Prison Industries: A Case for Partial Privatization

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The 1970’s and 1980’s have witnessed a renewed interest in prison industries, or more specifically, private sector employment of prisoners within the prison itself. This revived interest is reflected in the repeal of some of the state legislation which restricted the use of prisoner labor and the sale of prisoner-made goods,¹ in Congressional legislation which encouraged the development of prison industries,² and in Chief Justice Burger’s plea for “factories with fences.”³

Experts attribute the increased interest in prison industries to the escalating costs of prisons,⁴ the high degree of

¹. See infra notes 87-89 and accompanying text.
³. W. Burger, More Warehouses, or Factories with Fences?, Remarks at the University of Nebraska, sponsored by the Lincoln Bar Association (Dec. 16, 1981), reprinted in 8 NEW ENGLAND JOURNAL OF PRISON LAW 111 (1982) [hereinafter cited as Factories with Fences]. Although the “Factories with Fences” speech is perhaps the Chief Justice’s best-known presentation, it is certainly not his only speech which addressed prison reform—including prisoner labor and prison industries. See also W. Burger, Remarks on Nightline (ABC News, Show #812, June 19, 1984) [hereinafter cited as Remarks on Nightline]; W. Burger, Remarks at the National Conference on “Factories with Fences:” Prison Industries Approach to Correctional Dilemmas, in Washington, D.C. (June 18, 1984); W. Burger, Remarks at the Safer Foundation Banquet, in Chicago (Jan. 26, 1984); W. Burger, We Refuse to be Responsible for the People We Imprison, Address at the Annual Dinner of the National Conference of Christians and Jews, in Philadelphia (Nov. 1972); W. Burger, Address to the National Conference on Corrections, in Williamsburg (Dec. 1971); W. Burger, No Man is an Island, Address at the Midwinter Meeting of the American Bar Association, in Atlanta (Feb. 1970); W. Burger, A Proposal to the 92nd Annual Meeting of the American Bar Association, in Dallas (Aug. 1969).
⁴. The 1982 operating cost per state prisoner ranged from $5,121
prisoner idleness, and widespread public dissatisfaction with the American prison system. In spite of the growing interest in prison industries, however, state and federal legislation still restricts the use of convict labor and the sale and transport of prisoner-made goods.

This article argues for private sector employment of state prisoners in prison industries. Part I briefly surveys the historical background of the use of convict labor in prison industries and of private sector involvement in those industries. Part II examines three important justifications for prisoner labor and private sector participation: the promotion of human dignity, economic necessity, and rehabilitation. Part III then describes the trend toward, and the barriers to, private sector participation in prison industries. The barriers include legislative restrictions and prohibitions, as well as those barriers inherent in a prison setting, such as high inmate turnover. Finally, Part IV recommends legislative changes to encourage the full development of privately-run, profit-oriented prison industries. Specifically, it argues that restrictive legislation should be repealed and replaced by laws which permit and encourage private-sector employment of prisoners while protecting the prisoners from abuse and exploitation.

I. BACKGROUND

Prison industries were not an American invention; the first prison industries evolved in England and Holland in response to the developments of the sixteenth century: mercantilism, an increasing demand for consumer goods, labor shortages, high levels of vagrancy, capitalists’ search for profit-seeking enterprises, and the popularity of the Calvinist

to $22,748; construction cost per state prison bed ranged from $34,000 to $110,000. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 93 (1983) [hereinafter cited as BJS REPORT].

5. In 1979, only ten percent of all state and federal prisoners were employed in prison industries. G. FUNKE, B. WAYSON & N. MILLER, ASSETS AND LIABILITIES OF CORRECTIONAL INDUSTRIES 13, 20-21 (1982) [hereinafter cited as ASSETS AND LIABILITIES].

6. This dissatisfaction resulted from the perceived failure of American prisons: treatment programs failed to lower recidivism rates while prison costs continued to rise. See id. at 4-5; Factories with Fences, supra note 3; Schaller, Work and Imprisonment: An Overview of the Changing Role of Prison Labor in American Prisons, 10 PRISON J. 3, 4 (1982).

7. See infra notes 19-24, 87-89 and accompanying text.
work ethic.⁸ “Houses of correction” or “manufactories,” run by government officials, were built across Europe. Inmates were employed by the government or by private manufacturers.⁹

Originally designed to combat vagrancy and promote the goals of mercantilism, the houses of correction gradually evolved into prisons as incarceration became the mode of punishment. By the eighteenth century, the houses of correction were used primarily to inflict corporal punishment, and no longer emphasized “industries.” For example, “[p]risoners carried huge stones from one place to another and then back again, they worked pumps from which the water flowed back to its source, or trod mills which did no useful work.”¹⁰ These institutions had failed to realize their expected profit, and the demand for productive prisoner labor rapidly decreased.¹¹

During the Enlightenment, corporal punishment and execution, rather than imprisonment, were the penal norm.¹² Suggested reforms of the European penal system included provisions for prisoner labor.¹³ As a result, prison industries

8. For a discussion of the historical development of prisoner labor and prison industries during the sixteenth century, see T. Eriksson, The Reformers 8-17 (1976); M. Grünhut, Penal Reform 11-22 (1948); G. Rusche & O. Kirchheimer, Punishment and Social Structure 24-52 (1939); J. Sellin, Slavery and the Penal System 70-82 (1976).

9. “The usual inmates were able-bodied beggars, vagabonds, idlers, prostitutes, and thieves.” G. Rusche & O. Kirchheimer, supra note 8, at 42. In some instances, the entire house of correction was contracted out to a private employer. Id. at 43.

