

2023]

71

SLAVERY WITH EXTRA STEPS: WHY PRISON LABOR AS CRIMINAL PUNISHMENT ENCOURAGES GOVERNMENT RENT-SEEKING

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INTRODUCTION

What do states do when they do not have enough people to work on public projects, but hiring people is too expensive? Across the country, state and federal prisons provide the answer: cheap inmate labor. In 2018, nearly 14,000 firefighters battled fires in California.¹ Approximately 2,000 of these firefighters were prisoners in the California prison system, while approximately 1,500 more inmates worked in support roles for the firefighter inmates.² These inmates do the same work as non-inmate firefighters, but only receive one dollar per hour to fight fires.³ Cal Fire, the state's department of Forestry and Fire Protection, also employs non-inmate firefighters starting at the California minimum wage, which was eleven dollars per hour in 2018.⁴ These firefighters fight the major fires in the state, and also receive overtime pay to augment wages.⁵

This situation is just one example of a state using cheap prison labor to cut hiring costs. To save money, states compel inmate labor and reap huge windfalls in labor cost savings, but also use inmates to increase prison revenues. Under the Thirteenth Amendment, this is all perfectly legal.⁶ The fact that states can profit from cheap inmate labor opens the door to perverse sentencing incentives and systemic abuse.

States have a financial interest in punishment and benefit from the fruits of compulsory prison labor. States are rational actors and, accordingly, act to

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¹ Abigail Hess, *California is Paying Inmates \$1 an Hour to Fight Wildfires*, CNBC (Aug. 14, 2018), <https://www.cnbc.com/2018/08/14/california-is-paying-inmates-1-an-hour-to-fight-wildfires.html>; Cal. Dep't Indus. Relations, *Minimum Wage Frequently Asked Questions* (Dec. 2022), https://www.dir.ca.gov/dlse/faq_minimumwage.htm.

² *Id.*

³ *Id.*

⁴ CAL. LAB. CODE § 1182(1)(B); Jennifer Calfas, *These California Firefighters Are Getting Paid Minimum Wage to Battle Deadly Wildfires*, MONEY <https://money.com/california-firefighters-minimum-wage/> (Oct. 12, 2017).

⁵ *Id.*

⁶ U.S. CONST. amend. XIII.

further their profit interests. Prisons force inmates to engage in free or cheap labor that is lucrative for states, which invites and facilitates inmates' abuse by the states.⁷

The United States has a long history of exploiting labor for profit. In the pre-Civil War era, slaves provided massive profits to southern and northern states and enabled slaveowners to get cheap raw materials at low cost.⁸ At the same time, the first state prisons began cropping up and became more centralized from the late 1790s through the mid-1800s.⁹ In the post-Civil War era, incarceration rates exploded, especially throughout the South.¹⁰ This is because prisons were very profitable for states through the mid-twentieth century, and state economies were dependent on cheap labor.¹¹ States originally compelled inmates' labor through either private companies contracting with prisons for in-prison work or prisons leasing convicts out to private entities.¹² Currently, however, the system of profit-driven prison labor is supported by, ironically, the Thirteenth Amendment, which prohibits slavery or involuntary servitude "except as a punishment for crime."¹³

The American prison-prisoner dynamic is problematic because the government can compel people to work but also make money from forced labor. This makes the government interested in incarceration outside of general punishment goals. The government chooses to make as much money as possible for itself and any private actors contracting with states. Profit incentives for prisons create perverse punishment incentives for states and the U.S. government. Any punishment levied in connection with profit interests is a clear example of government rent-seeking.

The very fact that the government can compel free or cheap labor opens the door to abuse and flies in the face of traditional penological goals. This Comment will address the economic pitfalls of compulsory prison labor and propose a potential solution for the problem. The only permanent solution is amending the Thirteenth Amendment, removing "except as a punishment for crime whereof the party shall have been duly convicted." This would be a difficult pill for states to swallow alone, so such an amendment would need to be accompanied by independent federal legislation, paying states to offset short-term cost increases of stopping prison labor.

Part I of this Comment will address a brief economic history of prison labor, inmate production, and a contemporary analysis of the prison labor structure. Part I will also briefly describe the regulatory background

⁷ Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 282-287 (1999).

⁸ Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 889-891 (2012).

⁹ W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 91, 104 (2014).

¹⁰ Armstrong, *supra* note 8, at 877.

¹¹ Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 359-64 (1998); Ball, *supra* note 9, at 78.

¹² Garvey, *supra* note 11, at 352-55.

¹³ U.S. CONST. amend. XIII.

surrounding state prisons. Part I will then address prevailing government incentives for reform.

Part II will discuss why compelling prisoners to perform productive labor creates perverse punishment incentives, and why this is societally undesirable. Part II will also argue that justifications for punishment fall flat once profit incentives are introduced into punishment. Part II will then explore the implications and counterarguments for both a Constitutional amendment and the necessary payout for the amendment.

I. HISTORY OF UNITED STATES PRISON LABOR

A. *Early America through the Twentieth Century*

The first U.S. state prison was established in 1790 in Pennsylvania.¹⁴ At the time, imprisonment was an uncommon punishment.¹⁵ Most felonies were punished with death, and lesser crimes with forms of beating or maiming.¹⁶ At first, most prison terms were brief, lasting less than three months on average.¹⁷ Following a series of legislation from 1789 to 1835, states developed fully functional prison systems, rather than a number of facilities which just happened to be prisons.¹⁸ These prison systems would increasingly rely on compulsory labor.

Before the 1830s, states wanted to operate prisons because there was support for a centralized system of punishment and because prisons were profitable.¹⁹ Prisons were initially profitable for private actors because the governments would pay a per-prisoner fee to prison managers.²⁰ Prison managers would also supplement their income with fees extracted from prisoners, such as “iron fees,” which inmates had to pay to remove heavy iron shackles.²¹ However, shortly after the 1830s, prisons generally lost money, and states were required to support them.²² Prisons lost money because of the rising costs of imprisonment.²³ To offset costs, states compelled inmates to work and secure revenue for the state.

Early state prisons broke into two camps with regard to how they made money. Private companies contracted with northern prisons to produce goods

¹⁴ Garvey, *supra* note 11, at 348.

¹⁵ Ball, *supra* note 9, at 89 (quoting HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 72 (Patterson Smith 1968) (1927)).

¹⁶ *Id.*

¹⁷ George Fisher, *The Birth of the Prison Retold*, 104 *YALE L.J.* 1235, 1265 (1995).

¹⁸ HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 73-74 (Patterson Smith 1968) (1927).

¹⁹ Ball, *supra* note 9, at 94.

