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Jailed with a Job:

An Overview of Penal Labor in the American Criminal Justice System

Introduction:

Initially, the focus of this research project centered around the relationship between economic inequality and the criminal justice system. This early research led me to penal labor, starting with the origins of the system in the state of Virginia. Prison labor in the Commonwealth of Virginia is striking because of how different the approach was compared to its southern counterparts, who embraced a system known as convict-leasing. Prison labor in Virginia is very nuanced because unlike some states in the south, Virginia established a penitentiary system, rarely leased convicts out to companies, and instead developed a state farm system in which manufacturing was embedded. The intended question focuses on the early forms of convict labor, specifically in Virginia, and how it contributes to the current structure of prison labor, but on a national scale.

Labor in the penal system is a concept that will help us understand how we arrived at a criminal justice system that primarily affects the poor. This research indicated that as much as the prison population is affected by labor, society is also affected, as every American is the beneficiary of prison labor. Whether it be offenders fighting wildfires in California recently or contributing to the agricultural industry of a state, prison labor has tentacles that stretch into an array of industries. The implementation of labor in the justice system can be understood by exploring early philosophies on the role that prisons should play in punishment.

Some Factors That Helped to Establish the Justice System

A pending question in the criminal justice field is how best to treat the offender. The two most popular schools of thought have been either retribution or rehabilitation. This balancing act has existed for centuries and is especially important in the United States because of the country's fervent efforts to maintain fairness in the justice system. The early framers of America's justice system invested time in understanding why individuals act with malignant intent towards their neighbors and property. Dr. Paul Knepper, a professor of Political Science and head of the Justice studies department at Northern Kentucky University, published a journal for the Kentucky Historical Society regarding the establishment of the penitentiary in Frankfort, Kentucky. According to Knepper, "unlike their colonial ancestors, who attributed criminality to innate depravity, early nineteenth century reformers believed they had uncovered the social origins of crime. They created the penitentiary to isolate lawbreakers from criminogenic social influences to instill proper principles of social organization: separation, labor, and discipline" (Knepper, 130). Veins of progressivism existed in the reformers perspective in terms of recognizing that bad behavior does not mean a person is inherently evil. However, "separation, labor, and discipline," according to Knepper, seemed to serve as a founding checklist for what they deemed an effective justice system and penitentiary, a concept that is rife with criticism. Using labor as a form of instilling order has been baked into the criminal justice system from the beginning.

Creating a penitentiary and invoking labor into America's justice system allowed for reformers to take a critical look at whether or not certain punishments fit the crime. Is the punishment of death, for example, ethical for an offense that is minor? A critical architect of America's system, Thomas Jefferson, grappled with the question while scrutinizing the English

Bloody Code, a document that he was repulsed by. (Knepper 130) The Bloody Code, the penal code that England abided by for a significant period of time, advocated for severe punishments for offenses that were trivial (Woods). A common punishment for many offenses was death, which was a response within the criminal justice system that Jefferson ardently advocated against. In Jefferson's, "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," Jefferson vented his disagreements with death being a popular penalty.

"And whereas the reformation of offenders, tho' an object worthy the attention of the laws, is not effect at all by capital punishments, which exterminate instead of reforming, and should be the last melancholy resource against those whose existence is become inconsistent with the safety of their fellow citizens, which also weaken the state by cutting off so many who, if reformed, might be resourced sound members of society, who, even under a course of correction, might be rendered useful in various labors for the public, and would be living and long continued spectacles to deter others from committing the like offences" (Jefferson).

Based on Jefferson's writing, he intended to make an example out of the prison population by using them as not only a resource, but as a visual reminder to society. The goal, in Jefferson's mind it seems, would be for the public to recognize their laborious efforts for the state, in an effort to deter the public from ending up in the prison system. According to Jefferson, death is not a sustainable measure in the justice system, nor would it deter the public from committing crimes.

Jefferson's push for "labors for the public" is reflected in how Virginia incorporated labor as a punishment in the state's justice system. The earliest forms of prison labor in Virginia were specifically for bettering the state and aiding residents.

