

Factories Behind Bars

by

Morgan O. Reynolds

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National Center for Policy Analysis

12655 N. Central Expwy., Suite 720

Dallas, Texas 75243

(972) 386-6272

Executive Summary

Prison inmates working inside the prisons for private-sector businesses assemble cables for electronic equipment and sew graduation gowns in South Carolina, make baseball caps in Connecticut and book travel reservations for airline customers in California. But fewer than 2,000 prisoners nationwide are employed by private enterprises. The prisons themselves employ prisoners to make such products as office furniture and license plates and to grow food for inmate consumption. But the prisons have jobs for no more than half of those imprisoned.

Despite a consensus of the American public that prison inmates should be gainfully employed, most are idle. Their idleness contrasts sharply with the circumstances of their 19th-century counterparts. Three-fourths worked and two-thirds of the workers were contracted to private entrepreneurs and farmers to produce goods for the general marketplace.

Under this system, many prisons posted financial surpluses rather than burdening taxpayers. Few prisoners served more than one term, suggesting much lower recidivism than today. Yet the success of prison labor was repeatedly attacked by prison reformers, trade unionists and business owners who opposed the possibility of competition from prison-made goods.

The attacks were successful. Over the years a series of federal and state laws made it increasingly difficult for either prison authorities or private firms to employ prisoners productively by banning the transport and sale of virtually all prison-made goods except to state and federal agencies. During World War II, prohibitions on inmate labor were relaxed, prison industries produced much-needed war materiel, prison morale rose and some prisons became self-supporting. But restrictions were reimposed when the war ended.

Providing access to productive jobs in the labor market for the state and federal prison population, now grown to 1.1 million, and reducing the burden of their upkeep on taxpayers requires removing the legal limitations on work by prisoners. It further requires involving the private sector in creating productive jobs and improving the productivity of the prisoner workers and the quality of their work.

If one in four prisoners could be put to work for private enterprise over the next five to 10 years, during which time the prison population is projected to increase to 1.6 million, that would mean 400,000 new prison jobs. Allocating 60 percent of their earnings to taxpayer compensation could reduce taxpayer

costs by \$2.4 billion per year, or somewhat less than 10 percent of the total cost of prison support. Further, this would increase the possibility of obtaining restitution for crime victims. Thus far, however, only halting steps have been taken to remove restrictions or to create jobs.

In 1979, Congress relaxed some strictures by passing the Percy Amendment. This amendment created the Private Sector/Prison Industry Enhancement Certification program, better known as the PIE program, which allows private companies to employ prison labor under very strict conditions.

- Since 1979, the PIE program has certified 37 jurisdictions to engage in joint ventures with private enterprises to employ inmates.
- The program has generated gross earnings of \$63 million for convicts, including room and board payments of \$13 million.
- At the end of the first quarter of 1996, 1,944 prisoners were employed in PIE projects and earnings were at an annual rate of \$13 million, with about half of the earnings going toward support of the prisoners' families, restitution to victims, taxes and incarceration costs.

Despite the success of the PIE projects, less than 2/10 of 1 percent of prisoners are part of the program. Clearly more needs to be done.

This study analyzes the American experience of private employment of prisoners and concludes that the advantages far outweigh the disadvantages. Expanding the role of the private sector in prison work would reduce crime, increase economic growth and reduce the burden of the criminal justice system on taxpayers. Among the steps that must be taken to make prisons hum with productive activity are:

- Repeal the various state and federal laws that restrict trade in prison-made goods.
- Repeal the laws that compel government agencies to buy prison-made goods in favor of competitive bidding for government purchases.
- Create prison-enterprise marketing offices in prison and jail systems.
- Allow private prison operators to profit from the gainful employment of convict labor.

Such reforms would overwhelmingly benefit American taxpayers, consumers, workers and businesses.

Introduction: Idle Hands behind Bars

The cost of operating the nation's prisons is soaring, along with the number of people in prisons.

- Since 1980 the state and federal prison population has increased from 316,000 to 1.1 million.
- By the year 2002 the inmate population is expected to increase by another 43 percent.¹
- The expense has reached about \$25 billion a year, or \$250 a year for every household in America.

One of the most promising proposals to reduce the cost of criminal justice is to increase the amount of productive work by prisoners. Yet, despite a long-standing consensus in favor of gainful employment for convicts, idleness in prison remains the norm.

Perhaps half of all prisoners do some kind of work, counting housework (prison maintenance chores) and vocational training programs in the prisons themselves. Most of these jobs, however, are part-time and produce no income for room and board, restitution and other ends.

Things used to be different. In 1885, three-fourths of U.S. prison inmates were involved in productive labor, the majority working under prison contract and leasing arrangements with private employers.² However:

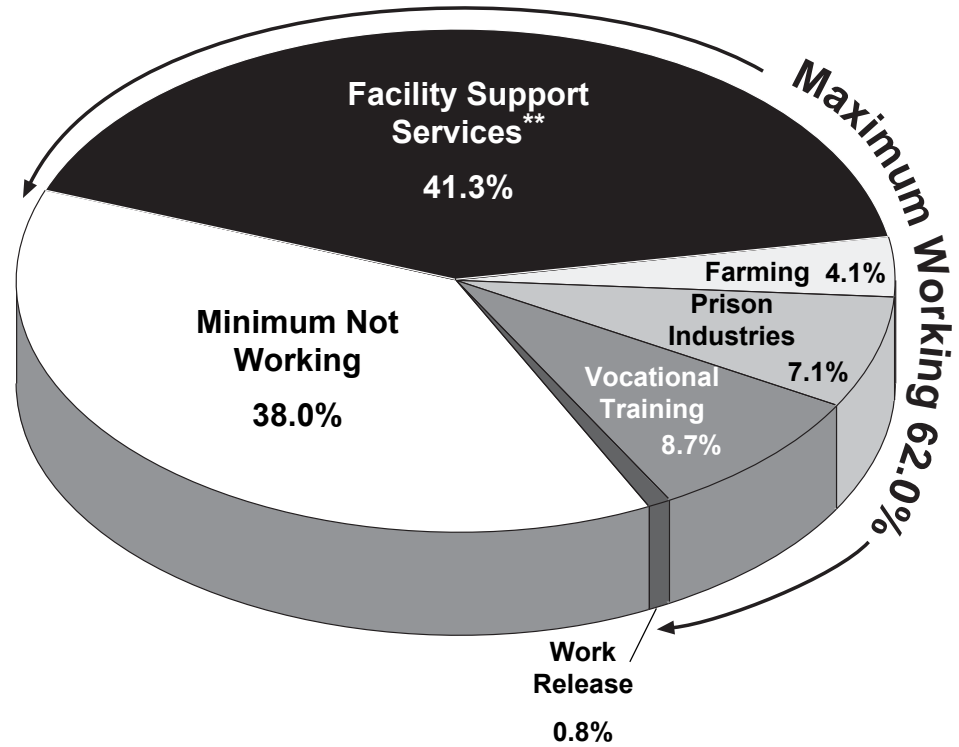
- Fifty years later, only 44 percent worked, and almost 90 percent of those who did worked in state rather than private programs.³
- A 1994 survey of 46 correctional systems in the United States and seven in Canada found that only 9.4 percent of female and 7.75 percent of male inmates worked at jobs other than housekeeping and maintenance.
- According to the *Correctional Industries Association 1995 Directory*, only about 70,000 inmates were employed in state and federal prisons in 1994.
- Fewer than 2,000 prisoners (less than 2/10 of 1 percent) worked for private companies in joint prison ventures in 1996.⁴

As Figure I shows, a 1990 census found that only 7 percent of prisoners worked in prison manufacturing industries and another 4 percent in farming, a fall from 11 and 5 percent, respectively, six years earlier. These figures suggest that prison employment did not keep pace with the enormous run-up in prison population since 1980.⁵ The same census did report, however, that the proportion of prisoners working at maintenance chores like laundry and food increased from 32 to 41 percent of inmates during the same period. Fewer than 1 percent were in programs that allowed them to leave the prison during working hours for a regular outside job, and nearly 9 percent were enrolled in the prisons' vocational training programs.

"In 1885, three-fourths of prison inmates were involved in productive labor."

FIGURE I

Maximum Share of Prisoners at Work*
(1990)



“7 percent of prisoners work in prison manufacturing and 4 percent in farming.”

* Some inmates participate in more than one work program. The chart ignores such double counting, thereby maximizing the estimated share of prisoners in work programs and minimizing prisoners’ idleness.

** Laundry, food services, office work, building maintenance, repairs, etc.

Source: U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1993*, p. 634.

Prison industries produced more than \$1 billion worth of goods and services in 1994, mostly for other government agencies. Much of prison industry output is shoddy, overpriced merchandise that state agencies are forced to buy from the prison industry monopoly.⁶ The largest prison supplier was the Federal Bureau of Prisons with \$433 million in output for federal agencies, yet the system employed only 16,000 inmates out of 61,000 inmates eligible to work (e.g., those not in solitary confinement, considered dangerous or being transferred) from its total of 85,000 inmates.⁷ Texas has been a leader in state-run prison industries, yet in 1994 employed only 7,500 inmates (one in 10) in 42 factories and another 6,500 in the prison agricultural division.⁸

Over the years, federal and state laws — often promoted by those opposed to competition from prison-made goods — have reduced the opportunities for employment, as discussed below. Halting steps have been taken recently to allow prison-made goods in the marketplace and to create private-sector jobs for prisoners, but legal restrictions that still remain have hampered progress.