²⁰ *Id.* at 93-94.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 95-96.

inside the prison to be introduced into the market, while southern states would engage in convict leasing.²⁴ Under convict leasing, prisons would lease inmates to offsite private actors for a term of years, allowing prisons to disregard housing costs.²⁵

Northern contract prisons were initially profitable but were met with resistance from local labor unions throughout the nineteenth century.²⁶ Labor unions were strongly opposed to the contract system because prison goods were introduced into the general market and were produced with a wage-less job force.²⁷ By the twentieth century, contract systems only produced goods for the state, rather than introducing cheaper goods into the general market.²⁸

Convict-leasing in the South has a more brutal history. After the Civil War, the government passed the Thirteenth Amendment, which prohibits slavery “except as a punishment for crime whereof the party shall have been duly convicted.”²⁹ In response to the emancipation of African Americans from bondage, southern states enacted Black Codes.³⁰ Black Codes specifically criminalized vagrancy, while disallowing black ownership of property.³¹ These state codes were a reapplication of the Slave Codes, which criminalized the status of being Black by disallowing actions such as being an unaccompanied slave off a plantation, vagrancy, and curfew violations.³² Laws in the post-Civil War South, which criminalized African American homelessness while simultaneously banning Black property ownership, created an explosion in the number of African American inmates.³³

By leasing out inmates, southern prisons could avoid the cost of housing inmates, while private businessmen could force inmates to perform work that free-market labor would not.³⁴ Private lessees would routinely work convicts to death, or, absent that, work convicts the hardest just before the lease ended.³⁵ Lessees had little regard for convicts toward the end of the lease because the lessee would no longer have rights to the convict; therefore, the convict would have no value to the lessee.³⁶

Southern prisons were able to turn a profit off of free labor because of the mass incarceration of African Americans in the post-Civil War era and

²⁴ Garvey, *supra* note 11, at 352-55.

²⁵ *Id.* at 354; *see also* Armstrong, *supra* note 8, at 877.

²⁶ Garvey, *supra* note 11, at 359-64.

²⁷ *Id.*

²⁸ *Id.*

²⁹ U.S. CONST. amend. XIII.

³⁰ William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 64 (2004).

³¹ *Id.*

³² *Id.*

³³ Armstrong, *supra* note 8, at 877.

³⁴ Garvey, *supra* note 11, at 356.

³⁵ *Id.* at 363-65.

³⁶ Jennifer Roback, *Southern Labor Law In The Jim Crow Era: Exploitative Or Competitive?*, 51 U. CHI. L. REV. 1161, 1170 (1984).

the convict leasing system.³⁷ African Americans were no longer slaves to private citizens but “slaves to the state.”³⁸ Until 1940, states could lease convict labor, and lessees could sell those convict goods in the interstate market at lower prices.³⁹ In 1940, Congress passed the Ashurst–Sumners Act, which prohibited the transport of prison goods in interstate commerce.⁴⁰ Convict leasing would largely die out in the 1930s and disappear by the 1940s, since goods could not be shipped out-of-state, leaving convicts working for the states.⁴¹

In the twilight of convict leasing, the federal government would also enter the market for prison labor. The federal government authorized UNICOR (Federal Prison Industries, Incorporated), which operates as a federally owned prison business supporting the federal government.⁴² The federal business employed a small fraction of federal inmates, but generally maintained large profits.⁴³ The presence of profit incentives in the federal and state prison systems opened the door for private actors to offer savings to states and profit off punishment.

Fast forward to the 1970s, and the formerly-profitable prisons experienced an explosion in incarceration rates, beginning with President Nixon declaring drugs “enemy number one” and continuing through President Reagan’s war on drugs.⁴⁴ The incarceration spike drove the states to open themselves to the three largest private prison corporations, who offered to build and run prisons. First, Core Civic (formerly Corrections Corps of America) began partnering with federal and state prison systems in 1983.⁴⁵ Today, however, Core Civic boasts that it is “the fifth-largest corrections system in the nation, behind only the federal government and three states.”⁴⁶ Second, GEO Group, another private company, received its first private prison contract in 1987 and operates as an international prison provider today.⁴⁷ Finally, Management and Training Corporation, a private

³⁷ Garvey, *supra* note 11, at 355-58.

³⁸ *Ruffin v. Commonwealth*, 62 Va. 790, 796-97 (1871).

³⁹ Ashurst–Sumners Act, 18 U.S.C. §§ 1761-62 (1935).

⁴⁰ *Id.*

⁴¹ Garvey, *supra* note 11, at 365-68.

⁴² Michelle Chen, *Exploiting Prison Workers for Cheap Sheets*, THE NATION (Mar. 10, 2023) <https://www.thenation.com/article/society/prison-workers-exploitation/>.

⁴³ *Id.*

⁴⁴ Andre Douglas Pond Cummings, *All Eyez on Me: America's War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 418-25 (2012).

⁴⁵ CoreCivic, *About Us*, CORECIVIC <https://www.corecivic.com/about> (last visited Mar. 23, 2023); CoreCivic, Inc., INVESTIGATE: A PROJECT OF THE AMERICAN FRIENDS SERVICE COMMITTEE (May 25, 2022) <https://investigate.afsc.org/company/corecivic#:~:text=It%20owns%20or%20manages%2074%20prisons%20and%20jails,estate%20used%20by%20government%20agencies%20in%20the%20U.S.%E2%80%9D>.

⁴⁶ *Id.*

⁴⁷ *Geo Group History Timeline*, GEO GRP., https://www.geogroup.com/history_timeline (last visited Mar. 22, 2023).

prison company, started in 1981 and is the third largest private prison corporation behind CCA and Geo Group.⁴⁸

The private prison model promised lower costs to house inmates; however, whether they are actually cheaper is still an open question.⁴⁹ The private companies receive a per diem amount for each inmate they hold, and states supplement this by having minimum guarantees of filled prison beds.⁵⁰ The minimum guarantee means that, even if the set number of beds are not filled, the company still receives money.⁵¹ To supplement funds, private prisons contract with private companies to produce low-skill goods, such as uniforms.⁵² The private-state-federal prison system persists today.

B. *The Regulatory Landscape*

The Thirteenth Amendment is the primary constitutional provision supporting the current prison system; however, the Eighth Amendment offers modest prisoner protections.⁵³ After the prisoners' rights movement, which demanded more humane prison conditions, inmates could pursue Eighth Amendment violations against prisons for cruel and unusual punishment.⁵⁴ However, until 1981, the Supreme Court had never considered whether "conditions of confinement," including labor conditions, were protected by the Eighth Amendment.⁵⁵ This meant that inmates had little recourse against prisons at all. Before 1981, prisoners could only win an Eighth Amendment claim for egregious problems, such as refusal of medical care, indefinite solitary confinement, or under-feeding isolated inmates.⁵⁶

Courts will not impose on prison administrators or state legislators without an objective Eighth Amendment reason.⁵⁷ The Court in *Rhodes v. Chapman* held only that prison conditions "must not involve the wanton and

⁴⁸ Management & Training Corporation, *MTC-Overview*, MANAGEMENT & TRAINING CORPORATION, (November 7, 2018) <https://www.mtctrains.com/about-us/>; Harrison Berry, *Idaho's Last Private Prison*, BOISE WEEKLY, (Sep. 7, 2016) <https://www.boiseweekly.com/boise/idahos-last-private-prison/Content?oid=3883909>.

