt to the market without existing preferences. Government agencies would be freed from purchasing restrictions.

Existing state protective trade legislation was passed to prevent the evils of convict leasing, prevent unfair competition, and preserve government control over prison labor and industries. To some extent, the states were retaliating with trade barriers in response to the barriers set up against them by other states. Any statute that protected the worker or public from harm should not be affected in any reformed system.

**2. Limited Freedom of Contract.** Freedom of contract should prevail between prison employers, prisoners, and federal and state correctional institutions. Prisoners and private businesses (or existing correctional industries) would negotiate on a *laissez-faire* basis, within the limitations imposed by ongoing sentences of imprisonment. Federal and state governments should encourage contracts between private and state businesses and prisoners regarding negotiated wages, hours, and conditions of employment. Private prison industries could be established within space rented from the prison or in separate secure facilities, forcing out state-sponsored businesses if it benefited the state. Transportation, food, clothing, and shelter might all be addressed in contracts if

industries chose to employ workers outside existing prison walls.

*Instead of the prison system or state leasing its prisoners, as in the discredited convict leasing systems of the past, prisoners should contract directly with private employers.* Involuntary convict leasing has a tragic record and should be avoided. The history of convict leasing provides guidance on how not to work prison labor: do *not* intermingle the determination of guilt with the desire for cheap labor; do *not* let the government lease convicts; do *not* eliminate wages or incentives for decent treatment; do *not* make most prison labor involuntary; do *not* send prisoners to the most dangerous jobs; and of course do *not* discriminate on the basis of race.

In practice, a tri-partite contractual relationship would arise because prisons would impose conditions on private employers and prisoner-employees. The primary condition would be that prisoners remain in prison or be securely confined in a comparable facility. While this may sound complicated, it would take on many attributes of existing tri-partite, dual-employer contracts between general employers (temporary service employers or agencies), special employers (companies needing work performed), and their shared employees. Although we need to get government-owned-and-operated prison industries out of their current business of losing money, the state will remain involved in a lesser but vital role. Private enterprises could submit bids to prisons regarding the renting of developed or undeveloped space, machinery, utilities, and other industrial needs. These concessions would reduce the costs of incarceration. State correctional industries could sell out to private concerns, partner with other businesses, transform themselves, or try to survive as they are.

Obviously, businesses will create contracts to ensure productivity, peaceful work environments, innovation, and hard work. Contracting parties can achieve these goals by agreement much better than any level of government regulation. Employers would surely prohibit gang activity, weapon production, violence, suspicious or preventable accidents, and other behavior prisons struggle to bar. For example, prisoners might be required to break up any fights as soon as possible on pain of losing their own jobs.

It is to some extent inconsistent to speak of a prisoner's freedom of contract when the prisoner loses his liberty and other freedoms upon incarceration or when the state intervenes in the market to support workers who are then enabled to work for lower wages than if they were required to provide their own food, clothing, shelter, and health care. Thus, freedom of contract in the context of prison labor is limited by the conditions of incarceration. With an imprisoned workforce supported at state expense, the market is never truly "free." All that can be done is to inject more freedom of action into prison industries and labor and try to benefit the public at large by getting repealed crippling laws. The unequal bargaining position of prisoners is inherent in their status as prisoners and in reality provides pro-social forces greater power to discipline them.

**3. Immunity from Claims, Lawsuits, and Prosecution.** "Corporate tax liability, employee benefits, tort litigation, [and] regulatory compliance . . . contribute to the cost differential confronting manufacturers in the United States."<sup>123</sup> Statutes, regulations, tort claims,

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<sup>123</sup> MFG. INST., FACTS ABOUT MANUFACTURING 4, *available at* <http://www.themanufacturinginstitute.org/Research/Facts-About->



required employee benefits, lawsuits, hearings, investigations, government enforcement agencies, extra procedures, forms, compliance activities, delayed personnel decisions, and legal expenses drive up the cost of American labor and send manufacturing jobs to lower-wage countries.<sup>124</sup> “Structural costs in 2011 were 20 percent higher than for our major competitors, up from 17.6 percent in 2008. That cost differential excludes the cost of labor.”<sup>125</sup>

To prevent expensive litigation and compliance costs, private and state prison industries should enjoy full immunity from almost all lawsuits and claims.<sup>126</sup> Employment laws, wage and hour legislation, insurance, employee benefits, tort claims, and restrictions protecting law-abiding workers should exempt prison labor industries, with the exception of OSHA and scaled-back workers’ compensation for permanent injury, something similar to

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x.