In 1985, the late Chief Justice Warren E. Burger urged repeal of all statutes limiting the amount of prison industry production and discriminating against prison-made goods. Burger urged the cooperation of business and organized labor to use prison labor productively. Burger proposed an immediate increase in the number of prisoners working from 10 percent of the prison population to 20 percent, with a 10-year goal of “a full 50 percent of inmates working.”⁹ More than 10 years later, Burger’s proposed goal is little closer to realization than it was then.

Why the Private Sector Needs To Be Involved

States need only so many license plates, only so much furniture for government agencies and only a certain number of workers on prison farms. Thus the private sector must be involved both in creating jobs and in finding markets for prison-made products if prisoner work is ever to employ large numbers of inmates and produce significant income.

Prisoners employed by the private sector, whether by contract or lease, have consistently outperformed those working in prison system industries. For example, in 1923, when the private sector still played a significant role in prisoner employment, a Labor Department survey found that:¹⁰

- Output by prisoners employed by private businesses was \$3,173 per worker year.
- Output by prisoners in state-use and public-account work was \$860 per worker year.
- Productivity was about four times greater under private control than under public control, even if the same industries were compared; for example, furniture manufacturing under private contract had output per prisoner year of \$2,740 versus \$683 for state use and public account.

Penologist Howard Gill observed that industries operated by the prisons themselves were terribly inefficient and had a lot of idleness compared to prison workshops operated by private industry. Gill wrote, “It appears that idleness increases as public control increases.”¹¹

“Prisoners employed by the private sector have consistently outperformed those working in prison system industries.”

Why Prisoners Need to Work

There are both economic and rehabilitative advantages to having prisoners work. Revenue from prisoner-produced goods and services can offset part or all of the cost of incarceration. Part of the wages paid to prisoners can be used for the same purpose or go to victims for restitution, or to the prisoners' families for upkeep. In addition, working provides other benefits to prisoners.

Projected Gains for Taxpayers

In a survey by the Enterprise Prison Institute, prison industry managers frequently mentioned 25 percent of prisoners as a desired target for employment. Gov. Tommy Thompson of Wisconsin has set a goal of 25 percent of state prisoners privately employed. U.S. Sen. Phil Gramm (R-TX) has proposed that federal prisoners pay 50 percent of their annual support cost through prison work.¹²

What could we reasonably expect under an aggressive expansion of private production by prisoners?

- A full-time job typically means 2,000 hours of work per year (40 hours per week times 50 weeks).
- An average wage of \$5.00 an hour is feasible, for a total of \$10,000 in gross earnings per prisoner each year.
- If a majority of these earnings were allocated to taxpayer compensation, say 60 percent, then at least \$6,000 a year per prison worker would be available to compensate taxpayers.

If one in four prisoners could be put to work for private enterprise over the next five to 10 years, during which time the prison population is projected to increase to 1.6 million, that implies about 400,000 new prison jobs. Their work would reduce taxpayer costs by \$2.4 billion per year, or somewhat less than 10 percent of the total cost of prison support.¹³

One of the difficulties of creating jobs for prisoners is that many of them are illiterate or semiliterate, or have low IQs, but champions of inmate labor are confident such jobs could be created. The federal system has the best prospects for high rates of payback because many of the prisoners are there for crimes typically committed by more intelligent criminals like counterfeiting, kidnapping and drug smuggling.

Restitution

Ideally, the money that prisoners earn also could provide restitution to their victims, along with upkeep for the prisoners' families and savings for use after their release. Under the current system, the lack of productive prison jobs has limited efforts to gain restitution for victims. Thus courts rarely order restitution when they send someone to prison.¹⁴

“Putting one in four prisoners to work could reduce taxpayer costs by \$2.4 billion per year.”

- In 1986, 36 percent of felons placed on probation, including 52 percent of burglars, were ordered by state courts to pay restitution.
- But only 14 percent of felons sent to prison were ordered to pay restitution.

Benefits to Prisoners

Putting prisoners to work at productive jobs results in better-behaved prisoners, can help train them in work habits and skills and may increase the likelihood of a productive life when they are released.

Prisoners Overwhelmingly Prefer Work to the Tedium of Prison Life. This is common knowledge among experts.¹⁵ Prisoners especially value opportunities to work for private-sector firms, as is demonstrated by the number who sign up for prison industry jobs wherever formal waiting lists exist.¹⁶

Prisoners Who Work Behave Better. This is confirmed by prison officials, although hard data from social scientists are less abundant and more controversial. For example, a 1989 survey found mixed results.¹⁷ However, a federal Post-Release Employment Project (PREP) study confirms that employed prisoners do better than those who do not work. Data were collected from 1983 to 1987 on more than 7,000 federal offenders. Study group members worked in prison industries (57 percent), participated in combined work and vocational training (19 percent) or in vocational training, apprenticeship training or a combination of the two (24 percent). Preliminary findings were reported in 1991 when all offenders in the study had been free for at least one year. The investigators used a sophisticated statistical matching procedure to compare study participants with otherwise statistically identical prisoners released in the same quarter.¹⁸ Prison conduct among inmates who participated in work, vocational or apprenticeship programs was better than that of otherwise similar prisoners. Participants were less likely to have a misconduct report during their last year of incarceration, and when they did receive a misconduct report it was less likely to have been serious.

After release to halfway houses, participants in the PREP study were 24 percent more likely to get a full-time or day labor job than those who had not worked in prison. Those who had worked in prison also earned more than those who had not and were more likely to move on to a better-paying job. Only 6.6 percent of those who worked in prison had their parole revoked or were charged with committing a new crime during their first year of supervised release, compared to 10.1 percent of the group who had not worked in prison.¹⁹

These same findings hold up over a much longer period. Most participants in a follow-up to the PREP study had been released for at least eight years and some for as long as 12 years. Prison work and training programs seem to have been especially effective in reducing the likelihood of recidivism in the long term.²⁰

“Prison conduct was better among prisoners who participated in work, vocational or apprenticeship programs.”

Badger State Industries (BSI), Wisconsin's state prison industries program, employs about 600 of Wisconsin's 10,000 prisoners to produce everything from coffee cups to furniture. A study indicated that the recidivism rate after three years was 15 percent lower for those who worked for BSI than for those who did not. According to BSI's director, Steve Kronzer, "People who worked for prison industries tended to do better than normal."²¹

Sociologists Peter Rossi, Richard Berke and Ken Lenihan concluded from a large experimental study in the 1970s, "Employment for ex-felons is clearly the strongest antidote to reengaging in criminal activities. ...(W)orking clearly lowers the probability of arrest on all sorts of charges."²²

Origins of Convict Labor

The idea of work by prisoners is hardly new. In 1787 the founding father of criminology in the English-speaking world, Jeremy Bentham (1748-1832), urged replacement of the jails of his day by what he termed "mills for grinding rogues honest and idle men industrious." In the late 18th century, the humane prison reformer Jean Jacques Vilain of the *Maison de Force* (House of Enforcement) at Ghent, Belgium, opposed life imprisonment and cruel punishment but administered his facility by the Biblical injunction, "If any man will not work, neither let him eat."²³

The American colonists, reflecting British traditions in punishment, relied on shaming, maiming or killing rather than imprisonment. Offenders were exposed to public derision in stocks (wooden devices for holding the feet) or the pillory (for the head and wrists) or branded for minor offenses. For more serious offenses, hanging and even burning at the stake were used. Primarily because of the expense, jails were used for temporary confinement only. These Colonial American practices were common not only in Britain but in most other European countries at that time.²⁴

"American colonists relied on shaming, maiming or killing instead of imprisonment."

Early Prisons

In April 1790 the Pennsylvania Legislature authorized the first penitentiary in the United States, the Walnut Street Jail in Philadelphia. Inmates were confined in individual cells, where they not only slept but also worked at handicrafts. Quaker activist George Fox, who was influential in bringing about the establishment of the penitentiary, believed that self-reformation would come from long-term isolation under fixed sentences, solitary work and contemplation. The "gaol" at Wymondham in Norfolk, England, erected in 1785, was the immediate inspiration for this first American prison. Wymondham's creator, Thomas Beever, said that the prison was far more effective than whipping, and with hard labor six days a week many prisoners earned more than double their maintenance.²⁵

As other prisons were established toward the end of the 18th century and in the early 19th century, the Pennsylvania system served as the model. But after 1823 the Auburn system, named after the New York state prison in that community, came to dominate U.S. prisons because of its superior economic productivity. The Auburn system confined prisoners at night in solitary cells but brought them together during the day in congregate workshops where they were not allowed to converse.

At first, work by prisoners was done for the state, although prison-made goods were sold on the open market. Almost immediately after the Auburn system was introduced, cabinetmakers in New York protested the competition of prison-made goods.²⁶ Nevertheless, private enterprise quickly began to play a prominent role in the Auburn system through contract prison labor.

Despite — or perhaps because of — the emphasis on handicrafts, Pennsylvania’s prisons were never self-supporting. The Eastern Penitentiary, the nation’s first, was never able to earn enough to offset the cost of feeding and clothing the convicts. The state’s Western Penitentiary finally earned enough from prisoner labor in the 1840s to pay the cost of prisoner maintenance exclusive of prison salaries.²⁷

Officials originally intended prison labor to offset the cost of incarceration, or at least a large part of it. Wardens were under substantial pressure to make their prisons financially self-sufficient, and they were “concerned as much about profits as prisoners.”²⁸ Newgate prison, opened in New York City in 1797, paid nearly all of its expenses during the first five years from production within the prison. By 1803 a tiny surplus remained after the prison’s expenses were paid.²⁹ By 1825 the legislature stipulated that the duty of prison agents was “to cause all the expenses...of any kind, to be supported wholly, or as nearly as shall be practicable, by the labor of the prisoners.”³⁰ [See Table I.]