⁴⁹ André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and The New Marketplace for Crime*, 6 WAKE FOREST J. L. & POL'Y 407, 429-432 (2016).

⁵⁰ *Id.* at 416.

⁵¹ *Id.* at 429.

⁵² *E.g.*, Allisson Aubrey, *Whole Foods Says It Will Stop Selling Foods Made with Prison Labor*, NPR, (Sept. 30, 2015, 7:52 PM), <https://www.npr.org/sections/thesalt/2015/09/30/444797169/whole-foods-says-it-will-stop-selling-foods-made-by-prisoners>; Simon McCormack, *Prison Labor Booms As Unemployment Remains High; Companies Reap Benefits*, HUFFINGTON POST, (Dec. 10, 2012, 2:19 PM), https://www.huffingtonpost.com/2012/12/10/prison-labor_n_2272036.html.

⁵³ Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 469 (1997).

⁵⁴ *Id.*

⁵⁵ *Rhodes v. Chapman*, 452 U.S. 337, 344-46 (1981).

⁵⁶ *Hutto v. Finney*, 437 U.S. 678, 682-84 (1978); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

⁵⁷ *Rhodes*, 452 U.S. at 346-47.

unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.”⁵⁸ Labor in prisons could only receive Eighth Amendment protections if that labor amounted to torture or deprived inmates of basic human needs, like food and water.⁵⁹ Therefore, state slavery or involuntary servitude are not cruel and unusual punishments under the Eighth Amendment.⁶⁰

C. *The Current Prison System*

There are two types of prison labor: regular prison jobs and “correctional industry” jobs.⁶¹ Over ninety-four percent of prisoners, on average, perform regular prison jobs.⁶² Regular prison jobs include agriculture work, janitorial and laundry services, uniform manufacturing, and prison maintenance.⁶³ Regular prison jobs even include service projects, menial tasks ranging from washing cars to repairing graveyards, and firefighting.⁶⁴ These jobs are revenue-generators for the state. For example, in 2016, Arkansas inmates earned approximately \$8.3 million in revenues for the state through agricultural work.⁶⁵

“Correctional industries” are state-owned enterprises that produce miscellaneous goods and services for both the government and private companies.⁶⁶ For example, in 2016, Texas Correctional Industries produced \$89 million from sales of goods including shoes, garments, brooms, license

⁵⁸ *Rhodes*, 452 U.S. at 347.

⁵⁹ *Id.*

⁶⁰ *Id.*; U.S. CONST. amend. VIII; U.S. CONST. amend. XIII.

⁶¹ Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Sebastian Murdock, *Louisiana Sheriff Wants ‘Good’ Prisoners To Stay Jailed For Their Free Labor*, HUFFINGTON POST, (Oct. 12, 2017, 1:58 PM), https://www.huffingtonpost.com/entry/louisiana-sheriff-steve-prator-prisoners_us_59dfa0bee4b0fdad73b2cded; Sarah Holder, *The Not-So-Invisible Labor Prisoners Do in Cities*, CITYLAB, (Aug. 18, 2018, 2:56 PM), <https://www.citylab.com/equity/2018/08/the-not-so-invisible-labor-prisoners-do-in-cities/568537/>; Eric Levenson, *Low on Resources, Boston Turns to Prison Labor to Shovel Snow*, BOS. GLOBE, (Feb. 17, 2015), <https://www.boston.com/news/local-news/2015/02/17/low-on-resources-boston-turns-to-prison-labor-to-shovel-snow>; Eric Escalante, *9 things to know about California's inmate firefighters*, ABC NEWS, (Aug. 9, 2018, 5:38 PM), <https://www.abc10.com/article/news/local/9-things-to-know-about-californias-inmate-firefighters/103-582161022>.

⁶⁵ Wendy Kelley, *Annual Report 5* (2016), ARKANSAS DEPARTMENT OF CORRECTIONS, https://web.archive.org/web/20170808005828/https://adc.arkansas.gov/images/uploads/2016_Annual_Report_Directors_Edits+_BOC_Approval_2_2_2017x1Final.pdf (Agricultural work includes the care, sale, and production of animals and animal products (i.e., chickens, cows, and pigs), and other agriculture products such as bales of wheat).

⁶⁶ Sawyer, *supra* note 61.

plates, janitorial supplies, soaps, furniture, textiles, and steel products.⁶⁷ In the same year, Arkansas Correctional Industries produced approximately \$8.2 million in revenues from similar goods and services.⁶⁸ Also, in 2017, Georgia Correctional Industries produced \$36 million in manufacturing goods and approximately \$25 million in farm goods.⁶⁹

Prison labor has some economic value, otherwise the states would not compel inmates to work. Most states also pay inmates. An average U.S. inmate earns between \$0.14 and \$0.63 per hour in regular prison jobs.⁷⁰ However, inmates in Texas, Alabama, Georgia, and Arkansas are unpaid.⁷¹ Unpaid prison systems use an allowance system for prisoners to buy goods at the commissary.⁷²

The real value of the prisoner's dollar depends on how they can use that dollar. Prisons have a commissary system that allows prisoners to spend "money" on non-prison goods like stamps, soda, chips, ramen, deodorant, and even medical costs.⁷³ Commissaries, like any vendor, have price markups; however, in prison these markups can be upwards of thirty percent.⁷⁴ An illustrative example of how far a prison dollar actually goes is the Texas prison system.

Texas does not pay inmates but allocates \$60 per inmate per quarter, with an additional \$25 for the October-December quarter, totaling \$265 yearly.⁷⁵ The money can only be spent at the Texas Commissary, where there is a wide range of prices on everything from hygiene products to stamps.⁷⁶ It is fairly easy to burn through the \$60 quarterly allotment given the commissary prices, especially for women when feminine hygiene kits cost \$24.⁷⁷ However, the real budgeting crunch happens if and when an inmate gets sick or hurt.

⁶⁷ Tex. Dep't of Crim. Justice, Annual Report (2016), https://www.tdcj.state.tx.us/documents/Annual_Review_2016.pdf.

⁶⁸ Kelley, *supra* note 65.

⁶⁹ Georgia Department of Corrections (2017), 2017 Fact Sheet, GEORGIA DEPARTMENT OF CORRECTIONS 1-2 <http://www.dcor.state.ga.us/sites/default/files/GCI%20Fact%20Sheet%202017%20.pdf>.