<sup>124</sup> Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233 (1991); C.S. Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1 (2004).

<sup>125</sup> MFG. INST., FACTS ABOUT MANUFACTURING 3, available at <http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/~media/3EBE6A748B5B420E853B5216D4812847.ash>  
x.

<sup>126</sup> See *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) (prisoner performing janitorial, kitchen helper and similar duties directly for Department of Corrections not entitled to minimum wage under Fair Labor Standards Act; different results in other cases); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008) (complexity of potential claims discussed).

the current federal Inmate Accident Compensation Act and its promulgated regulations.<sup>127</sup> American prison labor should be legally considered (1) part of the sentence imposed by the sentencing court, (2) required at the discretion of the state as “involuntary servitude” without compensation within the meaning of the Thirteenth Amendment, and (3) allowed gratuitously in the sole discretion of the state under the proposed legislation. For purposes of immunity from lawsuits, prisoners while incarcerated should legally be considered involuntary servants of the state.<sup>128</sup> Under the Thirteenth Amendment, the state is arguably entitled to 100% of the value of prisoners’ labor, a principle bolstered by the state paying for all of the prisoners’ food, clothing, shelter, and health care. That labor value belongs to all of the people and ought to be equally available to all manufacturers and service providers in the United States.

The Inmate Accident Compensation Act and its promulgated regulations impose significant limitations

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<sup>127</sup> 18 U.S.C. § 4126 (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)). Under 28 C.F.R. § 301.318, “The Inmate Accident Compensation system is not obligated to comply with the provisions of any other system of worker’s compensation except where stated in this part.” Other reasonable limitations are imposed on the inmates’ recovery, including factors such as minimum wage.

<sup>128</sup> In 1977, Supreme Court Justice Thurgood Marshall cited a Virginia decision that “[f]or much of this country’s history, the prevailing view was that a prisoner was a mere slave of the State, [who] not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him.” *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (quoting *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871)). Although antebellum slaveholders were not required to pay their slaves, they often did to increase production.

upon monetary recoveries for on-the-job injuries by federal inmates. “The Inmate Accident Compensation system is not obligated to comply with the provisions of any other system of worker’s compensation . . . .”<sup>129</sup> Imposed limitations include only calculating impairment at the time of release,<sup>130</sup> withholding payment until release,<sup>131</sup> suspension of benefits if an inmate is re-incarcerated,<sup>132</sup> and other limitations similar to those in most workers’ compensation laws. Prompt and simple determinations are facilitated: initial determination is made by a claims examiner,<sup>133</sup> with appeal to a committee.<sup>134</sup> Significantly, Federal Prison Industries—the employer—controls the accident compensation process.<sup>135</sup>

After almost fifty years, U.S. circuit courts are still split on the question whether Title VII applies to convict labor.<sup>136</sup> Many other unresolved questions exist in prison labor law. The legal uncertainties add greatly to potential compliance costs, discouraging employment. The potential compliance costs of labor laws and tort claims cause more unemployment in prison than any good they could possibly

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<sup>129</sup> 28 C.F.R. § 301.318 (LEXIS through 2013).

<sup>130</sup> 28 C.F.R. § 301.314(a) (LEXIS through 2013).

<sup>131</sup> 28 C.F.R. § 301.301(a) (LEXIS through 2013).

<sup>132</sup> 28 C.F.R. § 301.316 (LEXIS through 2013).