“Wardens were under substantial pressure to make their prisons financially self-sufficient.”

Contracting with Private Businesses

Under the contract system, prison officials advertised for bids from private employers to hire the labor services of convicts within the walls of the prison, while prison officials retained control over security and sustenance. Contracts usually were awarded to the highest responsible bidder, with the private contractor posting a substantial performance bond to insure the prison against financial default. Contractors typically provided the necessary raw materials and furnished the craftsmen and foremen needed to train and supervise the prisoners. Depending on the terms of the contract, the contractor might also provide tools, machinery and power to operate equipment. The contractor sold the finished products in the open market, and the state received a fixed fee per prisoner per day.

TABLE I
Selected Annual Prison Industry Earnings, 1848-1849

<u>Prison</u>	<u>Sales Per Prisoner</u>	<u>Costs of Ordinary Support Per Prisoner*</u>	<u>Calculated Surplus or (Loss) Per Prisoner*</u>	<u>Reported Surplus or (Loss) Per Prisoner*</u>
Auburn, NY	\$106.93	\$51.75	\$55.18	\$45.30
Connecticut Prison	90.00	63.00	27.00	39.00
Maine Prison	83.00	70.82	12.18	12.18
Massachusetts Prison	107.38	51.00	56.38	46.71
New Hampshire Prison	30.91	65.16	(34.25)	(11.34)
New Jersey Prison	92.19	63.00	29.19	28.78
New Penitentiary, Phila., PA	43.00	43.00	0	(17.00)
Ohio State Prison	93.54	43.00	50.54	30.90
Rhode Island Prison	49.00	NA	NA	NA
Sing Sing, NY, Male Prison	100.69	48.49	52.20	51.11
Sing Sing, NY, Female Prison	29.65	91.38	(61.73)	(62.75)
Vermont Prison	70.72	60.87	9.85	8.30

* Excludes salaries of prison officials. The discrepancy between the calculated and reported surplus or loss may be due to sales or costs not reported in the original table.

Source: *Annual Prison Report for New York, 1850*, reprinted in American Correctional Association, *The American Prison: From the Beginning...A Pictorial History*, p. 55.

Although the Auburn prison showed a deficit in its early years, it earned a surplus after 1829. The Sing Sing prison, also in New York, posted deficits in its early years, but from 1833 to 1841 earned surpluses totaling \$94,000. The prisons of Massachusetts, Ohio and Connecticut, among others, also showed surpluses.³¹

Advocates of the Auburn or congregate labor system argued that it meant lower costs to build and operate prisons, better vocational training and far more revenue for the state than the Pennsylvania system of individual handicrafts in single-cell confinement. Less isolation of the prisoners, gainful employment and a generally favorable experience with the system satisfied legislators. An article in 1839 celebrated the degree of satisfaction this way: “It is surprising how little it costs to do good, if we really set ourselves to work in the right way.”³²

Prisoner Leasing

After the Civil War, convict leases became another way in which prisoners were put to work. Under convict leases, private employers essentially assumed control over nearly all aspects of prison life, including security and living conditions. Prisoner leases usually involved work camps on farms, construction sites (including railroads) and mines outside prison walls. Leases to private employers usually yielded the highest revenues to the state.³³

The system of leasing prisoners to private businesses for work outside prison walls was first tried in Kentucky in 1825, and during Reconstruction the practice became widespread in Southern and border states whose economies had been devastated. Leasing proved economically successful but politically difficult.

All of the Southern states achieved net profits from prison labor in the limited sense that the taxpayers were relieved of the burden of maintaining prisons. Early lease contracts in the 1860s and 1870s were not always successful, but during the 1880s and 1890s leasing became very profitable and state officials welcomed the additional income from prison labor.³⁴

Case Study: Tennessee.³⁵ A 200-cell prison opened in Nashville in 1831 and prisoners worked at coopering, blacksmithing and manufacturing wagons, harnesses and shoes. Convicts also quarried and cut stone for the State Capitol. Proceeds from these labor services were supposed to defray the expenses of long-term confinement. During the prison’s first two decades, legislators praised it as a profit-making organization. Yet some mechanics and tradesmen complained that prison products and prison labor competed unfairly and degraded their respective trades. In 1853 the new Tennessee governor (and subsequent president of the United States), Andrew Johnson, agreed with the protesters and strongly condemned the prison for operating a “State Mechanic Institute” competing with free labor.

“Leasing proved economically successful but politically difficult.”

At the end of the Civil War, faced with the expensive prospect of refurbishing the old prison or building additional facilities, the poverty-stricken state chose to lease its convict labor for a four-year term to the highest bidder. The prison directors retained the authority to enforce rules “to promote the health, comfort, order and discipline of the convicts, and the proper deportment of the lessee, officers, keepers and guards of the prison.” A Nashville furniture manufacturer won the lease, paying 43 cents per day, the highest amount obtained by any state that the prison directors knew of. But a fire gutted one of the prison workshops a year later, destroying much of the manufacturer’s equipment, supplies and product. The lessee stopped payments and claimed damages against the state. The legislature disagreed and litigation ensued.

“Labor leases with the railroads produced problems in Tennessee, but leasing for other types of work fared better.”

Subsequent labor leases with the railroads produced other problems, including accidents on the job, escapes and administrative and supervisory trouble, along with objections to competition with non-convict labor and to the temporary nature of railroad construction.

But leasing for other types of work was more successful. Branch prisons at Tracy City and Battle Creek provided steady employment in mines. A five-year lease with an agricultural implements manufacturer provided almost half the prisoners at the main prison with jobs building wagons. Prisoners also worked on farms and were subleased to other private businesses. By 1872 Gov. John C. Brown boasted that the businesses employing convicts were meeting their financial obligations promptly, had offered a variety of jobs and had cut down on competitive effects through their diversified production. Tennessee’s system, he thought, was superior to those in neighboring states because they spent large amounts of money on their prisons while Tennessee did not.

Case Study: Texas.³⁶ Between the end of the Civil War and the outbreak of World War I, Texas also routinely hired out prison inmates to private individuals and corporations. The system did not emerge as the result of any “clearly conceived and well-executed master plan. Instead it developed from the plodding and often haphazard efforts of state officials to provide for a growing inmate population at a time when there was little money for state spending and limited public support for innovation in prison policy.” Fees paid by private contractors for the labor of prisoners from the 1870s until the end of the leasing system in 1912 offset most of the operating expenses for the Texas penal system. Industries operated by the state inside the prisons “languished...[and] never became profitable” while the private leases outside the prisons “flourished and paid handsome dividends.” Railroad contracts were more lucrative for the state than farm labor, but the latter was more common, especially in sugar farming, and yielded net revenue to the state of \$3.4 million over the period. Black prisoners predominated on sugarcane

farms, and the labor prices charged to companies were only slightly less than the wages of similar free labor. From 1908 to 1912 black prisoners in first-class physical condition cost \$31 per month and first-class white prisoners cost \$29 per month.

“Reformers complained that the contract-lease system did not teach prisoners a trade or reform them to lead productive lives.”

Reformers of the day complained that the contract-lease system did not teach prisoners a trade or reform them to lead productive lives during their terms in prison. As one inmate opined, the prisons were “a nurse and school” to prepare convicts to be career criminals. Yet the meager data show that Texas prisoners overwhelmingly were serving their first term, suggesting a low recidivism rate. During the 1880s, for example, more than 90 percent of Texas convicts were first termers and from 1900 to 1912 first termers ranged from 80 to 85 percent. By contrast, in 1994 only 47 percent of Texas convicts were nominal first termers in the state’s prisons, and only one in three was a true first termer, that is, with no prior time served in any prison.³⁷ Fragmentary national data suggest a similar pattern; recidivism experience has worsened over the last century.³⁸

Restricting Work by Prisoners

Many artisans and businesses in the outside world bitterly criticized enterprises that used prisoners, whether operated by prison officials themselves or by private businesses, because of the competition the prison products created. Allied with prison reformers, these interest groups eventually succeeded in many cases in obtaining restrictive legislation against what they regarded as unfair low-wage competition. Prison wardens, fearing a loss of decision-making power and the new task of supervising unproductive and idle prisoners, vigorously opposed new restrictions. Ironically, prison workshops generally had a hard time competing with private enterprise. Nevertheless, because it involved convicted felons and because questions were sometimes raised about the terms on which prisons awarded contracts to entrepreneurs, the “prison industry had certain attributes which made it a convenient scapegoat for the troubles of workingmen.”³⁹

Some mistreatment of convicts by private employers doubtless occurred.⁴⁰ Yet there is no study documenting that standards of treatment by private employers differed from those of prison officials. Gov. Peter Turney of Tennessee called the lease system “cruel in the extreme,” but it was not clear whether he was concerned about the well-being of convicts or his own political well-being in appealing for the votes of free laborers. Deplorable conditions in some 19th-century prisons are documented, to be sure. Yet the state, not private employers, held ultimate responsibility for prison conditions.