⁷⁰ Sawyer, *supra* note 61.

⁷¹ Prison Policy Initiative, *State and federal prison wage policies and sourcing information*, PRISON POLICY INITIATIVE (Nov. 11, 2018), https://www.prisonpolicy.org/reports/wage_policies.html; Tex. Dep't of Crim. Justice, Annual Report 26 (2016), https://www.tdcj.state.tx.us/documents/Annual_Review_2016.pdf; Kelley, *supra* note 65; Daniel Moritz-Rabson, 'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold To Government, NEWSWEEK (Aug. 28, 2018, 5:12 PM), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729>.

⁷² E.g., Tex. Dep't of Crim. Justice, *Frequently Asked Questions* (2018), <https://www.tdcj.state.tx.us/faq/ecom.html>.

⁷³ E.g., *id.* (describing the Texas inmate commissary program).

⁷⁴ Matt Stiles, *Buyers Behind Bars*, TEX.TRIB. (Apr. 8, 2010, 5:00 AM), <https://www.texastribune.org/2010/04/08/texas-prisoners-spent-95-million-at-commissaries/>.

⁷⁵ *Id.*

⁷⁶ *Supra* note 72.

⁷⁷ *Id.*

Texas requires that inmates pay a \$100 annual copay if they see a doctor any number of times for a non-chronic issue.⁷⁸ This copay is paid from their commissary account unless they have less than \$5 in their account, thereby qualifying as indigent.⁷⁹ The \$100 copay is 37.7% of the inmates' \$265 yearly allowance.⁸⁰ If an inmate has insufficient funds to pay the copay, half of all future quarterly commissary allowances are taken until the copay is paid.⁸¹ This leads to inmates opting not to go to a doctor because their limited funds would be better spent on other commissary items.⁸² The original copay price, before 2012 was only \$3 per visit.⁸³ Texas' justification for the price hike to \$100 yearly was solely to increase revenues by approximately \$9.9 million.⁸⁴ In reality, the hike raised only \$2.5 million, but was still five times the old revenues of approximately \$500,000 per year.⁸⁵

Except for the \$100 medical fee, Texas' prisoners are in the same boat with prisoners across the country. The states set the wages, prices, and work hours to maximize profits.⁸⁶

D. *Prison Labor, Even Volunteer Labor, is Compulsory and Penological*

The key distinction states make between regular prison jobs and correctional industry jobs is that industry and out-of-prison jobs are "voluntary."⁸⁷ If work is voluntary, then it is not exploitative because a worker can choose not to perform that work. However, several federal circuits ignore this

⁷⁸ Nick Wing, *Prisons And Jails Are Forcing Inmates To Pay A Small Fortune Just To See A Doctor*, HUFFINGTON POST (Apr. 19, 2017, 9:26 AM), https://www.huffingtonpost.com/entry/prison-jail-medical-copays_us_58f64bdbe4b0b9e9848ee23e (showing the next highest copay after Texas is Nevada, with a copay of \$8).

⁷⁹ Wing, *supra* note 78; *see also* Stiles, *supra* note 74.

⁸⁰ Tex. Gov't Code Ann. § 501.063, available at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.501.htm>.

⁸¹ *Id.* (meaning that if an inmate becomes sick or injured on December 31 and has \$5.01 in their account, thereby not indigent; the prison will take \$30 from the first quarter, \$30 from the second quarter, and \$30 from the third quarter, and \$10 from the fourth quarter. This leaves \$165 from allowances plus the \$5.01 in rollover funds, all for going to see a doctor.)

⁸² Maurice Chammah, *Some Inmates Forego Health Care to Avoid Fees*, TEX. TRIB. (Oct. 16, 2012, 6:00 AM), <https://www.texastribune.org/2012/10/16/tdcj-inmates-paying-100-fee-health-care/>; *see also* Wing, *supra* note 78.

⁸³ Chammah, *supra* note 82. ("As a result of HB26, which took effect [in 2011], [Texas Department of Criminal Justice] prisoners who seek medical care now pay a fee of \$100 once a year, whether they see a doctor once or multiple times.")

⁸⁴ Ioana Makris, *House Tentatively Approves Prisoner Health Care Fee*, TEX. TRIB. (June 16, 2011, 4:00 PM), <https://www.texastribune.org/2011/06/16/texas-prisoners-could-be-charged-100-healthcare/>.

⁸⁵ Chammah, *supra* note 82.

⁸⁶ *See* Cummings, *supra* note 44.

⁸⁷ *E.g.*, Cal. Dep't of Corr. & Rehab., *Conservation (Fire) Camps*, https://www.cdcr.ca.gov/Conservation_Camps/ ("An inmate must volunteer for the fire camp program; no one is involuntarily assigned to work in a fire camp"); Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison 'Real Work' Programs Work?*, 257 *NIJ J.*, 1, 1-43 (2007).

distinction on the grounds that no work performed in a prison is voluntary because an inmates' labor "belongs to the state."⁸⁸ Just because an inmate acts rationally and chooses—based on what they believe given their information—the best option, this action does not indicate any real "choice," especially when 76% of inmates report being threatened with "solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation, or the inability to pay for basic life necessities like bath soap" for not working.⁸⁹ Inmates do not contract with the state because there is no bargain; there is just a compulsion to perform, which necessarily benefits the prison.⁹⁰ Because the state owns the labor, courts conceptually prioritize penological justifications for punishment over economic issues when such penological goals exist.⁹¹ Typical penological justifications include the deterrent effect, rehabilitative effect, or retributive reasons.

E. *Prevailing Incentives for Continuing Prison Labor*

Inmates are not the most sympathetic group. While running for office, politicians rely on "tough on crime" rhetoric to score political points with voters.⁹² Since the platform of "more rights for prisoners" does not win elections, lawmakers are generally personally disinterested in pursuing prison labor reform, especially when reforms are severely hindered by private lobbying.⁹³ As previously mentioned, the 1980s brought us three large private prison companies who profit off incarceration.⁹⁴ To secure a steady revenue

⁸⁸ *Vanskike v. Peters*, 974 F.2d 806, 809-12 (7th Cir. 1992) (...the relationship between the DOC and a prisoner is far different from a traditional employer-employee relationship, because (certainly in these circumstances) inmate labor belongs to the institution) (citing *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1333 (9th Cir. 1991)); see also *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters.*, 112 F.3d 1119, 1124-25 (11th Cir. 1997).

⁸⁹ *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996) ("In the instant case, for example, tutoring of other inmates by prisoners who volunteer may be superior to tutoring by prisoners ordered to do so. In any event, the voluntary performance of labor that serves institutional needs of the prison is not in economic reality an employment relationship. The prisoner is still a prisoner..."); see also *Vanskike*, 974 F.2d at 809 ("Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration"); AMERICAN CIVIL LIBERTIES UNION, *CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS* 5 (2022), <https://www.aclu.org/report/captive-labor-exploitation-incarcerated-workers>.