History of Labor in the Virginia Criminal Justice System

In a historical sense, Virginia remained an outlier in how it applied labor as a punishment in the state's criminal justice system. Matthew J. Mancini, author of *One Dies, Get Another*, describes Virginia's approach to labor in the justice system by writing that Virginia is, "an example of a Southern state whose penitentiary experiences were atypical of the rest of the region..." (Mancini, 6). Mancini is referencing Virginia's reluctance to fully embrace the system of convict leasing, which was embedded in the criminal justice systems of nearly every southern state. Convict leasing was a system that was established after the civil war where prisoners would be lent to various private companies to perform work that was dependent on the industry that the company was in (Equal Justice Initiative). This system of prison labor was external and not being done directly for the prison system or the state, rather a private company always had a stake in the profits from the labor that inmates did.

Instead, Virginia embedded labor in the penitentiary that was constructed in downtown Richmond. "On March 25, 1800, Governor Wood proclaimed the commonwealth's penitentiary system in operation and appointed Martin Mims the keeper of the still unfinished penitentiary-house" (Brumfield 25). One of the earliest forms of labor was nail-making. "...a nail manufacturing facility under the supervision of Assistant Keeper Henderson Stile was set up as part of the "labor in confinement" strategy" (Brumfield 29). Nail manufacturing mimics a type of labor that was conducted at Monticello, the estate belonging to Thomas Jefferson. "Jefferson's nailery was only one of several operations which he developed along Mulberry Row at Monticello, including spinning, weaving, and blacksmithing" (Keene, 38). Jefferson was the earliest proponent of establishing a penitentiary in Richmond. "The [Virginia] legislature

appropriated thirty thousand dollars for building the Richmond facility and selected plans submitted by Benjamin Henry Latrobe. Jefferson later wrote that Latrobe copied his plans “in principle, but not in exact form” (Knepper, 135). Nail-making being one of the earliest forms of embedded labor in the penitentiary calls into question Jefferson’s influence in both the construction of the building and the policy inside due to the fact that that industry was popular at Jefferson’s estate, Monticello.

Labor remained isolated to the penitentiary for only a period of time before policy makers decided to expand it beyond prison walls with the establishment of the state farm system. One of the farms was located on a plot of land roughly 4,000 acres in size situated on both sides of the James River in Goochland and Powhatan counties. (Richmond Times-Dispatch) The area has been described in romanticized detail by an article from the Richmond Times-Dispatch that was written and published in the year 1923. “A place of ideal beauty, with its lovely old trees, its green lawns and well cultivated fields, its rolling pastures, through which the James River winds, and its neat, well-kept buildings” (“From the Archives”). Based on the description, one would not assume that the plot of land that the article is referencing is the site of penal labor. At the time, it was described in a very idyllic way. The type of labor that was performed on this farm varied. “At the time, the Powhatan side of the farm was used primarily for chicken raising and on the Goochland side; there was a dairy with a herd of over 200 cows which resided in the fields” (“From the Archives”). The architects of this particular state farm were decisive in how they used the plot of land. With the James River bisecting it, inmates were subjected to a completely different form of labor depending on the side that they were stationed. The state farm system is not the only form of convict labor that existed outside of the penitentiary building in Virginia.

The state convict road force was also an expansion of the prison labor system in Virginia but differed from the state farms because it lacked the agrarian component. The Withers-Lassiter Good Roads Law ushered in the use of the state convict road force, because it placed construction and maintenance of roads around the commonwealth in the hands of the penitentiary superintendent (Brumfield 101). One of the first jobs assigned to the State Convict Road force was completed far away from the penitentiary that was situated in downtown Richmond. “The first improvement project completed with the help of the commission was the road between Williamsburg and Jamestown Island. Most of the road was surfaced with gravel and a mixture of sand and clay; about two miles were macadamized” (The Royal Examiner). With one of the first projects being closer to the Eastern Shore, individuals all over the Commonwealth may have prison labor to thank for the construction of the roads they use for travelling every day. The state convict road force represents how widespread prison labor was in the state of Virginia at one point in time. It was not confined to a penitentiary nor a piece of real estate in a rural area separate from civilization; It can be inferred that this construction was taking place among civilians at the time, a visual that Jefferson was a proponent of, as indicated above.