10. Id. at 112.

11. For a discussion of the history of the houses of correction after the sixteenth century, see T. Eriksson, supra note 8, at 18-49; M. Grünhut, supra note 8, at 23-42; M. Ignatieff, A Just Measure of Pain 13-113 (1978); G. Rusche & O. Kirchheimer, supra note 8, at 23-83.

12. Eighteenth century punishment practices are vividly described in M. Ignatieff, supra note 11, at 14-43.

13. In 1704, Pope Clement XI founded the Hospice of St. Michael in Rome, which included work in its program of correction for juvenile delinquents; Beccaria advocated prisoner labor in On Crimes and Punishments, published in 1764; Vilain XIII opened a house of correction in Ghent in 1771 which implemented prisoner labor; Howard’s The State of the Prisons, published in 1777, recommended prisoner labor as part of a “total institution;” the Penitentiary Act of 1779, drafted by Blackstone and Eden, included a provision for “fixed hours” of work and for construction of houses of correction (penitentiaries); the Quakers reformed the Walnut Street Jail in Philadelphia through a program which included work in 1786; Bentham’s Panopticon, published in 1791, even included architectural plans for an industrial prison. For an overall view of these reforms, see id.
were somewhat revitalized, but by the nineteenth century, a variety of factors culminated in the demise of the houses of correction. Among the contributing factors were an over-supply of labor, opposition from both industrialists and the working class, lack of funding, inhumane working conditions, prisoner abuse and exploitation, and changes in penal theory.14

In America, prison industries were part of the development of the penitentiary system in the early nineteenth century.15 During the nineteenth and twentieth centuries, prisoners worked under various employment systems which involved the public or private sector or both.16 The public

at 44-113. See also T. Eriksson, supra note 8, at 18-49. St. Michael's Hospice is also described in M. Grünhut, supra note 8, at 21; Sellin, The House of Correction for Boys in the Hospice of Saint Michael in Rome, 20 J. CRIM. L. & CRIMINOLOGY 553 (1929-30).

14. Rusche & Kirchheimer cite economic factors to explain the demise:
The factory replaced the house of correction, for the latter required large outlays for administration and discipline. Free labor could produce much more and it avoided the drain on capital involved in the house of correction. In other words, the house of correction fell into decay because other and better sources of profit had been found, and because with the disappearance of the house of correction as a means of profitable exploitation the possible reformatory influence of steady work also disappeared.

G. Rusche & O. Kirchheimer, supra note 8, at 95. Hawkins, on the other hand, argues that "the elegant simplicity of the economic determinists' road map is a poor guide to the itinerary actually followed. It is clear that it was largely a matter of penal policy [which put an end to the development of profit-seeking prison industries]." Hawkins, Prison Labor and Prison Industries, 5 CRIME & JUST. 85, 93 (1983). Hawkins emphasizes that concern for the lack of uniformity in the treatment of prisoners was one of the "matters of penal policy." Id. at 93-95.

15. See T. Eriksson, supra note 8, at 50-72; D. Rothman, The Discovery of the Asylum 79-108 (1971); J. Sellin, supra note 8, at 138-44.

16. The private sector was not involved in three types of employment systems—the public account system, the state use system, and the public works and ways system. In the public account system, the state acted as a manufacturer and sold the goods on the open market; the state use system simply limited the "market" to government agencies. Inmates employed in public works and ways built and repaired roads and public buildings. The chain gangs and prison farms are perhaps the more notorious examples of the public works and ways systems. These state run systems are more fully described in Assets and Liabilities, supra note 5, at 9, 11-13; Fundamental Questions Concerning Prison Labor 9-11 (1933); L. Robinson, Should Prisoners Work? 95-104 (1931); J. Sellin, supra note 8, at 133-44, 165-76.

In the lease system, the private sector had full control over the prisoner and the prison industry. The state "leased" the prisoner to the employer in
sector systems gave the state full control over the prisoners' lives, including their earnings, but state-run industries had two major drawbacks: the state had to bear the financial risks, and prisoners did not learn marketable skills.

Private sector industries, on the other hand, shifted the financial risks away from the state and emphasized free enterprise and "free world" skills, but the state lost a certain amount of its control over the prisoners. Unfortunately, private sector involvement met considerable opposition. Competitive manufacturers and unincarcerated labor opposed private sector prison industries and pressed for Congressional restrictions which severely curtailed the market for prisoner produced goods, thus eliminating many prison industries and decreasing employment opportunities for inmates. Prisoner exploitation and inhumane working and living conditions characterized both private and public sector prison industries.

In 1885, nearly ninety percent of all American prisoners were employed in prison industries, but by 1979, the employment rate had dropped to only ten percent. Many factors contributed to this decline: exploitation of prisoner labor in the form of low wages and inhumane working conditions, labor opposition during the Depression, and opposition from return for payment for the inmate's labor. The profit-seeking emphasis of the private employers resulted in severe prisoner abuse and exploitation:

It was a pernicious system which did nothing to reform offenders and subjected them, temporarily or for life, to a form of chattel slavery even worse than that from which blacks had been freed. It began, grew, and flourished only because almost all who suffered under it were ex-slaves whom the master class still thought of as belonging to an inferior race. This also accounts for the indifference toward the often shocking neglect and brutality of the lease camps, the cause of such abnormally high death and morbidity rates that official investigators in several states concluded that a convict who survived five to seven years in the camps, or two years in some of the lumber camps, could consider himself fortunate.

J. Sellin, supra note 8, at 162. See also Assets and Liabilities, supra note 5, at 10-11; Fundamental Questions Concerning Prison Labor, supra at 8-9; L. Robinson, supra at 87-90.

