

child support, fines, and other charges. About 50% of US incarcerants have unsupported minor children, such that there are more unsupported minor children of US inmates (estimated 2.5 million) than inmates. However, in contrast to most families, rather than the working-age parent supporting children, for America's inmates, therefore, resources flow in reverse, from children and households to dependent incarcerated adults.

3. Current Law, Custom, and Social Deliverables – All That's Wrong Today

Perhaps the first best thing to learn about the US Constitution and primary Federal prison labor law is that both are largely irrelevant for day-to-day Federal, state, and local prison labor practices, which are driven almost entirely by a culture of discrimination and facilitated by prison industry's monopsony (exclusive) buyer relationship with the captive labor force.

Purportedly the United States' Constitution, Federal, state, and local laws, and regulations underlie contemporary exclusion of incarcerated American adults from employment in the civilian labor force, the two major being -

1. **The US Constitution, 13th Amendment, slavery exception clause:**
“Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted* [italics mine] shall exist within the United States...”
2. **Ashurst-Sumners Act of 1935 (Title 18 USC 1761(c))**, making transport of prisoner-made goods in interstate commerce a Federal criminal offense:...”Whoever knowingly transports in interstate commerce ...any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners...shall be fined under this title or imprisoned for not more than two years, or both.”

However, in fact neither prevents a willing nation from accommodating inmate employment should we choose to do so.

Constitution: First, contrary to convoluted popular impression, the 13th amendment slavery exception permitting *forced* work, has nothing whatsoever to

do with the issue here of US practices universally *denying* opportunities for work. As noted in *Watson v Graves*, 1990, the United States Court of Appeals, fifth circuit, states, "...a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights..." which therefore means that the overwhelming majority of persons incarcerated today are rarely even subject to involuntary servitude. The vast majority of departments of corrections explicitly define prison industry participation as voluntary, not involuntary. Therefore, for all practical purposes, the 13th amendment exception is of little substantive value in assessing inmate labor and labor force exclusion as exercised today.

Federal Law: Similarly, although the Federal title 18 USC prohibition has been wielded to completely bar all US inmates from employment in the civilian economy, in fact Title 18 remains porous in allowing US incarcerated persons to be employed in the civilian economy *should the public and policy makers choose:*

- Services jobs not prohibited: The Federal title 18 prohibition applies only to *goods* production and not to services, and today service employment accounts for about 80% of US jobs. And in correctional circles, "services" is expansively interpreted to include virtually all rebuilt and refurbished goods.
- Work Release Allowed: Inmates on work release today are employed in civilian jobs outside the walls, in both goods and services production.
- PIE Allowed: Although not defined as "employment," incarcerated persons engaged in the Federally authorized "Prison Industry Enhancement" (PIE) program, a specific exception to the Title 18 prohibition, may work under defined conditions and be paid prevailing wages in interstate goods production.
- Court Rulings Allow Inmates civilian jobholding: Although somewhat confusing, court cases in which inmates lent out to work for private firms but paid prison wages have sued and successfully won FLSA coverage. Courts have ruled that when work performed by an incarcerated person for a private firm fits the "four FLSA factors of economic reality," namely, (1) the incarcerated person is hired (chosen) or dismissed by a civilian firm, (2) conditions of performance are set by that civilian firm, (3) pay is provided

by the firm, and (4) a series of records is maintained by that firm, then the reality is that the incarcerated person is, in fact, an employee covered by the Fair Labor Standards Act. See again, in particular, *Watson v Graves* (1990), which in turn cites other decisions such as “...we emphatically hold that the fact that [Carter] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of FLSA...the category of prison inmate is not one of the groups Congress expressly excluded from coverage by FLSA.” And, “...we must apply the four factors of the economic realities test to the facts...in light of the policies behind FLSA.”

- Finally, then, from these court cases comes the key distinction between “prison labor” and “FLSA employment.” The distinction between prison labor and employment is not – as we might initially assume – that the worker is a prisoner (He or she is a prisoner in both cases), but instead a distinction between the rules of governance of that labor, in “employment” including labor services performed by an inmate meeting FLSA conditions, and prison labor including labor services provided under conditions failing the economic realities tests, such as “hiring” and “firing.” Terms, and assignments, pay, and records are maintained by departments of corrections. *Rather than seeing “prison labor” as a characteristic of prisoners, instead both “prison labor” and “employment” involve separate sets of malleable policy rules and customs under which a prisoner’s labor is performed.*

In sum, then, my conclusion is that there are virtually no Federal law limits on inmate participation in the civilian labor force in the production and interstate commerce of virtually all goods and services, so long as any goods production meets the FLSA four economic factors test – and not incidentally, are essentially therefore “fair competition.”