The types of offenses committed for a person to end up in the prison labor system were varied. Superintendents of the penitentiary and those in charge of the state farm and convict road force used a system of index cards to keep a record of the inmates that were in the penitentiary or outside of it for the purposes of performing labor. Overall, according to box 598, some of the more common offenses that individuals committed that would place them on either the state farm or in the road force were robbery, larceny, drunk driving, breaking and entering, vagrancy, violation of prohibition laws, or unauthorized use of an automobile (“*Index Cards for Jailmen*”).

The prominent charges were typically very low-level offenses, which made any escapes by the prisoners less of a risk for the general public, an important consideration as they were completing work outside of a physical building. An escape carried out by offenders who were in the system for petty crimes is less significant than if an offender, who was charged with a crime such as murder, were to escape. One of the most prominent charges in box 598 of *Index Cards for Jailmen* was “non-support of children.” S.N. Bennett, a white male, was convicted of violating the prohibition laws and was sentenced to 12 months in the prison system from July 30, 1926 to August 8, 1927. He served his time at convict camp no. 31, along with an additional four months in “satisfaction of his fine and cost.” Bennett’s costs were a \$200 fine and \$196.50 in court costs (*Index Cards for Jailmen*). Aside from being in jail for a failure to pay child support, a popular charge at the time, individuals were sentenced to labor in order to satisfy an array of payments for the state. Prison labor has particularly affected the indigent, as it can be inferred that they would not have the means to garner funds on short notice.

An economic criticism of the prison labor system in Virginia centered around competition in the country’s free-market system. In a report from the Virginia Advisory Legislative Council, the competition between private industry and state sponsored prison labor was scrutinized. According to House Joint Resolution No. 53, a council was established to study penal labor in the commonwealth. At the time, criticism must have been heavy enough for such a council to be created in the state’s General Assembly. The most notable quote from the source is, “Resolved by the House of Delegates, the Senate concurring, That the Virginia Advisory Legislative Council is directed to make a study and report upon the extent to which agencies and activities of the State compete with private labor and business in any respect. The council shall especially consider the extent to which the use of convict labor in the construction,

reconstruction and maintenance of the State highway system by the State Department of Highways competes with private labor and business in such work on such highways” (Virginia Advisory Legislative Council). The disagreement at the time seemed narrowly focused on the highway system and the industries that both built and maintained the highways. The commonwealth instituted the State Highway Road Force within the penal system for convicts to strictly work on the roads in the state. The council concluded that the state infringed on private industry, but the conclusion was unrelated to the state convict road force. The report says, “Agricultural Lime: The production of this commodity by the State, is a direct intrusion upon private labor and business since most of the lime so produced is sold to private interests...The operations of the Appomattox plant will soon be terminated when the supply is exhausted” (Virginia Advisory Legislative Council). The conclusion differs from the original premise of the council, which seemed more concerned with the state road force than it did the agricultural industry.

Labor in the American prison system has changed over the years in part because the demand for different goods is constantly shifting. Much like convicts were used for various state projects such as the construction and maintenance of roadways through the Virginia State Road Force, prisoners in modern times are still instructed to manufacture goods for the state.

Modern Prison Labor

A state benefitting from the use of prison labor to manufacture goods is not a concept isolated to Virginia. “Every U.S. state except for Alaska features some sort of correctional enterprise, where inmates make goods like license plates and desk chairs. And in several states, public universities are required to buy from those entities” (Burke). Virginia is a state that requires public universities to purchase furniture for campuses from Virginia Correctional

Enterprises, which is an organization made up of roughly 1,300 inmates (Burke). Purchasing goods from the prison system is not a recommendation, rather it is a codified law. "...rule § 53.1-47 of the Code of Virginia requires all universities that receive state funding to purchase their equipment from VCE" (Truong). The approach in Virginia differs from the state of California, where the purchasing of goods from an equivalent system for state use is merely a recommendation (Burke). The products that prisoners employed by the Virginia Correctional Enterprise produce are varied. Throughout the COVID-19 Pandemic, prisoners have made various forms of personal protective equipment. "In less than two months, half a million face masks were manufactured by a handful of offenders for use by 30,000 inmates, thousands of corrections officers and other staff of the Virginia Department of Corrections" (Green). Labor in the criminal justice system has the ability to change with the times, meaning that when demand for a product spikes, such as the case during the COVID-19 pandemic, the organizations that drive prison labor are able to adapt to the demand.