Complaints that the prisons were not reforming prisoners or that the prisoner work camps were a threat to the safety of people living nearby often coincided with local resentment because work done by the convicts allegedly

eliminated work for local residents or because private contractors diverted business from local merchants. A *Galveston (Texas) Daily News* reporter in 1879 pointed out that there had been no public outrage regarding treatment of prisoners as long as local businesses supplied the camp with needed goods. But when the local contractor began buying supplies outside the area, local citizens became upset and began complaining about abuse of prisoners.⁴¹

State Action

The combination of complaints about competition from prison-made products, allegations of abuse of working prisoners and concerns about the security of citizens created mounting political pressures in many states to do something about all three. Under such pressures, for example, the New York Legislature in 1842 banned even the transfer of new skills to inmates, declaring that “no convict shall...be permitted to work...at any other mechanical trade than that which...such convict had learned and practiced previous to his conviction.”⁴² By 1844 both Auburn and Sing Sing were running deficits under the impact of the restrictive statutes. The idea of the self-supporting penitentiary was being undermined. By 1855 the expenses of the penal system exceeded earnings by over \$325,000, partly because prison industry efforts to avoid competitive impacts brought financial ruin through poorly chosen industries.⁴³

In 1887 the New York Legislature passed the even more restrictive Yates law, which abolished all labor contracts and all manufacturing using “motive-power machinery,” limiting prison industries to handicrafts and distribution to in-state only. New Jersey, Ohio and Illinois abolished contracts in the early 1880s, too.⁴⁴ Beginning in 1883, Pennsylvania passed a series of restrictive laws that achieved the nearly complete extinction of private prison industry in that state by 1897.⁴⁵

Between the 1890s and the 1920s a number of legislatures enacted laws to prohibit the sale of convict-made goods within their states. Many, like New York, adopted the public-use or state-use system, which permitted convicts to manufacture goods for sale to state government agencies only — a very limited market. The opportunities to use prisoner labor continued to dwindle during the first three decades of the 20th century, and during the Great Depression 33 states passed laws prohibiting the sale of convict-made goods on the open market.⁴⁶

Case Study: Tennessee. During the 1870s and 1880s prison reformers and labor leaders stepped up their opposition to the lease system. The Tennessee legislature conducted numerous inquiries and the majority reports always found the system satisfactory while a minority condemned it. Gov. James D. Porter in 1877 remarked, “The present system of employing convict labor is wrong, but I am not certain that the general sentiment of the people of Tennessee is not in favor of it.” He complained about the escapes involved in

“Opportunities to use prisoner labor dwindled during the first three decades of the 20th century.”

subleasing convicts to farmers and railroads. His successor, Gov. William B. Bates, also opposed the lease system but felt that economic necessity required its continuance.

In 1891 non-convict miners in east Tennessee stormed the branch prisons and during a three-day riot freed more than 400 convict workers before order was restored. The mining company capitulated, rehired union miners and halted the use of convicts. In 1892 all four gubernatorial candidates promised to abolish the lease system. By 1897 the legislature had confined leasing to those firms that would operate factories within state prison facilities. Gov. Turney claimed that a return to the old leasing system would be “cruel in the extreme.” He asserted that the state “really made no money, but rather lost, by leasing convicts on account of riots, outbreaks, and invasions” [by organized labor, not prisoners!]. By the early 20th century, all forms of convict leasing had ended in Tennessee, largely because of the so-called progressive movement and rising sympathy with labor, especially organized labor.⁴⁷

Tennessee law still requires that convicts “be kept at labor when in sufficient health” within the prison. Outside employment is permitted only under government direction on state-owned or -leased land, except for about 50 prisoners in a work release program that involves community service on the property of nonprofit agencies like Goodwill Industries.⁴⁸ Essentially, no employment is allowed in the productive voluntary sector, and government agencies are monopoly employers of convict labor as well as exclusive buyers of convict-produced goods and services.

Case Study: Texas. The Texas lease system ended after a concerted attack by reform-minded persons. The most important reformers were the chaplain of the Huntsville unit, the Rev. Jake Hodges, and a crusading young reporter for the *San Antonio Express*, George W. Briggs. Hodges had for years interfered in disciplinary actions, especially in instances of corporal punishment. Hodges found a sympathetic ear in journalist Briggs, only two years out of school, whose series of articles was published over a span of five weeks in December 1908 and January 1909. In an era of progressive journalism devoted to exposing maladministration, the biggest so-called revelation was that “the system was geared almost exclusively to making money, with very little effort expended to reform prisoners.” The series triggered enough political controversy to induce a skeptical governor to ask that legislative leaders establish a committee to investigate the prison system.⁴⁹

The committee’s findings led to a new prison law that abolished “the system of leasing and hiring out of prisoners.” The evidence consisted mostly of unverified allegations of horrific abuse by profit-driven entrepreneurs, charges embraced by those who believed that rapacious capitalists systematically abused and exploited their workers.⁵⁰ Witnesses offered little support

“Tennessee law requires convicts to work, but essentially the state provides no employment or buyer except government.”

for their charges and participants abandoned leasing without considering improvements to the state system of bonding, inspecting and monitoring private contractors. By 1923 not a single convict was leased to the private sector.⁵¹

The movement to end the Texas lease system was bolstered by the discovery of an immense oil field at Spindletop, near Beaumont, Texas, on January 10, 1901. Spindletop filled the state government's coffers and allowed it to subsidize the prison system. The taxes paid by the new energy industry made it far less urgent for prisons to pay their own way. Some reformers even argued that the taxpayers would not suffer because if private contractors made profits on convict farm labor, state industries and farms could too. They ignored the obvious differences in incentives between state bureaucrats and entrepreneurs, not to mention centuries of experience with government's profligacy.

Federal Restrictions

The federal prison system of today had its origins in objections to the leasing of prisoners. For years, federal prisoners had been kept in state prisons at federal expense. But in 1887, Congress outlawed the leasing of federal convicts to farmers and entrepreneurs.⁵² This action came at a time when many states still depended heavily on the revenue from prisoner leasing, so some state penitentiaries refused to accept federal prisoners after 1887. As a result, Congress voted in 1891 to establish a separate federal prison system.⁵³ Still, the major impact of federal action on state use of prisoners did not come until 1929.

“From 1929 onward, a series of federal laws restricted shipment of prison-made goods.”

Restrictions on Interstate Commerce. From 1929 onward, a series of federal laws limiting shipment of prison-made goods made it increasingly difficult to provide productive employment for prisoners.

- The Hawes-Cooper Act (1929) mandated that prison-made goods transported from one state to another be subject to the laws of the destination state. The effect was to permit a state to ban the sale of all prisoner-made goods, whether made outside or within the state. Hawes-Cooper went into effect in 1934 and affected only states that banned the sale of prisoner-made goods.
- The Ashurst-Sumners Act (1935) made shipping prisoner-made goods to a state where state law prohibited the receipt, possession, sale or use of such goods a federal offense. Although the act strengthened Hawes-Cooper restrictions on interstate shipment of convict-made goods, protectionist businesses and unions were unsatisfied because the act relied on the states to ban such commerce.
- The Sumners-Ashurst Act (1940) made it a federal crime to knowingly transport convict-made goods in interstate commerce for private use, regardless of laws in the states.⁵⁴

Restrictions on Federal Procurement. In addition to restricting the shipment of goods made by state prisoners, both Congress and the president placed restrictions on federal contracts and purchases.

- The Walsh-Healy Act (1936) banned convict labor on federal procurement contracts in the “manufacture...production or furnishing of any...materials, supplies, articles or equipment used in government contracts where the amount thereof exceeds \$10,000.”
- Executive Order 11755, effective January 1, 1973, restricted the purchase of inmate-made goods by the federal government.⁵⁵

As a result of restrictions by the federal and state governments, “the original conception of the penitentiary was thus turned on its head,” Andrew Peyton Thomas, a young assistant attorney general in Arizona, said recently. “Prison labor, once viewed as indispensable for restoring a healthy relationship between the criminal and society, was made literally a federal offense.”⁵⁶ The irony is that “whether their preferred penal philosophy was rehabilitation, retribution or deterrence, virtually all of the founders of America’s prisons believed in the values of prison labor.”⁵⁷

Wartime Relaxation of Restrictions. During World War II, federal prohibitions on inmate labor were temporarily relaxed, prison industries produced much-needed war materiel and prison morale reportedly rose. Some prisons again became self-supporting and ran surpluses. But the federal government reimposed the restrictions after the war, paying no heed to the prosperity earned through prison self-sufficiency and the habilitative value of work for prisoners themselves.

Relaxation of Restrictions under the PIE Program. In 1979, Congress relaxed some of the strictures on prison labor when it passed the Justice System Improvement Act or Percy Amendment, named after then-U.S. Sen. Charles Percy (R-IL). The Percy Amendment permits waivers of the Summers-Ashurst and Walsh-Healy restrictions on the interstate sale of prison-made goods and sale to the federal government provided that:

- Prisoners are paid the “prevailing” or comparable wage (sometimes union scale);
- Local labor union officials are consulted and approve;
- Officials find that local non-convict labor is unaffected; and
- Goods produced are in an industry with no local unemployment.

The Percy Amendment created the Private Sector/Prison Industry Enhancement Certification program (PS/PIEC, better known as the PIE program), a first step in allowing private companies to employ prison labor, since most business markets cross state lines.

“The Percy Amendment set up the PIE program, permitting some waivers of federal restrictions.”

Work for Prisoners Today

Federal and state officials as well as private prison reform groups have spent several years exploring ways to increase the number of prisoners who work. This renewed interest in prison labor stems from the tremendous increases in the prisoner population, the diminished belief that prisons can reform prisoners and an American business community unafraid of competition from labor-intensive products best suited to prisons — and typically produced offshore.⁵⁸ Progress has been slow, both because of the PIE program's many constraints and because increasing work for convicts has not had a high priority with either government officials or private businessmen.