I do not address individual state or local laws and regulations.

The “Real” Foundations of Inmate Exclusion:

Culture – primarily a culture of discrimination, and next monopsony – are the true factors underlying prison labor as known today, resulting in nearly 100% exclusion of incarcerated persons from the US civilian labor force.

As the United States begins its second decade of the 21st century, we exclude almost 100% of incarcerated persons from participating in the legal civilian labor force because we first inherit and accept discrimination to exclude prisoners and then we leave the vacuum in work opportunity to be filled by prison industry monopsony as the exclusive user of incarcerated labor.

Discrimination:

The first fact that we must confront is that we discriminate against incarcerated workers because that is what we have always done to disfavored subpopulations, part of the “economic racism” inflicted on the poor, the vulnerable, and the disliked. We clothe ourselves in patent fictions and feel justified them. Nothing more. In my opinion regarding current US prison labor practices, we choose to believe good that does not exist and collectively ignore harm that is real.

Discrimination: Economists define “discrimination” as the refusal to hire or use a productive resource despite its being economically productive and, as Nobel economist Gary Becker clarifies, we willingly forfeit a more materially productive economy in order to enjoy the nonpecuniary benefits of discriminating. Reaching a few decades back into the 20th century, one might recall declining to hire a minority professional (say, Jackie Robinson) because of the distaste of consumers (fans) or coworkers in having that person alongside, despite prodigious talent. Said otherwise, discrimination occurs when the dollar value of the economic production of the resource is less important than the psychic cost of having the resource involved. We don’t like some people and find the \$ value of their skills insufficient to overcome the dislike.

And overcoming discrimination is, we find, extraordinarily difficult to achieve. First of all, we inherit discrimination mostly unnoticed and unquestioned. Second, should we notice, we encounter a seeming solid array of bogus but dearly held objections, the universally and classically familiar being “they aren’t any

good and aren't qualified," "they will take our jobs or drive down our wage rates," "they don't deserve the jobs," or other barrier – sometimes including supposed divine ordination. But the time and effort to articulate, research, and debunk such discriminations is almost always extensive, costly, and socially unwelcome. Third, discrimination is in itself a somewhat self-fulfilling prophecy, reinforced by institutions, unfavorable economics, and social customs; education is denied, banks do not loan, and the discriminated group is likely not well known, not socially connected, and "different," not like "us." And finally, separating oneself from discriminating beliefs and behavior has proven in itself difficult and alienating, with the few enlightened individuals being perceived as ignorant, out-of-step, dangerous, recriminating, and unwelcome. Changing the balance ordinarily proves long and perilous, and changing perceptions from revulsion to notice, then to wary testing, to welcome is usually long and costly in coming.

In my view, discrimination is the primary key to contemporary policies excluding the incarcerated work force from the civilian labor force. We've inherited the practice and built beliefs, viewpoints and interpretations (or lack of data), institutions, and policies to reinforce, justify, and extend what we've always done. And in the case of the incarcerated work force, we specifically heap on the powerless incarcerated worker what are really our failings and those of public policymakers, prisons, and prison labor in clearly unfair competition of prison labor with civilian business and labor.

Discrimination Approaching Genocide:

The term "genocide" strictly only applies to four specifically defined groups -national, ethnical, racial or religious - among whom US inmates are not. Nevertheless, the *conditions* to which US inmates, their families, and communities are subjected very closely match genocide.

Genocide described: The United Nations Convention on the Prevention and Punishment of the Crime Genocide, Article II, states, "...genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group

There are two required strict components of genocide, one mental (intent) and one physical:

To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy defined group; cultural destruction does not suffice, nor does an intention to simply disperse a group.

Importantly, the victims of genocide are deliberately targeted - not randomly – because of their real or perceived membership of one of the four groups protected under the Convention. This means that the target of destruction must be the group, inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Relationship of genocide to US inmates, their children, families, and communities, with respect to inmate labor force participation:

Taking as a matter of statistical fact that almost no US adult inmates are members of the US civilian labor force or are employed in jobs covered by the FLSA as a result of deliberately enforced over decades, US laws, policies, culture, and customs all act directly to yield conditions consistent with genocide, “...inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” The deliberate feature stands all the more clearly when one reflects upon the stated justification for preventing inmates from holding jobs because they will take employment from deserving civilians and that incarcerated persons (and by extension their dependents and communities) do not deserve jobs.