The contract and the piece-price systems combined publicly run prisons with privately run industries. Under the contract system, private employers contracted for inmates to work at or near the prison. The piece-price system is a type of contract system, except the employer pays on a piece or article basis. See generally Assets and Liabilities, supra note 5, at 9-11; Fundamental Questions Concerning Prison Labor, supra at 8-10; L. Robinson, supra, at 90-95; J. Sellin, supra note 8, at 133-44, 163-76.

manufacturers who claimed that cheap prisoner labor contributed to unfair competition.\textsuperscript{18}

As a result of continuing opposition from labor and manufacturers, Congress passed legislation which severely restricted prison industries. The major provisions prohibit the interstate transportation of prisoner-made goods for private use\textsuperscript{19} and forbid the use of convict labor or convict-produced materials in government contracts over $10,000.\textsuperscript{20} Prisoner-made goods transported for government use must be in packages which are clearly marked to indicate that the goods are prisoner-produced.\textsuperscript{21} States may forbid or restrict the transportation, importation or sale of prisoner-made goods, including those made in the state's own prisons.\textsuperscript{22} Other provisions prohibit the postal service from purchasing equipment or supplies manufactured by convict labor\textsuperscript{23} and forbid the use of convict labor or convict-made materials in highway construction.\textsuperscript{24}

This restrictive federal legislation was somewhat ameliorated by the Free Venture Program and the Prison Industries Enhancement Act of 1979.\textsuperscript{25} The Free Venture Program was designed to develop a model for prison industries by providing funding to seven states to develop their own prison industries.\textsuperscript{26} These states have used the funds to develop industries characterized by six "Free Venture" principles which emulate private-sector employment practices:

1. A full work day for inmate employees.
2. Inmate wages based upon productivity, with a base wage significantly higher than payments available to non-industries inmates.

\textsuperscript{18} See generally id. at 7-27; D. ROTHMAN, CONSCIENCE AND CONVIENCE 137-43 (1980). The decrease in the employment of prisoners is also associated with increased participation in the state use and public works and ways systems.


\textsuperscript{22} 49 U.S.C. § 11507 (1982).


\textsuperscript{24} 23 U.S.C. § 114 (1982).


\textsuperscript{26} These states were Colorado, Connecticut, Illinois, Iowa, Minnesota, South Carolina, and Washington. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, IMPACT OF FREE VENTURE PRISON INDUSTRIES UPON CORRECTIONAL INSTITUTIONS 1-4 (1981)[hereinafter cited as LEAA EVALUATION]. Twenty-one shops were evaluated in this report.
3. Private sector productivity standards.
4. Responsibility for hiring or firing inmate workers vested with industries staff.
5. Self-sufficient or profitable shop operations.
6. A post-release job placement mechanism.27

The Prison Industries Enhancement Act exempted up to seven certified prison industry pilot projects from the federal restrictions on interstate transportation of prisoner-made goods and the use of prisoner labor or goods in federal contracts.28 In 1984, Congress expanded the number of projects to twenty.29 Six projects—five for adult offenders and one for juvenile offenders—are currently certified under the Act.30 These projects include:
- a metal fabrication plant, near the Kansas State Penitentiary, owned and operated by Zephyr Industries, Inc.;
- a mechanical and electrical component assembly plant at the Stillwater State Prison in Minnesota, owned and operated by the Minnesota Department of Corrections. Control Data Corporation contracts for this work on a piece basis;
- a metal fabrication project, owned and operated by the Minnesota Department of Corrections. Products are sold in the private sector; and
- a printing and graphics shop at the Utah State Prison, owned and operated by the Utah Department of Corrections. Products are sold in the private sector.31

Despite the exemption from some restrictions, further development of these types of industries is hampered by the restrictive federal laws. Further, many states still have laws which prohibit or restrict the use of prisoner labor and the marketing of prisoner-produced goods.32 These restrictive laws should be repealed and replaced by laws that permit and

27. Id. at 2. See also Assets and Liabilities, supra note 5, at 39-64.
30. The projects are in California (juvenile offender facility), Kansas, Minnesota (two projects), Nevada and Utah. Bureau of Justice Assistance, U.S. Dept of Justice, Private Sector/Prison Industry Enhancement Certification Program (1985) [hereinafter cited as PIE Program].
31. Id.
32. See infra notes 87-89 and accompanying text.
Encourage prison industries.

II. THE JUSTIFICATIONS FOR PRISON INDUSTRIES

The most viable arguments for prison industries focus on the ethical foundations of the work ethic, the economic need for prisoner labor, and the potential rehabilitative value of prisoner labor. These multiple justifications for prisoner labor help to explain the popularity and perceived feasibility of prison industries as a correctional reform—there seems to be an alleged justification to please everyone.33

A. Ethical Underpinnings: The Theology of Work

The theology of work historically has comprised the ethical foundation for convict labor and prison industries. This theology of work, emphasized by the doctrines of Calvinism and Catholic social teaching, continues to provide support for prison industry development in the 1970’s and 1980’s.

The sixteenth century houses of correction were highly influenced by the Reformation, especially by Calvinism’s emphasis upon work.34 Calvin taught that God conferred the “most eminent dignity upon work,” and therefore, man was created to work.35 Because of its inherent dignity, work sanctifies man; through work, man shows his devotion to and love for God. Idleness, according to Calvin, is a grave sin because idleness does not reflect this love and devotion. Calvinism emphasizes that man has both a right and a duty to work: a right to be sanctified and a duty to pay homage to God by working. Through work, man recognizes and respects the purpose of human existence.