Operating under the Federal PIE Program. Approved PIE programs directly involve private entrepreneurs in prison-based joint ventures. Since 1979 the PIE program has certified 37 jurisdictions and generated gross earnings for convicts of \$63 million, including room and board payments of \$13 million. At the end of the first quarter of 1996, 1,944 prisoners were employed and earnings were at an annual rate of \$13 million, with about half of earnings going toward family support, victim restitution, taxes and incarceration costs.⁵⁹ These modest results indicate that the Percy restrictions make it difficult to create useful jobs.⁶⁰ [See the sidebar on Private-Public Ventures in Prisons.]

“Since 1979 the PIE program has certified 37 jurisdictions and generated gross earnings of \$63 million, including room and board payments of \$13 million.”

The Percy legislation is “quite definite on the subject of wages: inmates in certified projects must receive wages comparable to those paid for similar work in the area in which the project is located. The legislative history accompanying the bill makes it clear that Congress saw comparable wages as the best compromise among competing positions.”⁶¹ In a bow toward regulatory freedom, fringe benefits and employment taxes need not be identical.

State Movement toward Work for Prisoners. In 1990 California voters rejected a \$450 million bond issue to fund prison construction but approved a change in the state's constitution to allow operation of private-sector prison industries when assured by the governor that the jobs would not result in the layoff of civilian workers. In 1994 Oregon voters overwhelmingly approved a constitutional amendment to put 100 percent of inmates to work. The Enterprise Prison Institute, headed by prison consultant Knut A. Rostad, promotes and studies corporate involvement in prison work programs. Its board includes Edwin Meese, former U. S. Attorney General, and Rep. Bill McCollum, chairman of the House Judiciary Subcommittee on Crime. A survey of prison officials who manage correctional industries in 25 states found that they believe inmate work programs should be increased so that between 18 and 30 percent of prisoners do full-time work.⁶² The Correctional Industries Association says that by the year 2000, 30 percent of inmates will work, up from about 11 percent today, and produce \$8.9 billion in sales, up from only \$1.3 billion.

Private-Public Ventures in Prisons

Since 1979 the Prison Industry Enhancement (PIE) program has certified 37 jurisdictions to engage in joint ventures with private enterprises to employ inmates. Although fewer than 2,000 prisoners in the nation participate in less than 120 work projects, correctional administrators who have taken part say the projects have been successful.

Example: Electronic Cables. Inside the Evans Correctional Facility in South Carolina, a maximum/medium security prison, some 250 inmates assemble nearly \$20 million worth of cables for use with and in electronic equipment annually for Escod Industries, a division of Insilco Corporation, a Fortune 500 conglomerate based in Columbus, Ohio. The cables are purchased by corporations like IBM and Canadian-based Northern Telecom. The Evans plant, one of the company's seven manufacturing facilities in the United States, is supervised by an Escod civilian staff of 10. The Evans plant manager, Bert Christy, says, "The productivity and quality of this work force is as good as, if not better than, any that I've ever worked with." Inmates with five unexcused absences within any six-month period are terminated. The plant won an award from IBM for being in the top 10 among 500 plants by delivering 25,000 cables with zero defects.

Example: Baseball Caps. Inside the maximum security Somers unit of the Connecticut Department of Corrections, Maryland-based Lyon Brothers Manufacturing Company employs 18 convicts to make baseball caps that are sold to private companies, retail sporting goods stores and government agencies. Lyon Brothers holds the license for manufacturing the emblems of all the teams of the National Football League and Major League Baseball. The caps worn by Midas Muffler mechanics, Little League World Series players and St. Louis police officers are sewn by Somers inmates. The warden says that the joint venture with Lyon Brothers has been good for the prison because it gives inmates a positive goal to shoot for, while the plant manager, Renate Hellin, says the venture offered an affordable way to enter a new market closely related to its main line of emblems.

Example: Reservations. Since 1986 TWA has employed a total of 300 inmates in the California Youth Authority's Ventura Training School for youthful offenders as agents who schedule all of TWA's itineraries for around-the-world trips. The work force typically consists of 70 agents, and nearly 60 have continued their employment at the company's Los Angeles reservation center after release from prison. The 1992 riots in Los Angeles following the Rodney King verdict highlighted the reliability of the Ventura center for TWA. The company was forced to close its Los Angeles office but Ventura operated over the two-day period, handling many calls from travelers who otherwise would have been lost to competitors.

Example: Graduation Gowns. Inside the Leath women's prison in South Carolina, 40 inmates sew, inspect, sort and package graduation gowns for Jostens, Inc., a Fortune 400 company and the largest manufacturer of graduation gowns in the country with 43 offices and manufacturing plants throughout the United States, Mexico and the Caribbean. Jostens' main gown plant is in Laurens, S. C., only 25 miles from the Leath prison. Production manager Linda Knight says that quality initially was a problem but it improved with new training methods. Knight says that absenteeism and turnover are no different than at the company's Laurens plant and that productivity is good, but the sewing must be kept simple and repetitive.

The wide range of other "free venture" prison production includes telemarketing, metal fabrication and assembly work like sheet metal products and heater assembly, mapmaking, computer networking equipment, saddles and related tack, pallets, boat lifts and exposed aggregate concrete.

Source: George E. Sexton, *Work in American Prisons: Joint Ventures with the Private Sector*, U.S. Department of Justice, National Institute of Justice, NCJ 156215, November 1995.

“South Carolina, the leading state in private employment, has 325 in the PIE program.”

Many states are moving toward private-sector jobs for prisoners, but slowly. South Carolina, the leading state in private employment of prisoners, has 325 in the PIE program. California is second with 274, Washington has 201 and Nevada 198.⁶³ In Texas, the legislature has repealed the state ban on pay for prisoners⁶⁴ and authorized the Department of Criminal Justice to contract with state agencies, local governments and private enterprise for the use of inmate labor, but only 134 prisoners have been employed.

The Texas state comptroller, John Sharp, has suggested a goal for the year 2000 of 6,000 Texas prisoners employed in joint ventures. Yet most goals for private employment of prisoners are very modest. For example, at the annual meeting of the American Correctional Association in August 1996 in Memphis, Tenn., prison industry officials expressed hope that 3,000 prisoners would be employed in the PIE program nationwide by 2000.

Answering the Critics

From the earliest days of prison industries, complaints have surrounded work by prisoners — complaints about prison-made goods competing with those produced on the outside; about physical abuse of prisoners, especially those leased to private businesses; and about security. The objections to competition from prison-made products were largely responsible for the restrictive state and federal laws that play a big part in the idleness of so many prisoners today. Are these objections and concerns serious enough to keep productive work for prisoners to a minimum, or can they be dealt with in ways that allow the use of this resource?

Does Prisoner Work Create Unfair Competition for Free Labor?

From an economist’s perspective, newly created value — whether produced inside or outside prisons — is a social boon, not a curse. Production by prisoners creates rather than destroys jobs. For example, if prisoners make filing cabinets, the task requires someone to manufacture sheet metal, to transport it to the work site and to transport the finished product. These and the demands for other goods and services create new jobs. But certain firms and local labor might be hurt more than helped, at least in the short run.

Case Studies. It is not difficult to find complaints about prison labor on the outside. For example, an article in the December 1995 issue of *Furniture Design and Manufacturing* magazine criticized a Federal Prison Industries (FPI) proposal to expand its production of furniture.⁶⁵ The FPI is a wholly owned government corporation created in 1934 to produce goods for sale exclusively to the federal government. The FPI is responsible for employing 25 percent of sentenced federal inmates and is required to diversify as much as

“Federal Prison Industries spends 73 cents of each sales dollar on materials, equipment and services purchased from private businesses.”

possible to minimize its market impact. In response to industry criticism, the FPI argues that its overall economic impact is positive, especially since 73 cents of each sales dollar is spent directly on materials, equipment and services purchased from private businesses. The competitive impact on the furniture industry is minimal, and if anything, creates net jobs in the industry, according to FPI analysis.⁶⁶

Other cases that have given rise to complaints, especially from organized labor, are as follows:

Lockhart Technologies. Lockhart Technologies, Inc. closed its Austin, Texas, branch, laid off 150 workers and moved its operations into a state prison located in Lockhart, Texas, that is operated by Wackenhut Corporation. The prisoners are paid the federal minimum wage to assemble circuit boards, provided no health or other benefits (they have them already) and allowed to keep 20 percent of their wages. The products go to computer industry giants like IBM, Compaq and Dell. Joe Gunn, president of the Texas AFL-CIO, complained that Wackenhut violated federal law by not consulting with organized labor and declared this kind of prison labor “absolute indentured slavery. [Wackenhut] puts people to work under conditions that we criticize China for.”⁶⁷ The Texas Employment Commission, on the other hand, said that the only economic impact was in largely rural Caldwell County, where the prison is located and where there were no unions to be considered.

Weastec Corporation. The United Automobile Workers union (UAW) pressured Honda in 1992 into discontinuing a contract with Weastec Corporation for parts assembled by jail inmates in Ross County, Ohio. “Honda backed off,” says Ohio UAW official Warren Davis, “because they didn’t feel the negative publicity was worth it.”⁶⁸

Toys R Us. A union protest stopped a Chicago-area Toys R Us store from using inmate labor to stock shelves at night in 1994.⁶⁹

Hog Slaughtering in Arizona. A hog-slaughtering plant was closed, putting United Food and Commercial union members out of work, and the Arizona Department of Corrections and the Pork Producers Association subsequently opened a joint venture plant.