⁹⁰ *Vanskike*, 974 F.2d at 809.

⁹¹ Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 890-92 (2008).

⁹² Cummings, *supra* note 44, at 420.

⁹³ *Id.* at 437-39.

⁹⁴ *Id.*

stream from the government, private prison companies lobby lawmakers for longer sentences and more stringent sentencing standards.⁹⁵

Lawmakers are not the losers in this situation. They receive cash donations from private companies in exchange for policies that win “tough on crime” points with voters. Taxpayers, on the other hand, foot the bill for prison expenses despite dubious claims of private cost savings.⁹⁶ Given the lack of voter pushback against these long-term punishment increases, lawmakers have little personal incentive to stray from the current course.

II. THE CASE FOR AMENDING THE THIRTEENTH AMENDMENT

This Comment takes the stance that “except as a punishment for crime whereof the party shall have been duly convicted” should be removed. This is because prison labor is inherently exploitative in economic terms, creates perverse incentives to perpetuate prison labor through greater incarceration, and has no support under any traditional penological justification.

A. *Prison Labor is Economically Exploitative*

Prisons facilitate a “forced labor” market and are therefore exploitative. Economic forced labor is “when the market wage is lower than the reservation wage.”⁹⁷ The reservation wage is the lowest wage where an individual will remain in the market.⁹⁸ If a laborer is compelled to work when they would otherwise drop out of the market, there is no free exit from the market.⁹⁹ Prisoners are paid at a below-market rate, and in several states are wholly unpaid.¹⁰⁰ Since no one freely chooses to work for a wage of zero dollars, this system is exploitative. Even assuming some kind of free exit (potentially through release programs based on prisoner behavior), this system would still be exploitative as a monopsony.

A monopsonist, in plain terms, is the buyer-version of a monopolist.¹⁰¹ A monopsonist takes supply as given, but since they are the only customer in

⁹⁵ Cummings & Lamparello, *supra* note 49, at 419-22; Cummings, *supra* note 44, at 437-39 (showing CCA spent more than \$3 million on federal lobbying in 2005. The largest U.S. private prison companies together have spent dozens of millions of dollars lobbying both state and federal legislators since the origin of the U.S. private prison corporation).

⁹⁶ Cummings and Lamparello, *supra* note 49, at 422-25.

⁹⁷ Roback, *supra* note 36, at 1180.

⁹⁸ *Id.*

⁹⁹ Roback, *supra* note 36, at 1176-77; *see also* Roger D. Blair and Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 319 (1990-1991).

¹⁰⁰ Sawyer, *supra* note 61.

¹⁰¹ *See* Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 402-03 (2008); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 265-66 (1998) (Analogizing a prosecutor with a monopsonist in the market for prosecutions).

the market, they are able to demand lower prices on goods, or purchase less goods to control prices.¹⁰² In the market for labor, a monopsonist will keep “buying” labor until the marginal market value of that worker’s product is less than the marginal cost of hiring (for example, a wage).¹⁰³ Prison labor generally fits into a monopsonic model. While the state has to must imprison everyone sentenced to a term of imprisonment, the government still can limit both the number of people sentenced, and the profit-maximizing wage for labor. Therefore, in the market for prison labor, the government will always want to keep any type of wage below the marginal benefit associated with any inmate. Because prison labor is shortchanging the laborer while reaping huge surpluses, this system is exploitative.¹⁰⁴

Prison labor is therefore unequivocally exploitative because it is forced labor, and even if it was were not, the prison-monopsonist would actively exploit inmates.

B. *Profiting Off Prison Labor Creates Perverse Punishment Incentives*

A system of punishment centered around compulsory labor unsurprisingly leads to perverse incentives. A perverse incentive occurs when an actor benefits from undesirable behavior which incentivizes more of that behavior.¹⁰⁵ In the context of any program, an actor has perverse incentives when they are able to benefit from the thing, behavior, or action that the program is designed to prevent. The perverse incentive leads to increased undesirable conduct based on a profit opportunity for the actor.

Applying this idea to prison labor is not, well, laborious when given the series of incentives for compulsory labor. The Thirteenth Amendment eliminated private slave labor, and slave labor is socially undesirable. However, the Thirteenth Amendment also creates a vehicle for states to profit off the same kind of labor. Because the states realized immediately that they could profit from compulsory labor, the same kind the Thirteenth Amendment stops private parties from facilitating, the states chose to further their financial interests.

The states are disincentivized against lighter criminal punishments because of significant cost-savings that inmate labor provides. A recent and highly publicized example of this is California’s inmate firefighter program.¹⁰⁶ The program allows nonviolent offenders to sign up to fight fires for

¹⁰² Roback, *supra* note 36, at 1176.

¹⁰³ Blair and Harrison, *supra* note 99, at 303-04.

¹⁰⁴ Roback, *supra* note 36, at 1176-77.

¹⁰⁵ Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 123-24 (Fall 2017).

¹⁰⁶ *E.g.*, Cal. Dep’t, *supra* note 87; Lizzie Johnson, *Fewer prison inmates signing up to fight California wildfires*, SAN FRANCISCO CHRONICLE, September 1, 2017, <https://www.sfchronicle.com/bayarea/article/Fewer-prison-inmates-signing-up-to-fight-12165598.php>; Escalante, *supra* note

\$2 daily, in addition to \$1 per hour while fighting fires.¹⁰⁷ Additionally, for each day fighting fires, inmates receive two days off their sentence (a “2-1” credit).¹⁰⁸ The program employs approximately 3,700 inmates and saves approximately \$100 million for California each year.¹⁰⁹ These savings are primarily because non-inmate firefighters obviously make more than \$10 per day.¹¹⁰ Jeff Johnson, a division chief with the California Department of Forestry and Fire Protection, explained that “If you had to pay [inmates the] minimum wage, the cost of these fires would generally go up quite dynamically.”¹¹¹

Lawyers for California in 2014 even argued that releasing inmates would leave the firefighter program short-staffed.¹¹² For context, in 2010, California’s prison system held approximately 156,000 people, which is nearly double what the facilities were designed to hold.¹¹³ A federal court ordered California to reduce its prison population to a still-overcrowded 137.5% of its capacity, 110,000 people.¹¹⁴ The Supreme Court affirmed because overcrowding violated the Eighth Amendment, and ordered California to reduce its prison population.¹¹⁵

California ultimately failed to meet the prison population deadlines set by the Court, prompting the 2014 hearing by the same 2010 plaintiffs, who demanded that a 2-1 credit be granted to low-security offenders to expedite

64; Philip Wegmann, *They fought wildfires as inmates, but California won't let them become firefighters when free*, WASHINGTON WASH. EXAMINER (Aug. 7, 2018) <https://www.washingtonexaminer.com/opinion/they-fought-wildfires-as-inmates-but-california-wont-let-them-become-firefighters-when-free>.