While I do not agree with those who see narrow “racism” against persons of color as the driving force of this much-lowered status of inmates and their families etc., I do see “economic racism” rampant in this arena, in that the poor and

marginalized of any race (about 50% of US inmates are classified as “white”) are considered unworthy of even the minimal attention of labor force participation rights.

Further, it is well worth noticing that conditions “b” physical and mental harm, and “d,” forcibly removing children and giving them to another group are both especially relevant to the children of female US inmates with children.

Monopsony:

Once discrimination has segregated the incarcerated labor force from the economy, the vacuum in work opportunity for prison laborers is filled as it is today by the economic sister of monopoly (single seller), that is, monopsony (single buyer), here the traditional prison and prison industry as sole buyer.

Economists and history have long shown that when there is only one purchaser, the terms of trade are set by the buyer, and the terms of trade themselves will be the more or less favorable to one party or the other depending upon the relative market power and the range of difference of that power, between seller and buyer. The misfortunes for inmate labor sellers include having no other buyer, the prison and prison industry being fully able to repel competing buyers, making the conditions of availability to competitors unpalatable, indifference and actual dislike by the surrounding community (who believes in varying degrees in slavery as fit punishment), and the overwhelming control over the labor force in its basic life behaviors, including board, room, safety, mobility, contact, care and conditions – all enforced 24/7 with walls and weapons. Applying to the all-controlling monopsonist buyer Alfred Marshall’s dictum about monopolists, “The monopolist’s greatest reward is the leisure life,” further means that prison industry buyers of inmate labor will, inevitably, operate the prison industry system inefficiently and for their own comfort. Anyone expecting prison industries to operate efficiently or to maximize inmate opportunity, income, and welfare under conditions of monopsony, ignores the clear evidence of human behavior. It will be very difficult under current circumstances to expect

contemporary prison industries to operate efficiently or for inmates' benefit, especially absent significant incentives to managers of prison industries.

When monopsony reigns in the presence of a powerful buyer and powerless seller, the wage outcome is a forgone conclusion.

Social Deliverables -Security First, Last, and Always:

So long as the job of the most junior correctional employee, also that of the chain of command, from the prison industries director, the warden, the director of corrections, then the Secretary of Public Safety, and finally the elected governor – all are held by voters to the maintenance of security above all else in corrections - then security will be delivered at the expense of all else, including rehabilitation, human rights, and employment of incarcerated workers. Therefore, in corrections today, any possible threat to security is dismissed out of hand.

Debunking Inmates as an Unqualified Labor Force:

Almost 50% of those incarcerated today were legally and productively employed in the normal economy at time of arrest, and the incarcerated subpopulation, while markedly less educated and skilled than the overall civilian labor force, nevertheless includes hundreds of thousands of well-educated and highly productive persons whose crimes were (usually) independent of their labor force qualifications. The purported harm inmates pose – driving down wage rates, for example - instead is an artifact of public policy decisions under which they are excluded from normal labor protections and then abandoned to just one employer, US correctional industries.

Conclusion:

Under any rational economic scrutiny, the prevailing arguments for excluding incarcerated workers from the US civilian labor force and protections repeat in even more severe fashion the classic economically harmful tropes of discrimination long ago debunked and set aside – to the benefit of the entire economy as well as the discriminated groups – for African-Americans and other racial minorities, women, the disabled, the elderly, and other US workers, but still continuing in

even more severe fashion for the incarcerated subpopulation and their families. Whereas under segregation, minorities at least enjoyed place on lower economic ladders, had reserved sway in some professions (eg, railway porters), and could climb professional ladders within their own communities (doctors, lawyers, undertakers, educators, clergy), such that at least honorably if humble livelihoods could be and were achieved, while incarcerated workers are entirely walled off from all access to any means of family support.

4. The “Two Minute Primer on Competitive Economics, Theory and History”

The first objection to welcoming the incarcerated subpopulation to the US civilian labor force is that their participation will drive down the economy and take civilian jobs.

But...

Bedrock western economic theory and observed/documentated 20th century US history convincingly show exactly the opposite of arguments commonly flaunted in barring US inmates from employment: *barring* inmates from the civilian labor force drives down the economy, while welcoming them spurs economic growth, including business and civilian hiring expansion.

- The central tenet of western competitive economics is that every resource be used (employed). Not using (unemployment) by definition reduces a nation's output of goods and services and reduces national well-being.
- In addition, not only should every productive resource be used, each should be used to its highest (most valued) production.
- Further, via “multiplier effects,” unemployment triggers successive unemployment, by reduced consumer purchasing (demand reduction) cascading into wider layoffs. The observed fact is that employment spurs additional jobs and that layoffs trigger additional unemployment.