According to Jack Henning, executive secretary-treasurer of California’s Federation of Labor, joint ventures using prison labor are obligated to consult local labor unions but “they rarely do.”⁷⁰ Opponents of profit-and-loss prison labor projects — sometimes termed “enterprise prisons” — argue that cheap labor, not social responsibility, fuels the movement toward private employment for prisoners.⁷¹ Some critics admit that prisoners are eager to work, especially since they can save thousands of dollars over a few years, but object that prisoners are exploited without the right to organize politically or unionize.⁷²

“The potential impact of expanding work for welfare recipients would dwarf that of putting 1.1 million prisoners to work.”

Overall Economic Benefits. In the competitive fray, one person’s productive success often harms or even ruins another supplier financially. Yet we tolerate competition, even celebrate it, because its advantages vastly outweigh its disadvantages. Despite sometimes visible and poignant costs, competition is good rather than bad. As gymnastics coach Bela Karolyi put it, “No competition, no progress.” Economist Joseph Schumpeter (1883-1950) called the innovations that continuously render obsolete old inventories, ideas, technologies, skills and equipment “gales of creative destruction.” The only alternative to consumer sovereignty and free markets is producer sovereignty and guaranteed monopoly.⁷³ This would serve us very badly as a society because competition allows us to discover the cheapest and most efficient or effective way to do any job, sparing productive resources for new tasks.

Comparing Prisoner Work to Workfare for Welfare Recipients. Consider a related issue: welfare reform. Getting able-bodied adults off welfare and into jobs is widely viewed as progress rather than as a threat to the livelihood of others.⁷⁴ Work for prisoners, by contrast, has been treated as a competitive threat. What is the economic difference? To be sure, community hostility toward convicts emerges from the fact that they are criminals, and the welfare recipients are merely dependents. Yet there appears to be little concern over the competitive impact of large numbers of welfare recipients going to work. With 15 million persons receiving Aid to Families with Dependent Children, 6 million receiving Supplemental Security Income, 27.5 million on food stamps and millions more on Medicaid and other welfare programs, the potential impact of a large expansion in work and production among welfare recipients would dwarf that of putting 1.1 million prisoners to work.

Comparing Prisoner Work to the “Dumping” of Goods in Foreign Trade. Fear of prison production resembles the debate over the so-called dumping of goods by foreign producers. Economists argue that we should let foreigners “dump” all the valuable goods they want. If others wish to give us their goods, they add to the opportunity and wealth in our community. Adversely affected business owners and displaced workers are seldom so sanguine. Yet interest groups like the U.S. Chamber of Commerce and the AFL-CIO are on record in general support of private-sector prison industries.⁷⁵

Minimizing Adverse Impacts. One way to minimize the adverse impact of prisoner labor is to apply it to products that have negligible domestic competitive effects. For example, Prison Blues, jeans produced by prisoners, compete primarily with jeans produced offshore. However, if domestic and free private enterprise cannot produce something at a profit, prison labor probably cannot, either. A second way is to remove restrictions on prison-made goods in interstate commerce, insuring that prison labor competes in a national market.

Finally, states should repeal requirements that prison-manufactured goods be used by state agencies or given preferences by those agencies. The federal government should do the same with its mandatory purchase requirement for federal agencies. This would give private enterprise an opportunity to compete for the business from state and federal agencies and from joint ventures employing prisoners.

Why Prison Production Is No Guarantee of Profit. Focusing only on wages can be misleading. There are other factors that make prison production more, not less, expensive than non-prison production. These factors include security problems, high turnover, lack of skills, poor work habits and remote prison locations. A large percentage of inmates are illiterate or semi-literate. Prison labor usually is suitable only for labor-intensive, low-skilled work, at least on a large scale. In general, profit is no more easily achieved in prison than out. If convict labor is cheaper than civilian labor, it probably is because the entrepreneur hiring the labor expects it to be less productive.

Does Prisoner Work Make Prisoner Abuse More Likely?

Accounts of the abuse of prisoner workers are often mixtures of fiction and truth. Some of these accounts have come from historians who despised capitalism and sought to discredit it, especially in labor matters, in both prison workplaces and free world enterprises.⁷⁶ Journalists are alert to any story of abuse, whether behind bars or not.⁷⁷

Certainly convict laborers have been killed and seriously injured on the job, especially in railroad construction and mining. The same has been true of non-convict workers.⁷⁸ However, no systematic data exist and no one has demonstrated a “convict differential” in industrial accidents.

In a new book, Rutgers University historian David Oshinsky declares that convict leasing “would disgrace the South...serve to undermine legal equality, harden racial stereotypes, spur industrial development, intimidate free workers and breed contempt for the law. It would turn a few men into millionaires and crush thousands of ordinary lives.”⁷⁹ Oshinsky maintains that “the South’s economic development can be traced by the blood of its prisoners,” an unsustainable accusation in view of the fact that the rate of incarceration in the South was about the same as in the nation as a whole. In 1880, for example, Mississippi had 65 prisoners per 100,000 population and the nation’s average was 61. By comparison, in 1994 the national incarceration rate was 386 per 100,000.⁸⁰ While the convict mortality rate was high,⁸¹ the real villain was not leasing, but rather government’s failure to protect human rights in the entire prison system.⁸²

Private lease deals and work behind prison walls for private employers (sometimes termed “enterprise prisons”) must conform to the U.S.

“No one has demonstrated a ‘convict differential’ in industrial accidents.”

Constitution’s Eighth Amendment prohibition of cruel and unusual punishment. Further, the state should retain ultimate control and responsibility for the treatment of convicts, whether they are leased out for profit or working within prisons. As in prison operation, the state is likely to do a better job of investigating, monitoring and auditing private enterprise than of overseeing jails and work facilities operated by other bureaucrats. [See the sidebar on Penal Servitude.]

Does Prisoner Work Create Unreasonable Security Problems?

Security is, rightly, a central preoccupation of prison officials. But convicts are far from equally bad or equally risky. Systematic risk classification of prisoners was one of the advances in penology during the 19th century. Among the manifestations of such progress are minimum, intermediate and maximum security prisons.

Accountability is the fundamental answer to the security question. Prison authorities and private enterprise must continue to be held liable for escapes and security. Performance bonds posted by private employers entrusted with prisoners can improve the incentives for those employers to maintain security. In some cases, contractors can hire their own guards and adopt their own innovative security methods under careful monitoring. Work release programs already operate successfully, as do joint ventures within prison walls, and no peculiar new security solutions are required before prisoners go to work either inside or outside prisons. As mentioned above, constructive occupation of prisoner time is likely to reduce security problems.

“No peculiar new security solutions are required before prisoners go to work either inside or outside prisons.”

Conclusion

What can be done to make prisons hum with productive work? In particular, how can private-sector jobs and high-quality goods and services be radically boosted within prisons? State and federal prison systems control a huge asset — convict labor — and largely waste its productive potential. All 50 states now have prison industry programs, and in 1934 Federal Prison Industries, Inc. (trade name UNICOR) was established as a self-sustaining corporation to keep federal inmates constructively employed and provide job training. But the possibility of making a profit must be allowed if the rapidly growing population of prisoners is going to have gainful employment. This means repealing state and federal obstacles and encouraging private-sector involvement.

Penal Servitude?

The Thirteenth Amendment to the U.S. Constitution abolished slavery but preserved the authority of prison officials to require convicts to work. It states, “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...” Court cases have repeatedly upheld the wide authority of prison officials to manage prisons and assign work, provided that there are no constitutional violations (*Lucero v. Russell*, 741 F.2d 1129 [CA Mont. 1984]; *Wendt v. Lynaugh*, 841 F.2d 619 [5th Cir. 1988]; *Fuller v. Lane*, 686 F. Supp. 686 [USCD Ill. 1988]; *Smith v. Bingham*, 914 F.2d 740 [5th Cir. 1990]).

A typical opinion states, “The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations like this” (*Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119 [1977]). Prison officials are not allowed to discriminate or make decisions based on unlawful criteria like race, religion or national origin.

Armed with this authority, a few states reinstated chain gangs in recent years, but Alabama, the first to bring back the chains (made of plastic!), has been the first to again end the practice. They declared it too inefficient and unsafe.

Work for prisoners, whether for private or public employers, does not have to be forced labor. Those who favor such work are not advocating a new form of slavery, involuntary servitude, an American gulag or any other such revolution. Nor is any reduction in prisoner rights and privileges involved. Rather, the denial of productive work can be considered physical, mental and moral abuse for healthy prisoners.

Joint venture companies behind bars do not want forced labor. In fact, firms want to choose among applicants, who almost certainly will be numerous because of the advantages to prisoners inherent in these work opportunities.

State statutes to facilitate work among prisoners should be drafted in permissive rather than mandatory language to afford prison officials managerial discretion in assigning work and to avoid triggering prisoner litigation under the due process or equal protection clauses of the Fourteenth Amendment.

“The possibility of making a profit must be allowed if the private sector is to provide gainful employment.”

Public Policy Reforms. Among the steps that need to be taken are these:

- Repeal the Sumners-Ashurst Act making it a federal crime to knowingly transport convict-made goods in interstate commerce.
- Repeal the Walsh-Healy Act ban on the use of convict labor in federal procurement contracts over \$10,000.
- Repeal similar state laws restricting trade in prison-made goods and services.
- Repeal state-use laws that compel state agencies to buy goods and services made in that state’s prisons and institute competitive bidding for all state, local and federal purchases.
- Repeal state and federal limitations on inmate pay to allow more flexible, market-determined prices for inmates’ labor (compensation based on anticipated productivity).
- Pay modest bonuses to wardens and prison officials for progress toward making their prisons financially self-sufficient.
- Create prison-enterprise marketing offices in prison and jail systems.
- Allow private prison operators to profit from the gainful employment of convict labor.
- Encourage and publicize private-sector proposals for enterprise prisons.
- Set up procedures for competitive bidding for prison labor.
- Diminish prisoner litigation against prison work by repealing the Civil Rights of Institutionalized Persons Act and the federal habeas corpus procedure, then institute the English rule by which prisoners can lose as well as gain something of value in lawsuits.⁸³
- Explicitly allow contracts for convict leasing for work outside prisons with responsible private enterprises, paying careful attention to legal liability, security against escape and state inspection and supervision.
- Reallocate effort away from make-work training programs and nonprofit “doing good” and toward getting real jobs done.