The duty to work provided the ethical foundation for the efforts of houses of correction to combat vagrancy. The reform programs instituted in the houses of correction com-

33. “[I]t is one of the few reforms capable of securing broad based ideological support . . . .” Cullen & Travis, Work as an Avenue of Prison Reform, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 47 (1984). Robinson expressed the same view in 1931, even though public opposition to prison industries was strong at that time: “Is there anyone who believes that prisoners should not work? Few will confess to any such opinion.” L. ROBINSON, supra note 16, at 3.

34. See M. GRÜNHUT, supra note 8, at 11-22. See also T. ERIKSSON, supra note 8, at 16; G. RUSCHE & O. KIRCHHEIMER, supra note 8, at 33-52.

bined the discipline of work with religious instruction (or bible reading), and corporal punishment. Thus, in addition to seeking profit, the houses of correction also sought to rehabilitate the inmates.

Catholic monasticism also influenced the concept of prisoner labor and prison industries. In the Middle Ages, clergy members who had violated the law were confined in monasteries. Houses of correction run by the Catholic Church offered the same three-pronged measure of discipline and reform as did their Protestant-oriented counterparts: hard work, religious instruction and corporal punishment.

While the emphasis of Catholic social teaching regarding work has changed since medieval times, contemporary Catholic social teachings continue to emphasize the right and duty to work and point out that work is a part of human dignity and the salvific process. Specifically, work has a "threefold moral significance." First, work "embodies the distinctive human expression and self-realization." It is an essential part of human dignity and self-esteem.

[Work] corresponds to man's dignity, [it] expresses his dignity and increases it. If one wishes to define more clearly the ethical meaning of work, it is this truth that one must particularly keep in mind. Work is a good thing for man—a good thing for his humanity—because through work man

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36. "[T]he use of religion as a means of inculcating discipline and hard labor was an essential feature of these institutions everywhere." G. RUSCHE & O. KIRCHHEIMER, supra note 8, at 45. See also T. ERIKSSON, supra note 8, at 8-17; J. SELLIN, supra note 8, at 70-82.

37. See T. ERIKSSON, supra note 8, at 4-6, 26-27.

38. At the Hospice of St. Michael in Rome, "[t]he juvenile offenders worked together in the central hall, occupied in spinning and knitting, chained by one foot, under a rule of silence and sometimes listening to pious reading . . . . Whipping was a frequent penalty for 'past mistakes' as well as for non-performance of the daily task." M. GRÜNHUT, supra note 8, at 21.


40. Second Draft, supra note 39, para. 98.

41. Id.
not only transforms nature, adapting it to his own needs, but he also achieves fulfillment as a human being and indeed in a sense becomes "more a human being.""  

Second, work has moral significance because it is "the ordinary way for human beings to fulfill their material needs;" it is financially necessary, especially to support a family. Finally, "work enables people to contribute to the well-being of the larger community." As a matter of social justice, each person has a duty, through work, to contribute to the common good.

These three moral aspects of work are clearly interrelated: the dignity and self-fulfillment of human work arise from the ability of the individual to contribute to the support and development of himself, his family and the community. This theology depicts work as both a right and a duty. Because work is such an integral part of human dignity, each person has a right to work and a right to contribute to society. At the same time, each person has a duty to work, as a means of support for both the worker's family and as a responsibility to societal well-being.

These three moral aspects of work apply equally, if not more so, to prisoners. Depriving a prisoner of the right to work and thus of the dignity of work adds a demeaning and demoralizing component to the already-imposed punishment of incarceration. Moreover, incarceration without the right to work denies prisoners the opportunity to perform their societal duty to work. As a result, prisoners cannot develop and support themselves, their families, or the community.

The theology of work underlies the recent prison reforms proposed by the United States Catholic Conference (USCC). These reforms seek to promote rehabilitation, improve overall prison conditions, and correct "positive injustices" in prisons, including "unsatisfying work experience." According to the USCC, prison work, in order to promote human dignity, must also be dignified. "The work to which a resident is assigned should be—and appear to be—worthwhile and compatible with the dignity of a human
being. Nothing is so devastating to human aspirations as a work assignment which both parties know is really useless." 47

The courts have looked to similar factors as those found in a theology of work when interpreting the rights of prisoners. 48 For example, in Laaman v. Helgemoe, 49 the district court reviewed prisoners' working conditions at the New Hampshire State Prison and found that the lack of useful work contributed to prison conditions which violated the prisoners' constitutional rights. Experts at the trial, testifying about the pervasive idleness at the prison, explained the underlying ethical need for prisoner work: "Every person has a need to contribute something of his being to a seemingly beneficial task, regardless of the nature of the work. The more interesting and constructive the work seems to be, the more personal satisfaction the individual derives." 50 The experts added that the lack of work decreases inmates' self-esteem and self-confidence and "leads to degeneration." 51 The court's order of reform to the prison included the requirement that each prisoner be afforded the opportunity to perform useful work. 52

Chief Justice Burger has also supported prison industries with arguments similar to those of the theology of work. 53 Three moral aspects of work underlie the Chief Justice's proposals: work as a manifestation of human dignity and self-esteem; work as a necessary means of family and self-support; and work as both a right and duty to contribute to the well-being of society. Thus, the theology of work has continued to provide ethical support for prison industries and also coexists with the two other justifications for prison industries: economics and rehabilitation.