Not only is the production of goods for state use a popular argument used in defense of maintaining the system, but prison labor is very cost effective for the United States. The combination of saving money while producing necessities is the overall incentive. "According to a study by the Prison Policy Initiative, Virginia pays inmates between \$0.55 and \$0.80 per hour for their work...Corrections officials typically note that wages are so low because they're garnished for fees like room and board and debts like child support" (Burke). In the twentieth century, based on the "*Index Cards for Jailmen*," non-support of children was a prevalent reason for not only prison time, but labor was often used to cover the outstanding debt. Lack of child support payment being a reason to compensate for lower wages could mean that predominantly men are not only disproportionately being affected by not only prison labor, but the inadequate

payment that comes with prison labor. “In some states, a judge will base child support orders on the amount he or she *believes* a father can pay, not his actual income. When a father can’t pay child support, he accrues debt called “arrears.” This debt disproportionately harms low-income fathers: no- and low-income parents owe the largest percent of arrears. Child support debt can accrue at an interest rate of up to 12 percent, depending on the state, and cannot be discharged in bankruptcy” (Pratt). The inability to pay child support not only creates insurmountable debt for a parent, but it can put them behind bars. Incarcerating an individual for not paying child support can create a ripple effect of turmoil that plagues them long after they are released from jail. “A 2005 survey in South Carolina found that one in eight inmates had been incarcerated for failure to pay child support. And when fathers are incarcerated, they cannot work or save money to send their children...And incarceration hurts fathers when they try to find employment after release from prison” (Pratt). If, in particular, fathers, are repeatedly being put in jail because of failing to pay child support, it can be inferred that at least a portion of them are producing goods for either a private company or through a state organization. The problem is that oftentimes individuals acquire skills while they are incarcerated but are unable to apply those manufacturing skills in the real world after release, because a previous record is stigmatized and may deem the formerly incarcerated unemployable.

The state of California, a beneficiary of labor in the criminal justice system, has become a case study in putting to use the formerly incarcerated newly acquired skill sets in an industry that is vital to the west coast. “California, where wildfires are a seasonal threat, has long employed inmate firefighters. According to NPR, they’ve made up more than a fifth of the state’s fire crews in recent years, and this year some 2,200 incarcerated people are facing down a historic fire season on the front lines” (Peters). Inmates being tasked with quelling fires around the west

coast shows how prison labor becomes varied depending on the necessities of a state. Because California has used a significant portion of the incarcerated population to work with fire departments during the intense fire season, the state has found a hybrid between maintaining the system of prison labor but putting it to good use after the time has been served in a new bill signed into law by Governor Gavin Newsom. “The bill clears the way for inmates who serve as firefighters to have their convictions expunged upon release, according to state assembly member Elosie Reyes, who sponsored the bill, and to apply for most types of state licenses-- including EMT certification, which is needed for most full-time municipal jobs-- without listing their prior convictions” (Peters). The system that California has established where inmates, who were forced into labor while incarcerated, have the ability to find similar employment after their sentence is key to reducing recidivism.

Private prisons, which exist in abundance in the United States, are a driving force in maintaining the system of labor in the American justice system. One of the main companies that operates private prisons, UNICOR, has netted nearly half a billion dollars per year through the use of prison labor (Stevenson). Private prisons also house a significant portion of inmates. “At its high in 2013, an approximate 220,000 inmates were held in private prisons, the two largest being CoreCivic...and GEO group” (Stevenson). The private prison system has established an interesting insurance policy for itself in being able to maintain labor. “In 2012, Corrections Corporation of America (CCA), the largest for-profit prison company in the United States, sent a letter to 48 state governors offering to buy their public prisons. CCA offered to operate state prisons in exchange for a 20-year contract that included a guarantee from the governors that the prisons would be at least 90 percent filled for the entire term. In other words, taxpayers had to agree to a 90 percent “lockup quota” or else have to pay for empty prison beds” (Habibi). Private

prisons have ensured that their facilities will rarely sink to below ninety percent capacity, therefore continuing the system of prison labor, and potentially incentivizing prison as a means of rehabilitation in the justice system. There is a significant financial incentive for private prisons to continue to put inmates to work in their facilities. “UNICOR employed almost 17,000 inmates in the 2017 fiscal year. The corporation sold \$453.8 million in goods including clothing and textiles, office furniture, electronics during the same period. Almost 4,500 inmates working for UNICOR in states from Colorado to New Jersey contributed to the clothing and textiles program, which sold over \$126 million in products” (Mortiz-Rabson). Inmates who are directly responsible for the production of these goods, oftentimes not by choice, make a wage that is significantly under the national minimum wage despite the large sums of money that private prison companies are making through the sale of their products.