Running Prisons as a Business. The proper way to mimic the free world of work as closely as possible is to encourage profit-and-loss employment of prison labor by private enterprise. Prisoner-run firms might even be allowed, provided the activity is consistent with orderly operation of the facility.⁸⁴

Inmates are eager to work for a variety of reasons: to relieve monotony, to earn money wages and to claim good time credit and early release. What about prisoner wages? Let them be flexible and set competitively. Prisoners and prison labor pools expected to yield low value-added will attract low offers and vice versa for high value. The evidence shows that for products that need entry-level, unskilled workers who are reliable and stable (light mechanical assembly, welding, sorting, data entry, etc.), inmates can be competitive with free world workers in terms of quality and productivity, given close supervision and clear work standards.⁸⁵ We can put many of the problems of prison industry into better — competitive — hands.

What about the choice of businesses and markets? Two methods are available. First, allow prison authorities to innovate and choose, aided by private-sector marketing and management consultants. Second, solicit private-sector bids for contracts and leases on convict labor and choose among the proposals. Only businesses can really succeed in business. So the answers to questions about what to produce and how can be answered by the competitive marketplace.

Policy Options. Repeal of federal restrictions on prison labor would allow the states to design their own lease and contract systems. Conditions and criteria would differ among the states. States could lease labor to industries both inside and outside prisons and retain final control, inspection and auditing responsibilities. Allowing state authorities maximum latitude in negotiating prison lease deals would benefit taxpayers, prisoners and crime victims and would improve public safety over the long run. As the *Houston Chronicle* put it in a recent editorial, “The advantages to society of prison jobs vastly outweigh any disadvantages.”⁸⁶

Comprehensive legislation from the U.S. Congress may be the best approach because a coherent package would make the goals and methods clear and likely would elevate the political discussion as well.

“Repeal of federal restrictions would allow the states to design their own lease systems.”

NOTE: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any bill before Congress.

Notes

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- ⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1993*, p. 634, Table 6.71.
- ⁶ See, for example, the 1990 market study of the unhappy government end users of Federal Prison Industries products conducted by Deloitte & Touche for the U.S. Congress, as described by Ann K. Nicknish, "Building Furniture Behind Bars," *Furniture Design and Manufacturing*, December 1995, pp. 88-91.
- ⁷ Amanda Wunder, "Survey Summary: Prison Industries & Inmate-Employees," *Corrections Compendium*, October 1994, pp. 9-22. Federal Prison Industries (FPI) points out that it is "responsible for creating job opportunities for approximately 25 percent of the sentenced Federal inmate population," in "Addressing the Effect of Federal Prison Industries on the Private Sector in General and the Furniture Industry Specifically," FPI, March 1996, mimeo.
- ⁸ Texas Department of Criminal Justice, *1994 Annual Report*, pp. 60-61; and Nelson Antosh, "Farmers in the Cell: Texas' Prison-Farm System Grows into Agricultural Giant," *Houston Chronicle*, November 26, 1995, p. 1D.
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- ¹³ The Texas state comptroller's office says that the earnings of prisoners who work typically are apportioned 20 percent each to costs of incarceration, taxes and compensation to victims, and 10 percent each to personal use, savings, legal obligations and family support.
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- ¹⁷ Timothy J. Flanagan, "Prison Labor and Industry," in Lynne Goodstein and Doris Layton MacKenzie, eds., *The American Prison: Issues in Research and Policy* (New York: Plenum Press, 1989), pp. 135-61.
- ¹⁸ William G. Saylor and Gerald G. Gaes, "Interim Report: The Effect of Work Experience, Vocational and Apprenticeship Training on the Long-Term Recidivism of U.S. Federal Prisoners," U.S. Federal Bureau of Prisons, rev. November 6, 1995, p. 1.
- ¹⁹ William G. Saylor and Gerald G. Gaes, "PREP Study Links UNICOR Work Experience with Successful Post-Release Outcome," *Corrections Compendium*, October 1994, pp. 5-8.
- ²⁰ Saylor and Gaes, "Interim Report," p. 3. It should be noted, however, that a 1984 Utah study and similar studies in the early 1980s in Ohio and Florida could not find a significant difference in recidivism between those who worked while in prison and those who did not. The same was true of a 1988 study in New York state. See K. E. Maguire, T. J. Flanagan and T. P. Thornberry, "Prison Labor and Recidivism," *Journal of Quantitative Criminology*, March 1988, pp. 3-18. Inmate release histories from the Lockhart, Texas, PIE program as of August 1996 showed that, of the 133 offenders released between September 1993 and July 1996, only seven (5 percent) have had post-release supervision revoked or escaped supervision, although a disturbing 32 (24 percent) were unemployed. Letter from Cathy Drake, assistant director of specialized supervision,

Texas Department of Criminal Justice, August 22, 1996.

²¹ Steven Elbow, "Privatization of Prison Labor," *Isthmus*, Madison, WI, October 1995.

²² Peter H. Rossi, Richard A. Berke and Kenneth J. Lenihan, *Money, Work and Crime: Experimental Evidence* (New York: Academic Press, 1980), pp. 277-78.

²³ American Correctional Association, *The American Prison: From the Beginning...A Pictorial History* (Laurel, MD: ACA Publishers, 1983), p. 15.

²⁴ *Ibid.*, pp. 2-27, and Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1978), pp. 1-20.

²⁵ American Correctional Association, *The American Prison*, p. 14.

²⁶ Gill, "The Prison Labor Problem."

²⁷ Harry Elmer Barnes, "The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania," *Journal of Political Economy*, October 1921, pp. 640-41.

²⁸ W. David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848* (Ithaca, NY: Cornell University Press, 1965), p. 42.

²⁹ *Ibid.*, p. 33.

³⁰ *Ibid.*, p. 99, citing 48th session document.

³¹ Orlando F. Lewis, *The Development of American Prisons and Prison Customs, 1776-1845, with Special Reference to Early Institutions in the State of New York* (Montclair, NJ: Patterson Smith, 1967 [1922]), p. 332.

³² Cited in Lewis, *From Newgate to Dannemora*, p. 100.

³³ During and after the Civil War, the piece-price arrangement developed in Northern prisons. Private contractors supplied raw materials with which prisoners manufactured goods within the prison, supervised entirely by prison officials. The contractors then paid a fixed price for each manufactured product and sold it on the free market. Responding to protectionist pressure from labor unions and some businesses in the 1870s, many prison systems turned to production processes owned and controlled exclusively by government. In the public account system, convicts worked in state-owned and -operated industry within prison walls exclusively, although products could be sold on the open market. In the public-use or state-use system, products were not only produced but consumed exclusively within the government sector as well.

³⁴ Donald R. Walker, *Penology for Profit* (College Station, TX: Texas A&M University Press, 1988), p. 192.

³⁵ Based on W.J. Michael Cody and Andy D. Barnett, "The Privatization of Correctional Institutions: The Tennessee Experience," *Vanderbilt Law Review* 40 (1987), pp. 829-49.

³⁶ Except as noted, this section is based on Walker, *Penology for Profit*.

³⁷ Texas Department of Criminal Justice, *Statistical Report, FY 1994*, Institutional Division, p. 21.

³⁸ In the 1890 census, only 26 percent of those in prisons and jails in the United States had served a prior prison term, and only 15 percent of those locked up in the South Central region had. Unfortunately, the prison and jail data were not separated, probably diminishing the percentage reported with a prior prison sentence. Between 1926 and 1936, the percent of prisoners received by state and federal prisons who had served prior prison sentences grew from 44 percent to 56 percent, suggesting higher recidivism. During the 1970s, about one-third of prisoners released from state prisons returned to prison within three years. See U.S. Department of Justice, Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850-1984*, pp. 62, 63. From 1895 to 1900, only 9 to 10 percent of federal offenders received from the courts had known prior commitments, but the share rose to 23 percent by 1925 and 54 percent by 1935, declined to 49 percent in 1945 and rose to 61 percent in 1970. The share had declined to 43 percent by 1984 (see p. 166 of *Historical Corrections Statistics*). A pattern of higher recidivism rates is also suggested in the studies cited in Daniel Glaser, *The Effectiveness of a Prison and Parole System* (Indianapolis, IN: Bobbs-Merrill, 1964), p. 25, and Richard B. Freeman, "The Labor Market," in James Q. Wilson and Joan Petersilia, eds., *Crime* (San Francisco, CA: Institute for Contemporary Studies, 1995), p. 189.

³⁹ Lewis, *From Newgate to Dannemora*, p. 187.

⁴⁰ Glen A. Gildemeister, *Prison Labor and Convict Competition with Free Workers in Industrializing America, 1840-1890* (New York: Garland, 1987), especially ch. 10 and 11. Herman Lee Crow argues that Texas labor camps had both high death rates and escape rates in the 1870s and 1880s. See Crow, *A Political History of the Texas Penal System — 1829-1951*, Ph.D.

diss., University of Texas, Austin, TX, 1964, pp. 143-44.