¹⁰⁷ Luis Gomez, *For \$1 an hour, inmates fight California fires. 'Slave labor' or self-improvement?*, SAN DIEGO TRIBUNE (Oct. 20, 2017) <http://www.sandiegouniontribune.com/opinion/the-conversation/sd-how-much-are-california-inmate-firefighters-paid-to-fight-wildfires-20171020-htmistory.html>.

¹⁰⁸ *Id.*; Nichole Goodkind, *California Wildfires: Inmates Are Risking Their Lives Working Alongside Firefighters For \$2 A Day*, NEWSWEEK (Aug. 8, 2018) <https://www.newsweek.com/california-wildfires-inmates-prisoners-firefighters-1061905>.

¹⁰⁹ Johnson, *supra* note 106; Alex Helmick, *Hundreds of the Firefighters Battling Sonoma Fires — Inmates*, KQED NEWS (Oct. 13, 2017) <https://www.kqed.org/news/11623289/hundreds-of-the-firefighters-battling-sonoma-fires-inmates>.

¹¹⁰ Calfas, *supra* note 4. The \$10 figure assumes that inmates fight fires for eight hours and receive the \$2 a day.

¹¹¹ Johnson, *supra* note 106.

¹¹² Defs.’ Opp’n To Pls.’ Mot. To Enforce, p. 3-4, *Coleman v. Brown*, No. 2:90-cv-00520 KJM DAD P (E.D. Cal.), available at <http://d35brb9zkkbdsd.cloudfront.net/wp-content/uploads/2014/11/2014-11-17-CalifPrisonLaborState.pdf>; Nicole Flatow, *California Tells Court It Can’t Release Inmates Early Because It Would Lose Cheap Prison Labor*, THINKPROGRESS (Nov. 17, 2014) <https://thinkprogress.org/california-tells-court-it-cant-release-inmates-early-because-it-would-lose-cheap-prison-labor-c3795403bae1/>.

¹¹³ *Brown v. Plata*, 563 U.S. 493, 501 (2011).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 501-02 (The Court noted several tools at the State’s disposal, “including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs” to mitigate the impact of the order).

releases.¹¹⁶ The 2-1 credit originally applied for low-security offenders who fought fires, but not the general low-security population.¹¹⁷ California argued that it should not expand the 2-1 to all low-security offenders because there would be less of an incentive for prisoners to fight fires, and higher release rates among these inmates would leave prison facilities short-staffed.¹¹⁸ This is because if there is a general 2-1 credit available, then no would be no additional benefit to fighting fires, and prisons would not be able to use inmate labor to staff prisons since the inmates would be released sooner.¹¹⁹ The state of California apparently forgot that it can hire people to perform work who are not prisoners.

The situation in California highlights the value prison labor has to the states. In fact, prisons are dependent on inmates' labor to operate. This, at a minimum, creates a state that is financially interested in how many people are punished. Add in lawmakers receiving money from prison corporations to punish people more harshly, and we have greater punishment based on profit interests of states and individual lawmakers.¹²⁰

C. *What about Penological Interests?*

Profit-driven prison labor does not further traditional penological interests. Penological theories help examine whether a punishment is a legitimate exercise of state power. Deterrence, incapacitation, rehabilitation, and retribution are all common themes in punishment policy, and this comment will address these four ideas as they relate to prison labor.¹²¹ Each of the following theories fails to actually apply to prison labor.

Deterrence can be disposed of fairly quickly. Deterrence theory proposes that if the state levies harsh punishments against criminals, then individuals will be disincentivized from committing crimes because the "cost" of crime has increased.¹²² However, the notion that harsher punishments such as longer sentences, the death penalty, or decades of exploitative labor actually

¹¹⁶ Paige St. John, *Gov. Jerry Brown's prison reforms haven't lived up to his billing*, LOS ANGELES TIMES, June 21, 2014, <https://www.latimes.com/local/politics/la-me-ff-pol-brown-prisons-20140622-story.html#page=1>.

¹¹⁷ Goodkind, *supra* note 108.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ Cummings and Lamparello, *supra* note 49, at 419-22; Cummings, *supra* note 44, at 437-39.

¹²¹ Alice Ristrophe, *Proportionality as a Principle Of Limited Government*, 55 DUKE L.J. 263, 271-79 (2005); *Ewing v. California*, 538 U.S. 11, 25 (2002) (*citing* 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.5 (1986)).

¹²² Ristrophe, *supra* note 121; Jeffrey G. Murphy, *Symposium On Kantian Legal Theory: Does Kant Have A Theory Of Punishment?*, 87 COLUM. L. REV. 509, 517 (1987).

deter crime is empirically dubious.¹²³ In fact, harsher punishments, whatever the form, are significantly less effective deterrents than greater certainty of being caught.¹²⁴ Simply increasing a punishment has little effect on general deterrence.¹²⁵ Accordingly, free or cheap labor, as an integral part of our incarceration system, is not going to have a significant deterrent effect.

Incapacitation theory is also easily dismissed as a justification for prison labor. This theory proposes that if you sequester a criminal from society, or just execute them, then society is protected from future crimes.¹²⁶ This theory does not apply to prison labor because the theory is more of a justification for either prisons or the death penalty, not forced labor.

Rehabilitation is fairly interesting as a justification for prison labor writ large. This theory asserts that punishment should cure criminal inclinations through programs seeking to help inmates.¹²⁷ This theory took root in the U.S. early on, where labor was thought to cure idleness, which at the time was considered a cause of crime.¹²⁸ The ideology lost prevalence until the 1930s but ultimately lasted into the 1970s.¹²⁹ Interestingly, this idea gained prevalence in the U.S. in the twilight of both convict leasing and state prison profitability.¹³⁰

The rehabilitative effects of labor are not borne out by evidence. There is some literature suggesting that work programs (like correctional industry programs or UNICOR) may have some rehabilitative effect, but the effect is questionable because of selection bias problems.¹³¹ However, there is significant doubt that compulsory labor has any rehabilitative effect at all.¹³² The

¹²³ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 252 (2013); see also NATIONAL INSTITUTES OF JUSTICE, *Five Things About Deterrence* (May 2016) <https://nij.gov/five-things/pages/deterrence.aspx#note1>.

¹²⁴ *Id.* at 206.

¹²⁵ NATIONAL INSTITUTES OF JUSTICE, *Five Things About Deterrence*, (May 2016) <https://nij.gov/five-things/pages/deterrence.aspx#note1> (“Some policymakers and practitioners believe that increasing the severity of the prison experience enhances the ‘chastening’ effect, thereby making individuals convicted of an offense less likely to commit crimes in the future. In fact, scientists have found no evidence for the chastening effect”).

