



REVIEW

The Economic Impact of Prison Labor for Incarcerated Individuals and Taxpayers

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Introduction

The United States' prison population is currently the second highest globally, falling closely behind China at just over 1.5 million individuals incarcerated.¹ This means the United States accounts for approximately 25% of the world's prison population, despite accounting for just 5% of the world's population overall.² Furthermore, the average cost of incarceration in the United States of America sits at approximately \$80 billion per year for the taxpayer,³ while corporations within the private prison industry are estimated to bring in an estimated \$374 million annually.⁴ Given the disproportionate number of incarcerated individuals in the United States of America, the private prison industry is opportunely positioned to make a

¹ "Prison Population Total," Prison Studies (World Prison Brief), accessed December 8, 2022, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.

² Neveen Hammad, "Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities," *Virginia Journal of Social Policy and the Law*, no. Summer 2019 (2019).

³ Neveen Hammad, "Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities," *Virginia Journal of Social Policy and the Law*, no. Summer 2019 (2019).

⁴ Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration," Prison Policy (Prison Policy Initiative, January 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

profit from cheap prison labor. The labor, however, is exploitative not only to incarcerated individuals, but also to taxpayers. At play within this legal situation is the profit of corporations complicit in the prison industry, the well-being of incarcerated individuals, and the financial implications for the taxpayer. This paper offers an alternative approach to the carceral system that deprioritizes corporate profit margins to better prioritize the incarcerated community and taxpayers.

I. History and Previous Case

While the Thirteenth Amendment outlawed slavery in United States, it did not eliminate the possibility of slavery does persist as a form of punishment for convicted criminals.⁵ Thus, despite the Thirteenth Amendment, slavery has since remained in the United States of America, in a roundabout fashion. Not only does the Thirteenth Amendment enable prison labor, but the Fair Labor Standards Act (FLSA) also enables prison labor through its definitions of ‘employees’ and ‘employers.’

In 1996, during *Burleson v. the State of California*, prison inmates attempted to receive federal minimum wage back-pay for work that took place within a California prison. At the conclusion of this case, the inmates did not receive the minimum wage compensation they sought, as they were not technically employees of the state according to the FLSA.⁶ To fall under the definition of “employee,” individuals must pass the economic reality test, a legal test designed to determine the status of someone’s employee-employer relationship. More specifically, an employee, under the definition of the economic reality test, is someone who “follows the usual path of an employee and is dependent upon the business which he or she serves.”⁷ Because this prison labor is penological rather than pecuniary, these incarcerated individuals did not pass the economic reality test.⁸

In 1992, incarcerated individuals in an Arizona state prison also sought to recover minimum wages from a plasma treatment center, which held a contract with

⁵ U.S.C.A. Const. Amend. XIII, § 1, USCA CONST Amend. XIII, § 1

⁶ *Burleson v. State of California*, 83 F.3d 311 (9th Cir. 1996).

⁷ “Employment Relationship Under the Fair Labor Standards Act,” United States Department of Labor (Wage and Hour Division United States Department of Labor, March 2022), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship#:~:text=An%20employment%20relationship%20under%20the,be%20subject%20to%20the%20Act.>

⁸ *Burleson v. State of California*, 83 F.3d 311 (9th Cir. 1996).

the State Department of Corrections. The inmates failed to receive minimum wage retribution as the court this time held that neither the plasma treatment center nor the Department of Corrections fell within the Fair Labor and Standards Act's definition of an 'employer,' which is defined as, "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency but does not include any labor organization or anyone acting in the capacity of officer or agent of such labor organization."⁹

II. Understanding the Economic Implications

The nature of prison labor varies from institution to institution. For example, the California Penal Code requires, "of every able-bodied prisoner imprisoned in any state prison [to perform] as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections."¹⁰ One firsthand account from a women's prison details an eight-hour day participating in manual labor outside, without ample water sources or sunscreen.¹¹ Another formerly incarcerated individual, Dominique Morgan, recounts his experience working as a chef while incarcerated. His workday would start at 4 am during breakfast hour, and he would work through dinner time at his facility. He made \$2.25 per day and did not receive sick days, despite being diagnosed with HIV.¹²

While subject to prison labor, incarcerated individuals within private prisons who do happen to receive pay are also subject to fees deductible from their wages. These fees include, but are not limited to, fees for room and board and other miscellaneous fees to offset the cost of incarceration. What is remarkable, however, is the fact that these fees are not a substitute for the federal funding these prisons receive. Rather, the private prisons can collect these fees *in conjunction* with federal funding from taxpayers.¹³ These institutions are not only exploiting incarcerated individuals as laborers; they are also pocketing money from taxpayers. This double-dipping of resources ultimately creates a profit for the private prison industry at the expense of citizens and incarcerated individuals.

⁹ *Gilbreath v. Cutter Biological, Inc.* 931 F.2d 1320 (9th Cir. 1991).

¹⁰ West's Ann. Cal. Penal Code § 2700, CA PENAL § 2700.