<sup>133</sup> 28 C.F.R. § 301.305 (LEXIS through 2013).

<sup>134</sup> 28 C.F.R. § 301.306 (LEXIS through 2013).

<sup>135</sup> See 28 C.F.R. §§ 301.302, -.313, -.317 (LEXIS through 2013).

<sup>136</sup> Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048, 1068 (2011).

do. Whether or not prisoners and prison industries are actually covered by specific labor laws, they must be exempted from and granted immunity regarding employment-related statutes and claims. Prisoners arguably do not deserve such protection, and many of their civil rights are already removed by virtue of their convictions and incarceration. Exemptions, even if not legally necessary, are desirable and will prevent claims and litigation regarding coverage and applicability. Immunity will make unskilled and uneducated prison labor more viable by reducing the labor burden. Across-the-board elimination of worker benefits and protection, with a few exceptions, would strengthen the hand of employers attempting to control problematic prison labor.

Prison labor and industries should be specifically exempted from and made immune from suit regarding the Fair Labor Standards Act, Age Discrimination in Employment Act, Equal Pay Act, Pregnancy Discrimination Act, Americans with Disabilities Act, Rehabilitation Act of 1973, National Labor Relations Act, Employee Retirement Income Security Act (ERISA), Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, all Civil Rights Acts, Uniformed Services Employment and Reemployment Rights Act, Employee Polygraph Protection Act, Consumer Credit Protection Act (CPCA), Davis-Bacon Act, McNamara-O'Hara Service Contract Act, Uniformed Services Employment and Reemployment Rights Act, Walsh-Healey Public Contracts Act, Migrant and Seasonal Agricultural Worker Protection Act (MSPA), Immigration and Nationality Act (INA), Worker Adjustment and Retraining

Notification Act (WARN), Federal Employees' Compensation Act (FECA), Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA), Civil Rights of Institutionalized Persons Act (except for modified portions of the Prison Litigation Reform Act), Health Insurance Portability and Accountability Act (HIPAA), Patient Protection and Affordable Care Act (Obamacare), The Genetic Information Nondiscrimination Act of 2008 (GINA), and the Family and Medical Leave Act. Some legislation such as the Federal Mine Safety and Health Act of 1977, Longshore and Harbor Workers' Compensation Act (LHWCA), Railway Labor Act, Energy Employees Occupational Illness Compensation Program Act (EEOICPA), Radiation Exposure Compensation Act (RECA), and the Black Lung Benefits Act (BLBA) would not need changing, as those environments are not suitable for prison labor. To the long list above, immunity from tort claims, unemployment insurance requirements, and comparable state statutes should be added. Employers are already immune from tort claims by virtue of workers' compensation laws. A host of state laws need addressing, on a state-by-state basis or with federal preemption. Employers should not be required to provide benefits to inmates that they otherwise provide to their non-incarcerated employees.

The mere listing of the statutes above, and contemplation of additional state employment-related statutes and tort claims, ought to inform the nation how complex, cumbersome, and expensive employment and tort laws have become relative to the rest of the world. Difficulties of interpretation and the expenditures of time

and legal expenses are even more burdensome in the context of prison industries, where prisoners have a proven record of filing a mountain of frivolous lawsuits, regulation is spread across fifty-one jurisdictions, and the existing legal framework is complicated and confusing in multiple ways.

Few of these federal employment-related statutes help prisoners now, and their existence harms prison employment prospects. Given the public's historical disdain of prisoners, now is not the time to grant prisoners the rights afforded under these laws, let prisoners imagine they have such rights, or allow litigation over coverage. A chief error of the PIECP was trying to bring prisoners up to prevailing wage standards. The creation of a *laissez-faire* employment regime would bypass the huge layer of employment laws that make American labor substantially more expensive than unprotected labor in foreign countries. In the process, it would create an excellent laboratory to test the value of the employment laws against a *laissez-faire* employment environment, one more similar to foreign labor-management relations in developing nations. In the prison context, the re-setting of the American employment relationship back to employment-at-will ought to educate the nation more fully on the advantages and disadvantages of its employment regulations. Experience will determine what employment protection prisoners need far better than adapting generally inapplicable or unsuccessful legislation to the correctional context. Even without legal requirements, "employers already largely accept and

comply with their employment law obligations,”<sup>137</sup> and this would be true of most established corporations operating in the prison context. Federal laws have changed attitudes and norms in society, and their repeal in certain contexts will not cause wholesale relapse.