47. Id. at 216.
50. Id. at 293.
51. Id. "The experts confirmed the old saying that idleness is the handmaiden of the devil."
52. Id. at 329. The experts had testified that "'makework' is only slightly less destructive than pure idleness and that only 'useful work' or 'meaningful work' can help an inmate acquire the skills and habits necessary for success upon release." Meaningful work was defined as "work which teaches skills saleable outside the prison gates and which is both a new psychological experience and a new motor activity." Id. at 294.
53. See generally Factories with Fences, supra note 3; Remarks on Nightline, supra note 3, at 10.
B. The Economic Need for Prison Industries

Economic considerations, usually profit motives, were a major impetus for the development of the houses of correction in Europe and in the American penitentiary system. Prison officials sought to reduce the cost of incarceration, and employers (who sometimes were the prison officials) sought profits. Unfortunately, these economic concerns focused greater attention on money than on the prisoners' welfare: "[The inmates'] welfare, present or future, was given little thought, because the cardinal aim of the regents, merchants and manufacturers all, was to make the institution profitable by exploiting the manpower of the inmates, the cheapest available labor."  

Prisoner exploitation and mistreatment resulted from prison labor systems which, for practical purposes, were operated solely for economic reasons, although that may not have been the intent of the systems' designers. The problems associated with economic motivations may be avoided if moral and rehabilitative considerations remain primary. This is not to say, however, that economic justifications and motivations have no role in the development of prison industries.

The theology of work, as propounded by the U.S. bishops, does not ignore the economic necessity of work. The bishops explain that unemployment not only wastes "talent and creativity" and harms the dignity of the individual, but also has economic cost. Thus, if prisoners do not work, they cannot financially support themselves or their families. As a

54. J. Sellin, supra note 8, at 79. See also id. at 138-144. The convict lease system had similar economic goals with similar consequences to the prisoners:

What a lessee was interested in was maximum financial profit from his management of the institution. This meant keeping maintenance costs at a minimum by feeding and clothing the convicts as cheaply as possible, hiring guards willing to work for substandard wages or using prisoners in that capacity. It meant working the prisoners from dawn to dusk and extracting their best efforts by the threat or use of the ever-present whip of the overseer.

Id. at 143.

55. The idealistic aim of the earliest houses of correction, to make them reformatory that would restore their inmates to society trained in useful occupations and Christian morals, was hardly realized . . . As they spread over the continent [the houses of correction] became state factories serving the mercantilistic policies of rulers more concerned with the balance of trade than with the reform of criminals.

Id. at 81.
result, families may have to turn to food stamps or other assistance. Further, unemployed prisoners cannot contribute, through taxes, to the financial well-being of the community. Since convict labor has failed to reduce recidivism rates, economic justifications for convict labor provide perhaps the most practical rationale in support of prison industries. The revenues generated from convict labor can provide financial support for the convict’s family, pay victim restitution, and pay taxes. The major economic benefit of convict labor, however, is simply that it may help reduce the escalating cost of incarceration. State prison operation costs have risen to as high as $22,748 per prisoner per year and construction costs are as high as $110,000 per prison bed. These costs loom even larger when one considers the 40.6% increase in the number of state prisoners from 1980 to 1984.

The Prison Industries Enhancement Act, which encourages the development of prison industries, includes provisions that control the use of the funds generated from the industries. The Act specifies that prisoner wages are subject to deductions for room and board, taxes, family support and victim restitution. Twenty states have similar laws. As of March 1985, prisoners had earned a total of $2,975,167 in the certified projects. Of those wages, $240,615 went to federal taxes, $54,504 went to state taxes, $302,621 reimbursed the states for room and board, and $1,021,323 went to the prisoners’ families.

56. "Jobless people pay little or no taxes, thus lowering the revenues for cities, states and the federal government. At the same time, rising unemployment requires greater expenditures for unemployment compensation, food stamps, welfare and other assistance." Second Draft, supra note 39, para. 141. The USCC reforms similarly emphasized the economic costs of unemployed prisoners. United States Catholic Conference, supra note 45, at 216.

57. See infra notes 75-79 and accompanying text.

58. BJS REPORT, supra note 4, at 93.


62. As of March 1985, earnings data was available for the projects in Kansas (certified in July 1981), Minnesota - Control Data (certified in
Because economics partially justifies prison industries, efficiency becomes a paramount concern. Government-run prison industries, however, have tended to focus on the therapeutic and rehabilitative aspects of work rather than on the development of efficient, profit-earning industries. The private sector's orientation toward business and profit would more efficiently realize the economic goals of prison industries.

Turning the operation of production facilities over to those who are most familiar with such operations, and who have already created a management structure and support system to insure optimum efficiency in manufacturing processes, therefore, is the most sensible path for government to follow. In short, each party should be freed to do that which it does best: government, to create and implement policy, and business, to productively utilize materials in the manufacture and delivery of goods and services.

The arguments favoring public control over prisoner labor typically point to the inhumane working conditions and "slave labor" which historically characterized private sector involvement in prison industries. These arguments against private sector involvement also emphasize the incompatibility

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PIE Program, supra note 30, at 2-5.

63. As Rothman explains, the eighteenth century penitentiary system had this problem: "Officials were ill-prepared to manage their side of the enterprise. . . . Their ignorance together with prisoners' ill will made almost every prison ledger show a loss. Most institutions, rather than abandon convict labor, increasingly used it as a method of punishment." D. Rothman, supra note 15, at 93. More recent government operations have had similar results. See generally Schaller, supra note 6, at 7; Hawkins, supra note 14, at 104.