¹¹ Simon McCormack, "Prison Labor Booms Despite High Unemployment" (HuffPost, December 10, 2012), https://www.huffpost.com/entry/prison-labor_n_2272036.

¹² "The Uncounted Workforce," *The Indicator From Planet Money* (National Public Radio, June 29, 2020), <https://www.npr.org/2020/06/29/884989263/the-uncounted-workforce>.

¹³ Neveen Hammad, "Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities," *Virginia Journal of Social Policy and the Law*, no. Summer 2019 (2019).

In addition to these circumstances, private companies are also encouraged to utilize incarcerated individuals as laborers via tax credit.¹⁴ The Work Opportunity Tax Credit (WOTC) is a tax credit for employers for hiring individuals of certain demographics, such as veterans, summer youth employees, and long-term unemployment recipients; also included within the WOTC are felons.¹⁵ Thus, this legislation not only allows corporations to exploit incarcerated individuals with little to no wages but also incentivizes the usage of prison labor by providing tax credits to companies for using such labor. Yet again, this double-dipping of resources further increases profit margins for private prisons and corporations at the expense of exploited workers and taxpayers.

Given these two presented methods of financial profit, it is evident the exploitation of incarcerated individuals not only impacts these workers directly, but it also displaces taxpayer dollars into the hands of corporations through subtle schemes. While the exploitation of the incarcerated workers here is rather blatant, the negative impacts on the taxpayer are much more subtle. Private prisons, as previously mentioned, are able to receive federal funding, which ultimately is derived from taxes. It is possible that this federal funding may be derived from the creation of new dollars within the United States; however, this production and distribution of money would still create the unintended consequence of inflation for the average citizen. Regardless, the structure of the private prison system demands a constantly laboring incarcerated population, which cannot exist without the financial support of facilities. Private companies utilizing prison labor benefit from WOTC, cheap labor, and federal funding. Incarcerated individuals within this system continuously labor; they do not receive the chance to rehabilitate or receive education, processes that are later illustrated in this paper as crucial to reducing recidivism. Thus, the legal structures surrounding prison labor not only allow the demand for prison labor but also perpetuate recidivism. The taxpayer, within this system, is left indirectly funding this cycle of exploitation by nature of the prisons receiving federal funding.

¹⁴ "Work Opportunity Tax Credit," Internal Revenue Service (Internal Revenue Service), accessed December 8, 2022, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit>.

¹⁵ "Work Opportunity Tax Credit," Internal Revenue Service (Internal Revenue Service), accessed December 8, 2022, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit>.

III. Legal Argument

To address the economic concerns of the situation at hand, a three-pronged approach is presented. First, this approach uses different definitions of “employee” and “employer” than the FLSA to ensure the fair pay and treatment of working incarcerated individuals. Second, the approach disincentivizes the double-dipping behavior of corporations to partially alleviate the financial burden the current carceral system places on taxpayers. Lastly, the approach calls for the replacing of prison labor with educational opportunities that will subsequently reduce the rate of recidivism and thereby further alleviate the cost of incarceration placed upon taxpayers.

A. Definitions

Redefining “employee” and “employer” to comprehensively include incarcerated individuals working for corporations while in federal and private prisons is the most direct approach to addressing the economic implications of cheap prison labor. Currently, the Fair Labor Standards Act encompasses niche demographics such as child laborers, agricultural workers, service members, and politicians;¹⁶ however, it fails to directly encompass the demographic of incarcerated individuals. This exclusion of the prison population in the Fair Labor Standards Act is detrimental to the well-being of incarcerated individuals and taxpayers, as it facilitates the exploitation of those incarcerated. Without this comprehensive redefinition of employee and employer, there remains an incentive for mass incarceration for corporations, lobbyists, and politicians.¹⁷ The burden upon the taxpayer is an unintended consequence of this incentivized mass incarceration, as the carceral system, from the court system to county jails to state penitentiaries, is ultimately funded by taxes. Enforcing a minimum wage by defining prisoners as employees will lessen the appeal of prison labor for corporations as a profit-increasing tactic. This, in turn, will subsequently lessen the annual cost of incarceration that falls upon the taxpayer.

¹⁶ 29 U.S.C.A. § 203, 29 USCA § 203 29 U.S.C.A. § 203 (West) § (2018).

¹⁷ Bob Sloan and Mike Elk, “The Hidden History of Alec and Prison Labor,” *The Nation* (The Nation, June 29, 2015), <https://www.thenation.com/article/archive/hidden-history-alec-and-prison-labor/>.

B. Disincentivizing Double-Dipping of Resources for Corporations to
Better Prioritize a Reduction in Recidivism and Taxpayer Alleviation

It is also necessary to eliminate the ability of corporations to receive a tax credit for utilizing prison labor under the Work Opportunity Tax Credit legislation. The incentivization of this labor use 1) perpetuates the economic demand for constant availability of a prison workforce, funded by taxpayers, 2) comes at the cost of taxpayers, and 3) disincentivizes providing rehabilitation programs for incarcerated individuals before reentry into American society. These education programs may have otherwise replaced the time demand of prison labor, and research suggests they reduce recidivism.¹⁸ For example, one study proactive prison education significantly reduces the long-term costs of recidivism.¹⁹ The reinforcement of the financial benefits to corporations via prison labor not only constantly demands the presence of a prison population, but it also is directly funded by taxpayers via the WOTC. Furthermore, in a long-term model, using the prison population as laborers inhibits any sense of rehabilitation for said individuals.