¹²⁶ Wayne R. LaFave, *Substantive Criminal Law*, 1 SUBST. CRIM. L. § 1.5(a)(2) (3d ed.).

¹²⁷ Wayne R. LaFave, *Substantive Criminal Law*, 1 SUBST. CRIM. L. § 1.5(a)(3) (3d ed.).

¹²⁸ William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1161 (2004).

¹²⁹ Gordon Hawkins, *Prison Labor and Prison Industries*, 5 CRIME AND JUST. 85, 117 (1983).

¹³⁰ Garvey, *supra* note 11, at 365-68; see also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450-51 (2005).

¹³¹ Moses, *supra* note 87 (While there is a positive rehabilitative effect, the totality of the effect is questionable because of selection bias in participation in the programs (i.e. only people who are low-risk offenders usually join the programs)); see also Doris MacKenzie, *Sentencing and corrections in the 21st century: Setting the stage for the future*, at 28 (2001) <https://www.ojp.gov/pdffiles1/nij/grants/189089.pdf>.

¹³² Hawkins, *supra* note 129, at 117-18 (“Nevertheless, those seeking confirmation of the belief that ‘suitable employment is the most important factor in the physical and moral regeneration of the prisoner’

benefit of rehabilitative theory could instead lie in its ability to limit other theories of punishment.¹³³ However, this would only be possible where a rehabilitative effect actually exists, which is clearly not the case with prison labor.¹³⁴

Our last penological theory is retribution, which admittedly is the most compelling of the four justifications, if only because of its very broadly broad application. This theory demands punishment when people deserve punishment.¹³⁵ Otherwise explained, retribution operates under the assumption that it is only right for someone who wrongs society to suffer accordingly.¹³⁶ This dynamic immediately presents the problem of what kinds of punishment are deserved? If inmates deserve “whatever the state wants,” then the theory is a mere truism. The punishment is just because the state says it is just. Alternatively, the theory is just as easily painted as self-limiting through moral principles.¹³⁷ If desert is taken seriously, then criminals have to must actually deserve whatever punishment they receive from a moral standpoint. If inmates do not receive morally just punishments, then the implication is that there is another, more perverse incentive at work.

There are two ways to apply retribution to prison labor. First, we can assume that prisoners deserve to work since it is incidental to their sentence, which is repayment for their harm to society. Second, we can recognize that the state is not disinterested in the imposition of labor and ask whether inmates deserve to be subjected to greater sentences, and by necessity more labor, because of the financial interest of private parties.¹³⁸ States are not disinterested in sentencing decisions.¹³⁹ To take any punishment that is motivated by outside private financial interests and call it legitimate at face value would mean that private entities can help determine what punishments we receive based on their profit margins. This is not inherently deserved from an offense, so the resulting prison labor cannot be retributive.

Monetization of prison labor, and the attendant perverse incentive, invite exploitation. The states know they can compel labor under the Thirteenth Amendment, as they have always done.¹⁴⁰ Therefore, the states are financially invested in greater imprisonment and greater use of compulsory labor.

(Great Britain Parliament 1933/34, p. 64) will find little gold in the meager supply of evaluative studies available. Reviewers of those studies have found either that the hope that prisoners will be rehabilitated by their work experience or by the acquisition of on-the-job skills is ‘not borne out by the evidence’ (Taggart 1972, p.56) or at best that the empirical evidence is ‘depressingly equivocal’ and that ‘research findings in this area . . . are riddled with inconsistencies’ (Braithwaite 1980, p. 2)).

¹³³ Ristrophe, *supra* note 121, at 278-79.

¹³⁴ Hawkins, *supra* note 129.

¹³⁵ Wayne R. LaFave, *Substantive Criminal Law*, 1 SUBST. CRIM. L. § 1.5(a)(6) (3d ed.).

¹³⁶ *Id.*

¹³⁷ Ristrophe, *supra* note 121, at 279-84.

¹³⁸ Cummings, *supra* note 44, at 437-39.

¹³⁹ Cummings, *supra* note 44, at 408-18.

¹⁴⁰ U.S. CONST. amend. XIII.

D. *Amending the Thirteenth Amendment*

Given the evidence of the exploitative nature of compulsory labor in the prison system, this Comment can propose a solution. This Comment proposes removing the section of the Thirteenth Amendment which reads “except as a punishment for crime whereof the party shall have been duly convicted.”¹⁴¹ This sub-part will first address how such an amendment would play out, then address potential counterarguments.

The immediate and obvious effect of this proposed amendment is that there would be no more exploitative labor in the prison systems. Without a cheap source of labor, prisons would immediately become significantly more expensive to operate. Every job that prisoners perform, from janitorial to industrial work, would need to be filled with an employee earning at least the minimum wage and subject to worker protections. This change in circumstances will eventually lead to long-term cost-saving changes in the way we punish.

The states will lose money in the short run. To illustrate the short-run losses to states, we can look to California, one of the most expensive prison systems in the nation.¹⁴² For simplicity’s sake, assume that there is an average of five years left on each long-term prisoner’s sentence.¹⁴³ Further, until most criminal sentences run their course, the states cannot profit from productive labor. Without cost-offsetting labor programs, states like California will spend over \$70,000 per inmate per year.¹⁴⁴ Three-quarters of these costs are for security and healthcare (which increase due to an aging prison population).¹⁴⁵ California held approximately 129,000 inmates in January 2017.¹⁴⁶ The projected cost per year would be \$9.03 billion. Over five years, the total cost would be approximately \$45 billion. For comparison, California’s total budget in 2017 was approximately \$180 billion.

The estimates in the previous paragraph were before the ballooning costs of running prisons at a market wage. California prisoners work approximately seven-hour work daysworkdays, for twenty-two days per month, on

¹⁴¹ U.S. CONST. amend. XIII.

¹⁴² Kurt Snibbe, *California has one of the most expensive prison systems in the world*, MERCURY NEWS (May 11, 2017) <https://www.mercurynews.com/2017/05/11/california-has-one-of-the-most-expensive-prison-systems-in-the-world/>.

¹⁴³ Janice Williams, *Serving Time: Average Prison Sentence in the U.S. is Getting Even Longer*, NEWSWEEK (July 22, 2017) <https://www.newsweek.com/prison-sentences-increased-2017-jail-639952> (the average California prison sentence jumped from an average of 4.8 years to 8.2 years from 2000 to 2014).

¹⁴⁴ Cal. Leg. Analyst’s Office, *How much does it cost to incarcerate an inmate?* (March 2017) https://lao.ca.gov/policyareas/cj/6_cj_inmatecost.