64. Schaller, supra note 6, at 7.
of profit-seeking with imprisonment, and claim that prisoner labor should not be a "commodity to be exploited for profit."65

In spite of the deplorable history of private involvement with prisoner labor in the houses of correction and, more recently, in the lease system, the private sector remains a logical participant in prison industries. The potential problems of exploitation and inhumane working conditions are avoidable through compliance with health, safety, and wage regulations; both courts and state correction officials can ensure this compliance. In determining safety and health standards, at least one court has found that prisons and prison industries must comply with the minimum guidelines of the Occupational Safety and Health Administration.66 In the alternative, prisons may have to comply with state health and safety guidelines.67 At the very least, courts must guarantee that prison industries do not violate the eighth amendment's prohibition of cruel and unusual punishment.68

Wage guidelines present a much more controversial issue.69 Courts could require that prison industries comply with the federal minimum wage requirement; however, state law

65. M. Ignatieff, supra note 11, at 112.
68. U.S. Const. amend. VIII. The courts have limited the use of convict labor when necessary to protect the health and well-being of the prisoner. See, e.g., Jackson v. Bishop, 268 F. Supp. 804, 816 (E.D. Ark. 1967), vacated on other grounds 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965). The courts have found that idleness alone does not violate the eighth amendment. Byrd v. Vitek, 689 F.2d 770, 771 (8th Cir. 1982) (per curiam); Garza v. Miller, 688 F.2d 480, 486 (7th Cir. 1982), cert. denied, 459 U.S. 1150 (1983); Hoptowit v. Ray, 682 F.2d 1237, 1254 (9th Cir. 1982); Ramos v. Lamm, 639 F.2d 559, 566-67 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (the court recognized that shelter, sanitation, food, personal safety and medical care are "core areas in any Eighth Amendment claim."); Capps v. Atiyeh, 559 F. Supp. 894, 908 (D. Or. 1982). However, idleness in addition to "other conditions" may violate the Eighth Amendment, as indicated by a series of cases dealing with the inhumane conditions at the Arkansas prisons. See, e.g., Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971) (Holt II).
may stipulate a wage rate or wage guidelines for prisoners.\textsuperscript{70} Wages, like the nature of the work itself, must reflect the dignity of the individual; Catholic social teaching requires a "fair" or a "living" wage to achieve this goal.\textsuperscript{71} Because the cost of living varies by locality, the Prison Industries Enhancement Act may best ensure a fair wage by requiring that it be relative to the locality.\textsuperscript{72}

Health, safety and wage standards can help ensure that prison industries do not exclude the values of a theology of work, as they focus more practically on economic necessity. These protective measures provide the final support for an economic justification for prison industries.

C. The Rehabilitative Potential of Prison Industries

Rehabilitative justifications for prison industries contend that incarcerated workers will develop habits which will ease their transition into society upon release and thus reduce recidivism. According to Chief Justice Burger:

\begin{quote}
[H]uman beings who are producing useful goods for the marketplace—who are being productive—are more likely to develop the self-esteem essential to a normal, integrated personality . . . . [T]his kind of program could provide training in skills and work habits that could make many prisoners better able to cope with life on their return to freedom.\textsuperscript{73}
\end{quote}

Statistics, however, do not show that prison employment reduces recidivism for inmates who work. Studies have shown that the factors having the greatest influence on recidivism exist at the time of incarceration, and include prior criminal record, age at first arrest, and nature of the offense. Therefore, as a general rule, programs or treatment occurring during incarceration do not affect overall recidivism rates.\textsuperscript{74} An

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\textsuperscript{71} Second Draft, supra note 39, para. 102. See also Leo XIII, supra note 39, para. 32.
\textsuperscript{72} 18 U.S.C. § 1761 (1982).
\textsuperscript{73} Factories with Fences, supra note 3, at 117-18.
evaluation of one of the Free Venture programs showed that participating inmates did not "develop better working habits, . . . [did not] gain employment sooner after release and [did not] earn higher wages . . . ."75

Although studies demonstrate that work has no overall impact on recidivism, the studies do not suggest that work is never rehabilitative. As the evaluation of the Free Venture program pointed out, work "seemed to have a positive impact on recidivism for some inmates."76 Further, those studies which examined the rehabilitative potential of convict labor took place during an era of extensive federal and state legislative restrictions on prisoner labor and prisoner-produced goods. Studies of more current prison industries may produce different results. The problem would then become determining a level of reduced recidivism necessary to support the rehabilitation justification for prison industries.77 This problem is magnified perhaps by the refusal of the courts to


76. Id. (emphasis added).

77. Chief Justice Burger tried to resolve this issue and upheld the rehabilitation justification as follows: "If only 10 percent of those who would otherwise return to prison do not, it would be worth the effort." Factories with Fences, supra note 3, at 112. Similarly, a prison industries study funded by the Justice Department concluded:

While the available evidence demonstrates that many rehabilitative programs in the prison setting have not worked, it cannot and should not be viewed as proof that present treatment programs in general and prison work programs in particular cannot rehabilitate. This proposition is logically unverifiable in the positive sense. Moreover, our study team has observed occasional programs which do have outstanding records of rehabilitation. This does not mean that imprisonment can continue to be justified on the promise or pretense of rehabilitation; given the available evidence, this would be the height of folly. It does imply that so long as society continues to incarcerate people it is in the social interest to continue to search for prison programs which do rehabilitate at least some offenders.