Limiting a private prison's ability to charge incarcerated individuals fees for expenses taxpayers already pay for has the potential to limit the profit margins that make prison labor preferable for corporations. Furthermore, if incarcerated workers are genuinely presented with the opportunity to establish savings, their ability to establish themselves upon reentry into society may increase. This will, in turn, reduce the likelihood of poverty-related crimes that contribute to recidivism. Research suggests there is a strong correlation between poverty and incarceration. One study illustrates how men in the bottom ten percent of the United States' income distribution are twenty times more likely to be incarcerated between the age of thirty and forty than those in the top decile.²⁰ Perhaps a more concerning revelation within this research, however, is the fact that within one year of release from prison, fewer than 20% of formerly incarcerated individuals earn more than

¹⁸ Center on Crime, "Education as Crime Prevention: Providing Education to Prisoners," *The Center on Crime, Communities, and Culture Research Brief Occasional Paper Series No. 2* (September 2, 1997).

¹⁹ "Public Policy Impacts of Rand's Correctional Education Research," RAND (RAND Social and Economic Well-Being), <https://www.rand.org/well-being/justice-policy/portfolios/correctional-education/policy-impact.html>.

²⁰ Adam Looney and Nicholas Turner, "Work and Opportunity Before and After Incarceration," *Economic Studies at Brookings*, March 2018.

\$15,000.²¹ As a result, formerly incarcerated individuals are extremely at risk of poverty-related recidivism immediately following their reintegration into society. Overall, without the ability to receive both rehabilitative education and accrue savings, research suggests rates of recidivism starkly increase, posing another long-term financial burden upon the taxpayer yet again.

C. Education

Research illustrates that recidivism decreases as education increases, and among prison populations, those with no GED are the most likely to become incarcerated more than once.²² Furthermore, 19% of adult inmates are completely illiterate and 40% are functionally illiterate.²³ Prioritizing literacy and a GED education for incarcerated individuals will better rehabilitate them for the demands of society upon reentry and better situate them to later secure jobs. Together, these improvements will help lower rates of recidivism. A study by RAND suggests that for every \$1 spent on prison education, \$4-5 of recidivism costs are saved in the initial three years after release from prison.²⁴ Currently, there is a grant program established to facilitate education methods in the carceral system.²⁵ Refining this grant program to prioritize the most at-risk demographics in the carceral system, those who are illiterate and without a GED, can decrease the population of the carceral system in future years. This refinement is a long-term investment that requires incarcerated individuals to forego labor^[4], but research does offer optimistic results.

C. Pros and Cons

The most immediate threat these law reforms pose is one to the profit margins of corporations. As these profit margins decrease, there is a possibility that this prison labor is simply outsourced to other countries by corporations for a similarly low price. Thus, labor exploitation would simply shift from the exploitation of the United States' incarcerated population to the exploitation of foreign workers.

²¹ Adam Looney and Nicholas Turner, "Work and Opportunity Before and After Incarceration," *Economic Studies at Brookings*, March 2018.

²² Cindy Hendricks, James E. Hendricks, and Susie Kauffman, "Literacy, Criminal Activity, and Recidivism."

²³ Center on Crime, "Education as Crime Prevention: Providing Education to Prisoners," *The Center on Crime, Communities, and Culture Research Brief Occasional Paper Series No. 2* (September 2, 1997).

²⁴ "Public Policy Impacts of Rand's Correctional Education Research," RAND (RAND Social and Economic Well-Being), <https://www.rand.org/well-being/justice-policy/portfolios/correctional-education/policy-impact.html>.

²⁵ 34 U.S.C.A. § 10741, 34 USCA § 10741 34 U.S.C.A. § 10741 (West) § (2018).

While this outcome is not necessarily desirable, the burden placed upon the taxpayer would remain relieved. Additionally, the timeframe of the legislative changes is also a possible pitfall. Although the long-term results are worthwhile, restructuring labor within the carceral system is sure to take years. Furthermore, implementing the proposed educational reforms to reduce rates of recidivism will also take years and come with an initial price tag. However, lower rates of crime after reentry into society and reduced prison populations associated with a decline in recidivism will later offset these initial investments.

Conclusion

Given the financial appeals of prison labor, it is no surprise corporations have taken full advantage of this possible asset. However, the multimillion-dollar annual profit of the prison industry comes at the cost of the exploitation of incarcerated individuals and taxpayers. Redefining incarcerated individuals as employees in an employee-employer relationship, disincentivizing prison labor for corporations, and prioritizing education within the carceral system can address these concerns. While incarcerated individuals are often referred to as forgotten members of society, their incarceration and exploitation continue to have an impact upon all of society.