Immunity from lawsuits would permit religious organizations a greater role in establishing, funding, and managing prison industries and workplaces in accordance with their particular religious principles. Hiring and management practices based upon religious activity or beliefs should be allowed because religion possesses the power to transform lives and will inject morality into prison systems. Businesses affiliated with particular religions ought to be clothed with the same constitutional protection otherwise allowed churches, mosques, synagogues, and temples.

The power and authority of federal regulation of interstate commerce relating to prison-made goods has already been established by 18 U.S.C. §§ 1761 and 1762 and comparable federal legislation. Federal law needs to encourage and facilitate this interstate commerce instead of blocking it. The best way is for Congress to preemptively wipe the slate clean, admit the bankruptcy of its domestic Smoot-Hawley regime, prevent states from imposing restrictions on interstate commerce, and allow a fresh start.

If prison jobs that simply help run the prison or jail are not counted, the huge edifice of federal and state regulation of labor and industries, in and out of prison, causes a market-productive prisoner unemployment rate of about 90%. Because the existing legal structure has failed

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<sup>137</sup> Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 945 (2008).

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prisoners and prison industries, contracts must take the place of the failed state and federal legislation. The reformed legal environment of a very few applicable employment-related laws and reliance upon contracts would still be better for all interests than the involuntary servitude contemplated and allowed by the first section of the Thirteenth Amendment.

Full and enforceable immunity is necessary given the volume of tort and statutory claims and suits that would be filed if prisoners were allowed the opportunity. Indeed, the primary reason for the Prison Litigation Reform Act<sup>138</sup> (PLRA) was the stupendous number of lawsuits filed by prisoners, almost all of them frivolous or unfounded. The PLRA succeeded in bringing a halt to the unprecedented volume of frivolous prison litigation and might be strengthened again to serve as a helpful vehicle to swiftly deal with and reduce “jailbird lawsuits.” Federal law already limits recoveries by injured Federal Prison Industries workers.<sup>139</sup> The Inmate Accident Compensation Act,<sup>140</sup> not the Federal Tort Claims Act (FTCA), is the exclusive remedy against the government by a federal prisoner with work-related injuries<sup>141</sup> and might be retained and made available to private businesses.

Legislatures and Congress chose to regulate prison labor and industries with criminal statutes.<sup>142</sup> The use of

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<sup>138</sup> 42 U.S.C. § 1997e (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)).

<sup>139</sup> *Smith v. United States*, 561 F.3d 1090 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1142, 175 L.Ed.2d 973 (2010); 18 U.S.C. § 4126 (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)).

<sup>140</sup> 18 U.S.C. § 4126.

<sup>141</sup> *United States v. Demko*, 385 U.S. 149 (1966); *Smith v. United States*, 561 F.3d 1090 (10th Cir. 2009), *cert. denied*, 558 U.S. 1148 (2010).

<sup>142</sup> *See* 18 U.S.C. §§ 1761-62 (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)).



criminal laws to regulate this trade had and still has a chilling effect on anyone seeking to find any exceptions or legal pathways through this complex, changing, and confusing anti-competitive body of law and deters railroads and transportation companies, too. Obviously, those anti-competitive criminal laws should be repealed, revised, or federally preempted.