41 Walker, *Penology for Profit*, p. 59.

42 Lewis, *From Newgate to Dannemora*, p. 197. Years earlier, discussion had swirled around which prisoners should be allowed to work, some insisting that “only felons serving life sentences should have their punishment alleviated by being allowed the diversion of labor.” Lewis, p. 66.

43 Another effort at making prisons self-supporting was mounted in New York in 1877, and Lewis Pilsbury, described as an “all-powerful superintendent,” cut the prison expense to taxpayers by 79 percent, from \$317,000 in 1876 to \$67,800 in 1878 before new legislative restrictions caused deficits to resume their growth. Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (Montclair, NJ: Patterson Smith, 1968 [1936]), p. 98.

44 *Ibid.*, p. 102.

45 Barnes, “The Economics of American Penology as Illustrated by the Experience of the State of Pennsylvania,” pp. 619, 640-41. Barnes also observed, “While the state-use system has quite generally come to be regarded as the most satisfactory method of controlling prison labor, it has rarely been found successful unless the purchase of prison-made products, when available, has been made compulsory with state institutions.” (p. 629).

46 American Correctional Association, *The American Prison*, p. 158.

47 By 1905, only 3,654 prisoners in the nation, or 7 percent, were leased, down from 9,104, or 20 percent, in 1885. Gill, “The Prison Labor Problem.”

48 Telephone conversation with Jim Rose, Tennessee Department of Corrections, Commissioner’s Office, July 31, 1996.

49 Walker, *Penology for Profit*, p. 185.

50 Walker reported without question the allegations of abuse. For example, he was astonished when the state branch of the Society for the Friendless, a voluntary society headed by eminent Texans and devoted to prison reform and programs to keep the young in schools, prevent lives of crime and assist released prisoners “visited [in 1907] almost every location in the state where convicts were kept and yet their descriptions of what they found bore virtually no resemblance to the horrible situation that existed. In a sense, therefore, their activities constituted a disservice to the people of Texas, particularly because the organization was headed by such a distinguished body of men.” *Penology for Profit*, p. 183.

51 Gill, “The Prison Labor Problem,” p. 88.

52 Gwen Smith Ingley, “Inmate Labor: Yesterday, Today and Tomorrow,” *Corrections Today*, February 1996, p. 28.

53 Norval Morris and David J. Rothman, eds., *The Oxford History of the Prison* (New York: Oxford University Press, 1995), p. 186.

54 The courts until recently have interpreted the boundaries of the interstate commerce clause to be virtually unlimited, so the Ashurst-Sumners Act was severely restrictive on almost all prison industry.

55 “The result,” writes Gwen Smith Ingley, American Corrections Association official, in something of an understatement, “was a significant drop in correctional industries’ employment levels.” Ingley, “Inmate Labor: Yesterday, Today and Tomorrow,” p. 30.

56 Frum, “Working for the Man,” p. 49.

57 A.P. Thomas, “Outdated Laws Shackle Prison Reform,” *Wall Street Journal*, March 30, 1995.

58 Flanagan, “Prison Labor and Industry.”

59 Auerbach, “Listing of Certified Prison Industry Enhancement Programs.” Of the \$63 million earned by prisoners in the PIE program, besides the \$13 million in room and board payments, \$4.5 million went to restitution of victims, \$4 million to support of prisoner families and \$7.3 million to taxes. The prisoners received the remaining \$34 million.

60 American Correctional Association, *Quarterly Financial Summary, Prison Industry Enhancement Certification Programs*, March 1, 1995.

61 Auerbach et al., *Work in American Prisons*, p. 14.

62 Ingley, “Inmate Labor: Yesterday, Today and Tomorrow.”

63 Auerbach, “Listing of Certified Prison Industry Enhancement Programs.”

- ⁶⁴ Prior to 1988, Texas law prohibited paying prisoners for working.
- ⁶⁵ Nicknish, "Building Furniture Behind Bars." Also see Joe Davidson, "Furniture Makers Allege Prison Agency May Well Force Them Out of Business," *Wall Street Journal*, February 7, 1996, p. B2.
- ⁶⁶ Federal Prison Industries, "Addressing the Effect of Federal Prison Industries on the Private Sector in General and the Furniture Industry Specifically."
- ⁶⁷ Reese Erlich, "Prison Labor: Workin' for the Man," *Arm the Spirit*, Toronto, November 30, 1995. Morgan Reynolds, the author of this study, visited the Lockhart prison and found working conditions to be humane.
- ⁶⁸ *Ibid.*
- ⁶⁹ *Ibid.*
- ⁷⁰ Christian Parenti, "Making Prison Pay," *The Nation*, January 29, 1996, p. 13.
- ⁷¹ *Ibid.*, p. 12.
- ⁷² *Ibid.*, p. 13.
- ⁷³ The economist Adam Smith wisely observed, "Consumption is the sole end and purpose of production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Modern Library 1937 [1776]), ch. 8.
- ⁷⁴ Robert Rector and Patrick Fagan, "How Welfare Harms Kids," Heritage Foundation *Backgrounders*, June 5, 1996, Washington, DC.
- ⁷⁵ Auerbach et al., *Work in American Prisons*, pp. 2-3. For guidance on the proper work program, the unions point to their apprentice electrician program for San Quentin inmates, which has trained only six apprentices.
- ⁷⁶ Friedrich von Hayek, ed., *Capitalism and the Historians* (Chicago: University of Chicago Press, 1954).
- ⁷⁷ For a recent example, see Paul Wright, "Slaves of the State: Prison Laborers Do Time in Factories with Fences," *Prison Legal News*, 1995; Wright is a Washington state prisoner and coeditor of *PLN*, a monthly magazine reporting on prison news and legal affairs.
- ⁷⁸ Stanley Lebergott, "Wages and Working Conditions," in David R. Henderson, ed., *Fortune Encyclopedia of Economics* (New York: Warner Books, 1993), pp. 503-08.
- ⁷⁹ David Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996), p. 56.
- ⁸⁰ U.S. Department of Justice, Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850-1984*, p. 30, and BJS Bulletin, *Prisoners in 1994*, August 1995, NCJ-151654.
- ⁸¹ Oshinsky, *Worse than Slavery*, pp. 46, 61.
- ⁸² The difference government action can make in protecting the human rights of prisoners can be seen in the transporting of British criminals to Australia in the 19th century. When the British government paid ships' captains a flat fee for each convict who embarked from a British port, the survival rate was as low as 40 percent. Edwin Chadwick, a British official, changed the payment system so that the captains got a fee for each convict who disembarked in Australia instead. Very shortly the survival rate of prisoners rose to more than 98 percent. Robert B. Ekelund Jr. and Robert F. Hebert, *A History of Economic Theory and Method*, third ed. (New York: McGraw Hill, 1990), p. 215.
- ⁸³ The Texas Legislature, for example, passed a law in 1995 to eliminate good time credits toward early release for inmates who file frivolous lawsuits against the Texas Department of Criminal Justice. Although not in the Texas law, those convicted on plea agreements should risk forfeiting some privileges if they contest their convictions and lose.
- ⁸⁴ U.S. Department of Justice, National Institute of Justice, *Topical Bibliography on Correctional Industries*, doc. 118.
- ⁸⁵ Auerbach et al., *Work in American Prisons*, pp. 44-45.
- ⁸⁶ *Houston Chronicle*, March 30, 1995, p. 32A.

About the Author

Morgan O. Reynolds, an NCPA Senior Fellow, director of the NCPA Criminal Justice Center and a professor of economics at Texas A&M University, received his Ph.D. in Economics from the University of Wisconsin in 1971. He has published many articles in academic journals, edited *W.W. Hutt: An Economist for the Long Run* (1986), and authored *Public Expenditures, Taxes, and the U.S. Distribution of Income* (1977), *Power and Privilege: Labor Unions in America* (1984), *Crime by Choice: An Economic Analysis* (1985), *Making America Poorer: The Cost of Labor Law* (1987), and *Economics of Labor* (1995). He has been a consultant for the National League of Cities, the U.S. Department of Labor and many private organizations. He also serves on the board of the *Journal of Labor Research* and the *Review of Austrian Economics* and is a member of the Mont Pelerin Society and an adjunct scholar of the Cato Institute.

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The National Center for Policy Analysis is a nonprofit, nonpartisan research institute, funded exclusively by private contributions. The NCPA developed the concept of Medical Savings Accounts, which are included in the 1996 health care bill passed by Congress and have been adopted by a growing number of states. Many credit NCPA studies of the Medicare surtax as the main factor leading to the 1989 repeal of the Medicare Catastrophic Coverage Act.

NCPA forecasts show that repeal of the Social Security earnings test would cause no loss of federal revenue, that a capital gains tax cut would increase federal revenue and that the federal government gets virtually all the money back from the current child care tax credit. Its forecasts are an alternative to the forecasts of the Congressional Budget Office and the Joint Committee on Taxation and are frequently used by Republicans and Democrats in Congress. The NCPA also has produced a first-of-its-kind, pro-free enterprise health care task force report, written by 40 representatives of think tanks and research institutes, and a first-of-its-kind, pro-free enterprise environmental task force report, written by 76 representatives of think tanks and research institutes.

The NCPA is the source of numerous discoveries that have been reported in the national news. According to NCPA reports:

- Blacks and other minorities are severely disadvantaged under Social Security, Medicare and other age-based entitlement programs;
- Special taxes on the elderly have destroyed the value of tax-deferred savings (IRAs, employee pensions, etc.) for a large portion of young workers; and
- Man-made food additives, pesticides and airborne pollutants are much less of a health risk than carcinogens that exist naturally in our environment.