NAT'L INST. L. ENFORCEMENT & CRIM. JUST., ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE 3 (1978). However, even Chief Justice Burger has admitted that the hopes for rehabilitation due to convict labor "seem to have been based more on optimism than reality." Burger, Ex-Prisoners Can Become Producers, Not Predators, NATION'S BUS, Oct. 1983, at 38, 39.
find that inmates have a constitutional right to rehabilitation.\textsuperscript{78}

Greater private sector participation in prison industries, however, may improve recidivism rates. From the perspective of rehabilitation and reintegration, a private employer "offers the prisoner a real bridge to the world of work outside the prison."\textsuperscript{79} Private employers present a "real world" atmosphere, and thus ease the prisoner's transition into society upon release, especially if the industry within the prison is a "branch plant."\textsuperscript{80}

Another aspect of the reformative potential of prisoner labor is its effect on the prisoners' behavior while in prison. Specifically, prison industries have been justified on the ground that inmate labor results in greater prison tranquility and fewer riots and uprisings, which are typically associated with high levels of prisoner idleness.\textsuperscript{81} An evaluation of the impact of the Free Venture shops showed that the program had a positive impact upon the tranquility of the institutions and upon the behavior of the inmates, as indicated by their disciplinary records.\textsuperscript{82}

Finally, rehabilitation can logically support prisoner labor when defined in the context of the theology of work. Prisoner labor can help rehabilitate inmates in the sense that

\textsuperscript{78} Courts have repeatedly held that inmates have no enforceable constitutional right to rehabilitative programs, including work. See Hoptowit v. Ray, 682 F.2d 1237, 1255 (9th Cir. 1982); Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977); Capps v. Atiyeh, 559 F. Supp. 894, 908 (D. Or. 1982).

\textsuperscript{79} Schaller, supra note 6, at 7.

\textsuperscript{80} "These branch plants would be designed to produce the same goods that the firms produce in normal operation, and they would teach inmates the same skills that are useful 'outside.'" Singer, Incentives and the Use of Prison Labor, 19 Crime & Delinq. 200, 205 (1973).

\textsuperscript{81} See generally Cullen & Travis, supra note 33, at 56; Potuto, An Operational Plan for Realistic Prison Employment, 1980 Wis. L. Rev. 291.

\textsuperscript{82} LEAA Evaluation, supra note 26, at 53-59, 66-68. The courts also have recognized that idleness contributes to violence at prisons. See Laaman v. Helgemoe, 437 F. Supp. 269, 293 (D. N.H. 1977)(experts testified that "full employment will result in vastly-improved inmate morale, improved institutional operation and the avoidance of disruptive incidents."); Palmigiano v. Garrahy, 443 F. Supp. 956, 968 (D. R.I. 1977), aff'd on other grounds, 616 F.2d 598 (1st Cir. 1980), cert. denied, 449 U.S. 839 (1980) ("[Idleness] breeds boredom and a quest for excitement, and . . . it is a major cause of the violence which has plagued the institution for years."); Pugh v. Locke, 406 F. Supp. 318, 326 (M.D. Ala. 1976), aff'd and remanded on other grounds, 559 F.2d 283 (5th Cir. 1977), modified, 438 U.S. 781 (1978) (per curiam) ("Such unbroken activity increases boredom, tension and frustration, which in turn promote incidents of violence.").
it may help restore dignity, self-esteem and confidence—even though this may not be reflected in recidivism statistics. Inmate rehabilitation, then, can be offered as a justification for prisoner labor, when combined with the theology of work, but because of the failure of inmate labor to reduce recidivism rates, it cannot serve as the sole justification.

III. CURRENT DEVELOPMENTS IN PRISON INDUSTRIES

A. Trends

The 1970's and 1980's have seen a revival of private sector interest and activity in prison industries that should continue to grow. As of January 1985, the private sector was involved in twenty-six prison industry projects at the state prison level.83 This increased activity has been attributed to various factors, including state legislation which encourages, instead of restricts, private sector involvement, as well as decreased opposition from both labor and business.84 Model state acts have included provisions that encourage private sector involvement in prison industries and call for repeal of restrictive legislation.85 Over the last ten years, nearly half of the state legislatures have passed provisions encouraging private sector involvement in prison industries.86 The current state legislative positions are shown in the following statistics:87

* Seventeen states specifically authorize private sector employment in prisons, eight states prohibit it, twenty-five states are silent on the matter;

83. Private Sector, supra note 61, at 2, 8.
84. The reasons for the change in attitude on the part of private enterprise are summed up in Hawkins, supra note 14, at 108. See also Private Sector, supra note 61, at 1-3, which also explains that the change in attitude resulted from a redefinition of the focus of prison industries by public officials—from rehabilitative devices to an economic tool and a means to generate revenue.
85. See, e.g., STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS § 4.1 (Joint Comm. on the Legal Status of Prisoners, Tent. Draft 1977) [hereinafter cited as STANDARDS]; MODEL SENTENCING AND CORRECTIONS Act § 4-804 (Uniform Law Commissioners 1979) [hereinafter cited as MODEL ACT].
86. Private Sector, supra note 61, at 3.
Sixteen states allow the private sector to contract for inmate goods or services, thirteen states prohibit it, twenty-one states are silent;

Twenty states allow open market sales of prisoner-made goods, twenty-five states prohibit it, five states are silent.

These legislative trends were encouraged by Congress in 1979 when it passed the Prison Industries Enhancement Act. While the Act does not require private sector participation, its exemption provisions clearly provide an incentive for the private sector to participate in prison industries.

B. Barriers to Private Sector Participation

In spite of the recent trends, barriers still exist which seriously impair full participation by the private sector. The primary impediment continues to be restrictive state and federal legislation which limits or prohibits prisoner labor and the transportation and sale of prisoner-produced goods.

Another barrier to prison industries historically has been opposition from labor and business. European guilds and manufacturers strongly opposed the original houses of correction and manufactories. Manufacturers protested that prisoner labor contributed to unfair competition because of inordinately low wages. The guilds protested that prisoner labor interfered with their control of the job market and resulted in displacement. In the United States, the major pieces of restrictive legislation were passed in response to similar opposition, although organized labor also protested on grounds of prisoner exploitation.