**4. Mutual Rights of Return to General Prison Population.** Subject to their contracts, private and state businesses should have the unfettered right to return offending workers to the general prison population. Likewise, prisoners could voluntarily return to the general prison population in the event employers did not provide a better working or living environment. Clearly, the draconian aspects of the Auburn System, such as enforced silence, lock-step marching, and masks, would not reappear because employers would seek to retain their workers. Many prisoners would naturally love to work in an air-conditioned environment, which is not something they enjoy in most prisons. Employment would be at-will, subject to whatever contracts the employers and prisoners made prior to the commencement of employment. Contracts might provide that prisoners have to return to the general prison population if they want to pursue a claim against their employers and that their legal damages stop accumulating once they leave their jobs.

**5. Trust Accounts.** Money earned by prisoners would be put into a trust account, pending good behavior and subject to claims for child support, victim restitution, court costs, fines, and their own room and board in prison. Deductions for federal, state, and local taxes, reasonable charges for room and board, child and family support, and victim restitution are already provided for and regulated in 18 U.S.C. § 1761(c)—TRANSPORTATION OR IMPORTATION [OF PRISON-MADE GOODS]. If prison work pilot projects pay

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prevailing wages and are designated by the Director of the Bureau of Justice Assistance, then wages “subject to deductions . . . shall not, in the aggregate, exceed 80 per centum of gross wages.”<sup>143</sup>

Misbehavior by prisoners under contracts might result in forfeiture of earnings on account of escape attempts, violence, theft, strikes, work slowdowns, or other violations of agreed rules and contacts. Prisoners would undoubtedly behave to assure their continued employment (and sometimes residence) in these better secure environments. Employers would more easily enforce discipline and rules with the absolute discretion allowed to employers in an employment-at-will relationship. Prisoners would then have an investment in their own good behavior, learn pro-social skills, and develop healthy work habits. Prisoners serving life without parole (or other long sentences) should be able to spend earned money, while the victims’ families receive regular checks from those earnings. Juries might determine the eligibility of victims’ families to receive these checks.

Deductions from the prisoner’s paycheck for family support, victim restitution, court costs, taxes, and the costs of confinement could vary from state to state. Optimum levels of deductions are yet to be determined. The states would be free to experiment with different deduction amounts and allocations. Something similar to the current overall federal limitation permitting no more than 80% of gross wages to be deducted seems wise; that overall limit on deductions might best be enforced by federal preemptive legislation.

**6. Oversight.** State and federal governments would provide administrative and judicial oversight of prison labor, industries, and contracts to assure prisoners received their agreed compensation, were not abused, and did not

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<sup>143</sup> 18 U.S.C. § 1761(c)(2).

agree to unconscionable contractual provisions. U.S. magistrate judges already resolve lawsuits filed by federal prisoners. Existing federal mediation and arbitration services could settle or decide disputes in the federal prison system. States are increasingly encouraging alternative dispute resolution, an expedited procedure appropriate for disputes in the prison context.

**7. Significantly Decrease Prison Population.** A common concern of those who are suspicious of business is that, like in the convict leasing age, the legal system will provide cheap labor by finding more criminals guilty and increasing the length of prison sentences. This legitimate concern is based upon (1) evidence that criminal convictions fed the need for free or low-cost labor and convict leasing regimes after the Civil War and for decades thereafter;<sup>144</sup> (2) current prison privatization, which merely privatizes the warehouse function of incarceration and provides to special interests the financial incentives to increase prison populations; (3) the political strength of private correctional corporations and correctional officers' unions; and (4) the power of the courts to affect the supply and demand for prison labor. Therefore, the opening up of vibrant prison industries ought to include an increase in alternative sentences such as drug treatment, proposed judicial corporal punishment,<sup>145</sup> community service, parole, probation, and other sentences short of incarceration.

The revitalization of prison industries does not depend upon increasing the 2.25 million prisoners now

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<sup>144</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME—THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008). The history of convict leasing instructs us on what *not* to do.