¹⁴⁵ *Id.*

¹⁴⁶ Cal. Leg. Analyst’s Office, *The 2017-2018 Budget* (Mar. 1, 2017), <https://lao.ca.gov/Publications/Report/3595>.

average.¹⁴⁷ Since the overwhelming majority of prisoners are regular laborers, this estimate will use the regular laborer wage of \$0.13 an hour.¹⁴⁸ The original costs to California from a yearly wage are \$240.24 per prisoner. If minimum wage workers filled this work time instead at the 2018 California minimum wage of \$11 per hour, then wages paid to workers per year would be \$20,328 (without consideration of worker benefits), or approximately 85 times the original cost. The total average wage paid to all prisoners earning the minimum wage per year would be over \$2.6 billion, or a twenty-nine percent increase in overall prison costs annually. Also, California would lose \$100 million a year in firefighting savings alone.¹⁴⁹

Not every state would have expenses like California. Cheaper states like Arkansas, which has approximately 19,000 inmates and a 2019 minimum wage of \$9.25, would simply require less money.¹⁵⁰ Even assuming an eight-hour work day/workday, for five days a week, for fifty-two weeks, Arkansas would only incur approximately \$84 million per year in costs, which is approximately one thirtieth of California's costs.

These costs are not fixed forever, because states would have to adjust their sentencing policy. Still assuming an average of five years left in the inmates' sentences, the costs for California total at \$13 billion, and after five years, prison will simply be a less attractive economic option for punishment. If states cannot force prisoners to work, then sentences would decrease because the expense to the state would balloon.

After seeing all the additional costs that states would incur, critics may ask why any state would ever agree to this. This is where the second part of this Comment's proposal kicks in: paying the states for their increased costs while they wean off inmates and readjust. Giving billions of dollars to state governments while they simultaneously attempt to cut costs is a win for state governments. States can offer boons to taxpayers such as modest tax decreases in accordance with future lower prison costs, making individuals more amenable to the amendment. Lawmakers could certainly be convinced to enact a major reform if the federal government foots the bill.

This proposed federal money grant would be well within Congress' spending power. This grant is similar to other cost-mitigating grants made by congress such as the Medicaid program.¹⁵¹ The general category of "open-ended reimbursement categorical grants," which this proposed prison grant

¹⁴⁷ Prison Policy Initiative, *supra* note 67; Cal. Code of Reg. § 3044 (2016), https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2016.pdf.

¹⁴⁸ CAL. CODE OF REG. § 3041.2 (2016) https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2016.pdf

¹⁴⁹ Johnson, *supra* note 106.

¹⁵⁰ Kelley, *supra* note 65, at 2; Heather Long, *Arkansas and Missouri just approved big minimum wage increases, a liberal victory in red states*, WASH. POST (Nov. 6, 2018) https://www.washingtonpost.com/business/2018/11/07/arkansas-just-approved-big-minimum-wage-increase-liberal-victory-red-state/?noredirect=on&utm_term=.501bc36eb733.

¹⁵¹ Center on Budget and Policy Priorities, *Policy Basics: Introduction to Medicaid* (August 16, 2016), <https://www.cbpp.org/research/health/policy-basics-introduction-to-medicaid>.

would fall under, basically allows the government to pay any given percentage of costs for a program.¹⁵² Like other grants already used by Congress, this grant can simply cover the costs of eliminating prison labor. Overall, this would not be highly burdensome to the federal government because while California's reform would cost \$2.6 billion per year as the most expensive prison system, other states like Arkansas would only cost \$84 million.¹⁵³ The states are also big winners in this situation because they are receiving free money to fix their respective prison systems.

By making the states more financially neutral toward a constitutional amendment targeted at prison reform, the amendment could be argued on its merits to the states. This leaves Congress, who could be convinced with the prospect of saving all the states billions in the long-run and downsizing the monetary black hole that is prison.

The prevailing problem with our prison system is the fact that there is no non-radical way to fix it. The status quo is rife with profit-interested states, who are influenced by profit-maximizing private companies that lobby for longer sentences, and a history of exploiting labor for money. Program-centered alternatives that leave the current prison structure in place do not sufficiently increase costs to deter rent-seeking in the form of increased punishments. Also, other legislative ideas are highly likely run afoul of the Tenth Amendment, since state prisons are only bound by the constitution, not individual federal programs.

Alternatives to a constitutional amendment risk uneven application across the country. It could be possible to convince one or two states, without the boon of billions in federal dollars, to change their prison systems. However, the problem is giving states the ability to opt-out of the idea. If most states would never forego having compulsory labor without a "carrot" there is no available "stick" besides the U.S. Constitution. States cannot opt out of the Constitution, so it would be the most surefire way to stop individual state legislatures from reversing course as soon as the program became politically inconvenient.

Accordingly, the only way to reasonably fix the problem is with a constitutional amendment. This is the only option with real permanence that could incentivize the states (with money) to go along with the idea.

This Comment is not suggesting that punishment and prison are socially undesirable, because both are desirable in appropriate doses. However, given that prison will be even more costly than before, states will want to, if not need to, explore alternative means of punishment. These alternative means, whether education programs, more extensive work release programs, or

¹⁵² Robert Jay Dilger, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, CRS (May 7, 2018) <https://fas.org/sgp/crs/misc/R40638.pdf>.

¹⁵³ Snibbe, *supra* note 142; *see also* Kelley, *supra* note 65 at 2; Long, *supra* note 150.

something entirely new, could not be worse or more expensive than long prison sentences that exploit prisoners to turn a profit.¹⁵⁴

CONCLUSION

There is hope for ending the profit-driven exploitation of people in prison. This hope stems from the fact that the ability to compel productive labor has, in no small part, made society worse off economically. Society is worse off because the primary winners are prison companies and politicians. Taxpayers bear the burden of paying for both public and private prisons, while states have a financial interest in greater incarceration rates, which in turn increases costs to the taxpayer. Continuation of the current prison system means that states like California will continue to spend \$9.03 billion per year simply housing inmates and dispensing any costs savings directly to private actors who lobby and invest for greater rates of incarceration and cheap labor.¹⁵⁵

Compulsory prison labor, enabled by the Thirteenth Amendment, does not serve any penological goals, and is just a ballooning expense for taxpayers. Given that prison labor is inherently exploitative, and the perverse incentives inherent in our prison system, the Thirteenth Amendment should be amended. The portion of the Thirteenth Amendment reading “except as a punishment for crime whereof the party shall have been duly convicted” should be removed. A constitutional amendment is not just a solution, it is the only permanent solution.

¹⁵⁴ See generally Joan Petersilia, *Beyond the Prison Bubble*, NIJ JOURNAL NO. 268 (Nov. 3, 2011), <https://www.nij.gov/journals/268/pages/prison-bubble.aspx>.

¹⁵⁵ CAL., *supra* note 144; Cummings, *supra* note 44, at 437-39.