The Prison Industries Enhancement Act addresses the concerns of labor and business by including the following conditions for certification: (1) Inmates must receive competitive wages relative to the locality, subject to deductions for taxes, room and board, family support, and victim restitution; (2) Inmates cannot be deprived of their right to other state or federal benefits because of their participation; (3) Inmates must participate voluntarily and agree in advance to the financial arrangements of their employment; (4) Local labor


90. See G. Rusche & O. Kirchheimer, supra note 8, at 44-45.

91. See ASSETS & LIABILITIES, supra note 5, at 22-27.
organizations must be "consulted" prior to the development of the project; and (5) The inmate employment must not create labor displacement in the locality.92

Several states have similar legislation designed to offset the concerns of labor and business.93 For example, six states have statutory provisions which stipulate that privately-operated prison industries may be opened only where substantial labor displacement will not occur.94 Twelve states have provisions which require that privately-employed prisoners be paid a minimum or prevailing wage.95 Finally, eight states have laws requiring that inmates who work for private employers must do so voluntarily.96

In addition to restrictive legislation and labor/business opposition, a final impediment to private sector involvement in prison industries concerns the problems of operating a business with prisoner labor: high turnover, lack of skilled and trained employees, and interference with production due to prison procedures, such as shake-downs, hearings, and drug/alcohol therapy. Other prison-related problems may include transportation costs (due to the remote location of many prisons) and the difficulty of attracting unincarcerated supervisors to work at a prison.97 A final issue which has been raised is whether the Fair Labor Standards Act applies to prisoner employees. If so, potential private sector employers may be discouraged by its minimum wage requirement.98

94. Private Sector, supra note 61, at 27. These states are Alaska, Iowa, Indiana, Nevada, Oregon and Vermont.
95. Id. at 24. These states are Arizona, Indiana, Iowa, Kansas, Louisiana, Minnesota, Nebraska, Oklahoma, Oregon, Tennessee, Utah and Washington.
96. Id. at 26-27. These states are Alaska, Kansas, Louisiana, Mississippi, New Mexico, Tennessee, Utah and Washington.
97. The barriers resulting from the prison atmosphere are discussed in Hawkins, supra note 14, at 103-105; Potuto, supra note 81, at 302; Private Sector, supra note 61, at 12-13 (which also identifies prisoner manipulation or "con games" as a disincentive to private sector participation in prison industries).
98. See generally Private Sector, supra note 61, at 13. The Prison Industries Enhancement Act only requires wages competitive with those for similar work in that locality. 18 U.S.C. § 1761(c)(1) (1982). The Joint Committee on the Legal Status of Prisoners recommended that "[p]risoners should be governed by provisions comparable to those of the Fair Labor Standards Act. Prisoners should receive the same wages and be
A variety of offsetting incentives can lessen the impact of these barriers and thus encourage private sector participation in prison industries. These incentives include tax breaks, government subsidies, capital equipment benefits, low cost utilities and rent, and preferred access to government contracts. Two states currently have statutory incentives for private employers at prisons: Indiana, which allows a tax credit; and Washington, which allows a preference on state contract bidding. The Uniform Law Commissioners' Model Sentencing and Corrections Act allows offsetting financial and service-oriented incentives of "additional costs [incurred] because of the nature and size of the confined-person work force or the location of the facility." The problem with this approach lies in identifying all the costs uniquely attributable to the prison work force or the location of the prison.

To minimize the negative aspects of the prison routine, one author has suggested the "elimination of many of the arbitrary, unnecessary, and demeaning rules and regulations governing the day to day existence of those incarcerated in favor of institutional rules that emphasize productive activity and efficient utilization of existing resources." To induce inmate cooperation in prison industries and thus further encourage private sector participation, some states provide sentence reductions for good work performance. This approach has been criticized, however, on the grounds that it is required to work no more than the number of hours that prevails in free society for similar work . . . ." Standards, supra note 85, at § 4.2(a), (b).


102. The director of the prison facility is allowed to:
(1) provide services and other assistance to the private enterprise;
(2) permit the private enterprise to supplement the confined-person work force with other employees; and
(3) after obtaining approval by the [Governor] . . . forgive payments to be made by the private enterprise, equivalent to the unavoidable additional costs incurred by employing confined persons.

Model Act, supra note 85, § 4-805.

103. Schaller, supra note 6, at 8.

the wrong type of inducement to offer prisoners. 105

IV. CONCLUSIONS AND RECOMMENDATIONS

This article has argued that prisoners should work and that private industry should employ those prisoners. Prisoner labor may be justified by the theology of work and supported by economic and rehabilitative considerations. This triad suggests that prisoner labor may be a morally compelling, politically feasible and a socially acceptable alternative to prisoner idleness.

State legislative changes reflect increasing public support for private sector employment of convicts in prison industries. Given this public support, the question then becomes what remains to be done to encourage maximum private sector participation in prison industries, consistent with the overriding need to protect the prisoner from exploitation, and to promote human dignity and rehabilitation.

The first step should be the repeal of state and federal legislation which restricts the use of prisoner labor or the sale and transport of prisoner-made goods. This legislation should be replaced by provisions which provide incentives for private sector employers, such as tax breaks or preferences on government contracts. Incentives should also be included for prisoner participation; the most common would be sentence reduction for good work performance. Legislation must also include health, safety and wage standards which are enforceable by appropriate government agencies. Both the courts and the state corrections agency would oversee the prison industries operations to protect the rights of the prisoners and prevent exploitation of convict labor at the hands of private parties. Finally, legislation should include provisions which would prevent the private sector from establishing prison industries in areas where substantial labor displacement is likely to occur.

105. Singer, supra note 80, at 201.