<sup>145</sup> See J.D. Gleissner, *Prison Overcrowding Cure: Judicial Corporal Punishment of Adults*, 49-4 CRIM. L. BULL. (2013) (author suggests halving the U.S. incarcerated population with judicial corporal punishment).

behind American bars. The reduction of the American prison population and the freeing of prison labor can proceed simultaneously. Both would recognize that some people in prison do not necessarily have to be there for the betterment of society as a whole. Incarceration is not a vital feature of the nation's republic. Incarceration as it is now known did not exist when the U.S. Constitution was written. The Declaration of Independence redirected the most successful form of British punishment, transportation of convicts, away from the Thirteen Colonies and toward Australia.

**8. Avoid Unfair Competition.** Several steps can be taken to reduce or eliminate unfair competition from prison industries and labor. These options include one or more of the following: (1) Competing employers should have equal access to prison labor. This is one advantage of eliminating convict leasing (or contracting for groups of prisoners) by the prison system and allowing prisoners and employers to make individual employment decisions. (2) Prison industries could be limited to manufacturing goods now exclusively made overseas or to domestic industries under serious assault by foreign manufacturers and processors. If only one American manufacturer made a particular item in the United States, that manufacturer could be allowed to hire prison labor. (3) Prison industries might be required to prove that their prison employees support existing employment in the free sector or re-shore jobs to the United States. Union shops, for example, would benefit from prison labor if their prison industry suppliers sold goods and services to union shops at lower prices. (4) The transfer of prison laborers from one prison system to another can be facilitated, increasing industrial efficiency, permitting more flexibility in hiring and plant locations, and avoiding or lessening unfair competition on a regional or distance basis. (5) Prison industries might be required to

show that they were not displacing currently employed, free American workers.

With the diversification of the world economy and production methods, the off-shoring of manufacturing jobs, and the limitations of incarceration, competition with American labor and businesses outside prison will not be as great as many perceive. Prison jobs under a reformed regime will largely be low-skilled jobs, and the competition for these jobs would not be as intense as with skilled positions. Prisoners would not mix with free workers or leave secure facilities. Prison labor cannot compete with workers in mining, transportation, construction, power generation and transmission, highly sophisticated manufacturing, defense industries, or any dangerous industry. Anything that required work in changing locations would be out of consideration for prison labor. American jobs that have already moved overseas, including less skilled positions, would not be endangered and in fact might be brought back to the United States.

Today, work shirts, the subject of the Supreme Court's 1936 decision in *Whitfield v. State of Ohio*,<sup>146</sup> are almost all made overseas. Americans still make horse collars, harnesses, and straps, the contested products in *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*,<sup>147</sup> but the leather industry has changed radically since 1937.

Production and supply have gradually moved from industrialized to developing countries and emerging economies, which are now becoming major players in

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<sup>146</sup> 297 U.S. 431 (1936).

<sup>147</sup> 299 U.S. 334 (1937).

the trade. In fact, developing and emerging economies can now manage the whole supply chain on their own and are fast becoming the most important suppliers of value-added finished products. About 45% of footwear, for example, is made in China.<sup>148</sup>

Competition between foreign and U.S. labor *dwarfs* any potential competition between free and incarcerated labor in the United States. America must work harder and smarter to remain the leading world power. All American manufacturing jobs create U.S. tax revenues and additional American employment, while manufacturing jobs lost to foreign countries generally subtract from the U.S. economy. Research, development, and engineering follow manufacturing. The nation needs a free trade agreement with itself. Clearly, jobs move overseas to lower-wage countries, indicating the relative economic advantages of lower wages. American prisoners would still be making more money than wages in Vietnam, India, China, or Pakistan . . . *and they would be making more money than they are making right now.*

**Expected Results of Proposed Changes.** Texas A&M economist Dr. Morgan O. Reynolds, former Chief Economist at the U.S. Department of Labor, predicted, “If

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*Leather*, INT’L TRADE CENTRE, <http://www.intracen.org/exporters/leather/> (last visited Jan. 1, 2013); see COMMODITIES & TRADE DIV., FOOD & AGRIC. ORG. OF THE UNITED NATIONS, WORLD STATISTICAL COMPENDIUM FOR RAW HIDES AND SKINS, LEATHER AND LEATHER FOOTWEAR 1992-2011 (2011) (unmistakable and growing dominance of developing countries over developed countries).

half of all prisoners worked in market-type jobs for five years, earning \$7 an hour in full-time employment, they could boost the nation's gross domestic product by \$20 billion. Prison-based industries would have a ripple effect in their communities, as they tap local suppliers and other services."<sup>149</sup> Additionally, tax receipts would rise. Prison laborers should pay taxes and be subject to Social Security because when they leave prison and grow old, they will be asking for Medicare or Social Security benefits.

If federal and state statutes restricting prison labor and private prison industries are swept away, freedom of contract would create jobs in a circle around prisons. "An increment to manufacturing production in the U.S. creates more economic activity both within and outside the sector than does a similar increment in any other major sector."<sup>150</sup> Manufacturing generates a larger economic multiplier effect than other sectors of the economy.<sup>151</sup> If, for example, 100,000 manufacturing jobs in prison were generated, a manufacturing multiplier of 1.5 would create an additional 150,000 jobs, for a total of 250,000 jobs. Economists argue convincingly that the 1.5 manufacturing multiplier significantly understates the true multiplying

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<sup>149</sup> Warren Richey, *Made in USA . . . But by Convicts*, CHRISTIAN SCI. MONITOR, Jan. 14, 1998, available at [http://www.csmonitor.com/1998/0114/011498.us.us.4.html/\(page\)/2](http://www.csmonitor.com/1998/0114/011498.us.us.4.html/(page)/2).

<sup>150</sup> JOEL POPKIN & KATHRYN KOBE, CO. FOR THE NAT'L ASS'N OF MFRS. & THE NAM COUNCIL OF MFG. ASS'NS, *MANUFACTURING RESURGENCE—A MUST FOR U.S. PROSPERITY* (2010), available at <http://www.nam.org/System/Capture-Download.aspx?id=f36ec9f5-7bff-4da4-aeba-faab4b009b92>.

<sup>151</sup> MFG. INST., *FACTS ABOUT MANUFACTURING 3 fig.2*, available at [http://www.themanufacturinginstitute.org/~media/1242121E7A4F45D68C2A4586540703A5/2012\\_Facts\\_About\\_Manufacturing\\_\\_\\_Full\\_Version\\_\\_\\_High\\_Res.pdf](http://www.themanufacturinginstitute.org/~media/1242121E7A4F45D68C2A4586540703A5/2012_Facts_About_Manufacturing___Full_Version___High_Res.pdf); Susan Helper et al., *Why Does Manufacturing Matter? Which Manufacturing Matters?*, BROOKINGS (Feb. 22, 2012), [http://www.brookings.edu/papers/2012/0222\\_manufacturing\\_helper\\_krueger\\_wial.aspx](http://www.brookings.edu/papers/2012/0222_manufacturing_helper_krueger_wial.aspx).

effect of the manufacturing sector on the economy.<sup>152</sup> Although prison labor would be unskilled at the outset, and relatively low wages would produce a smaller manufacturing multiplier, prisoners can boost productivity the old-fashioned way by working longer hours. Ambitious prisoners might, for example, work sixty hours per week at two dollars per hour and thereby bring manufacturing jobs back to the United States from lower-wage countries.<sup>153</sup> More convincing than mathematical projections is the historical record of profitability enjoyed by American prison systems in the nineteenth century.

Existing correctional industries owned by the state could expand their markets to make and sell many more different products or services to a greatly expanded base of potential purchasers, in and out of the government. This would undoubtedly boost their viability, make money for the prison systems, put more prisoners to work, and have more advantages in rehabilitation. Private businesses would provide stiff competition for state-run correctional facilities. Each government could best determine its preferred method of doing business.

Inevitably, private businesses would hire low-wage prison labor to make goods now made in lower-wage countries. The nation's competitive disadvantages relative to developing nations would shrink, and the danger to American manufacturing jobs would lessen. Consumer goods now made exclusively overseas would more

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<sup>152</sup> Michael Mandel & Diana G. Carew, *Manufacturing in the App Economy: How Many Jobs Should We Aim For?*, PROGRESSIVE POL'Y INST., May 2012, at 1, available at [http://progressivepolicy.org/wp-content/uploads/2012/05/05.2012-Mandel\\_Carew\\_Manufacturing-in-the-App-Economy1.pdf](http://progressivepolicy.org/wp-content/uploads/2012/05/05.2012-Mandel_Carew_Manufacturing-in-the-App-Economy1.pdf).

<sup>153</sup> One five-hour shift, followed by a five-hour rest period for naps, would make the second daily five-hour shift much easier. Prisoners would not have to commute, nor do they consume much time with family, civic, or social matters.



commonly be produced in the United States. Prison businesses would retain workers by providing safer, more comfortable, and more remunerative environments than exist for prisoners today—and that would not often take much extra effort. Organized labor would benefit by increased economic activity, the circle of jobs created around manufacturing plants, and the need of prison industries to repair machines, transport goods, supply goods and services, and generally participate in a more vigorous economy.

A variety of business arrangements would arise. Most correctional facilities have behind their fences and walls unused land on which to build factories or are located in rural areas with available land. Some private industries might prefer to house, feed, and care for their own captive labor force off the premises of existing state prisons but still in secure facilities. Other industries would contract with the state to rent existing or unused prison space. Businesses might be required to lower the state's direct incarceration costs or guarantee no increase in those costs. Prisons could rent space or equipment and sell any items it produced to prison industries. Plenty of used manufacturing equipment is available or in storage.

Overall, prison overcrowding and its attendant problems would decrease. Prisoners would have a better chance to support themselves when released from prison. Prison violence would decrease. Prisoners serving life without parole actually make some of the best workers if they mature in prison. The American economy would improve.

Because separate plants, workhouses, and work communities of prisoners would provide a safer, better life for prisoners, the behavior of prison workers would improve. Behavior in the general prison population would also improve as prisoners vied for jobs. Religious activity

would increase, and religious organizations would play a greater role than they do currently.

A hard core of incorrigible, insane, disabled, dangerous, sick, and lazy prisoners and gang members would remain in the general prison population, death row, or solitary confinement. Employers would know whom to hire and whom to promptly send back. If they misbehaved, prisoners would instantly lose their jobs, some or all of their trust account savings, and get sent back to the general prison population. Today, there are not nearly enough jobs for prisoners, and the scarcity of jobs would likely continue for years even if the protectionist regime fell.

Recidivism would decline once prisoners learned to work very hard in a private business, saved money for their releases, controlled their behaviors better as required by their employment contracts and authoritative employers, and stayed away from the corroding influences of the worst criminals. Even a small drop in recidivism has a very positive effect on the general economy.<sup>154</sup> Rehabilitation prospects advance with hard work, contributions to the larger society, and recognition of the monetary rewards from hard work.<sup>155</sup> Crime victims would benefit by increased restitution payments, just as families would benefit by increased child and family support income. The economic and social costs of incarceration would decrease.

## CONCLUSION

Nations do not prosper by putting millions of able-bodied workers in cages with nothing to do. This nation did not achieve its world position by discouraging hard work, letting foreign nations work harder and smarter, or by letting the government assume ever larger portions of its

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<sup>154</sup> Levitt, *supra* note 114.

economy and daily lives. Freedom, mutually beneficial exchanges, hard work, innovation, and enormous resources made America what is considered the leading economy in the world. Each of the fifty-one governments has a valuable labor resource it does not fully employ. In the context of prison industries, the nation must re-affirm the importance of hard work, private enterprise, less government control, freedom of contract, and competition. Economic and social conditions, standing in the world, and the enormous growth in the nation's prison, jail, and correctional populations all urge the creation of manufacturing jobs.

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