The Political Landscape of Prison Labor

Prison labor, recently, has seeped into the criminal justice reform conversation. Laymen tend to not be as invested in what occurs behind the prison walls. Inmates being subjected to labor does not carry the same visual that other criminal justice reform conversations do. For centuries, it has been the focus of policymakers and experts to determine how best to handle those who have done wrong in our society. When it comes to prison labor, the scales remain tipped between whether or not the system is a form of rehabilitation or exploitation. In terms of using labor as a method to rehabilitate, there is data to corroborate the claim. “A study of federal prisoners found inmates who took part in UNICOR were 24 percent less likely to reoffend and 14 percent more likely to be employed a year after their release. Another study of a Florida program found significant increases in employment, but no changes in inmates’ likelihood to

reoffend” (Lopez). It is important to recognize any bias in the source of the data for context purposes, as UNICOR is a private prison company.

Political leaders have recognized the role that private prisons play in the American justice system. Sally Yates, the former Deputy Attorney General of the United States under former President Barack Obama’s administration, played a role in establishing where the United States Department of Justice stood, at the time, on the use of private prisons. Yates wrote, “...the federal prison population has begun to decline from nearly 220,000 inmates in 2013 to fewer than 195,000 inmates today. In part, this is due to several significant efforts to recalibrate federal sentencing policy, including the retroactive application of revised drug sentencing guidelines, new charging policies for low-level, non-violent drug offenders, and the Administration’s ongoing clemency initiative” (Yates). The sturdiness of the private prison business and labor in the criminal justice system is determined by the number of offenders in the system. Yates clarified in the Department of Justice memo specific reasons why federal facilities are more desirable as opposed to private prisons. “They [private prisons] simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource-- and these services are essential to reducing recidivism and improving public safety” (Yates). The United States Department of Justice concluded during the Obama administration that their facilities could handle the punishment and potential incarceration of offenders, as opposed to facilities operated by companies such as CoreCivic or UNICOR. Yates communicated the Department’s decision in the memo by writing, “For all these reasons, I am

eager to enlist your help in beginning the process of reducing-- and ultimately ending-- our use of privately operated prisons. As you know, all of the Bureau's existing contracts with private prison companies are term-limited and subject to renewal or termination" (Yates). The Department of Justice's decision in abandoning the use of private prisons is significant, because it made a dent in the business model of CoreCivic or UNICOR, to name a few companies. "The number of federal prisoners held in private prisons rose 120 percent from 15,524 in 2000 to 34,159 in 2016" (Gostch, Batsi).

A changing of the guard at the Department of Justice means that policy can either be changed or created under the direction of a new Attorney General. "The Trump administration is following through on its promise to use more private contract prisons, with the Justice Department seeking to identify inmates to transfer out of government-owned facilities and to cut federal guard positions" (Katz). Contrary to the decision made by the Department of Justice at the tail end of the Obama administration, Jeff Sessions, the former Attorney General who served during a portion of the Trump administration, intended to beef up the role that private prisons play in the criminal justice system. The Sessions decision to make the private prison industry more robust is a lesson in campaign finance. "George Zoley, GEO Group's founder and CEO, has given \$514,800 to Republicans and only \$10,000 to Democrats during the [2020] election cycle, campaign finance records show" (Rambaran). Based on the amount of money that Zoley has given to republicans, it's clear that depending on the party in office, private prisons may fare better. Whether or not private prison companies have the backs of a particular political candidate has more tentacles than just campaign finance. "In 2017, the GEO Group moved its annual conference to a Trump-owned resort in Boca Raton, Florida" (Ahmed). There is an interesting dynamic at play between former President Trump and the private prison industry. The two seem

to have one another's back. A heavier reliance on private prisons under former President Trump's leadership coupled with significant spending on the Trump campaign on behalf of the GEO Group, one private prison company, shows how intertwined the political system is with the criminal justice system, and how reform can be dependent on whose interests are being protected. If private prisons churn a profit off of labor in the justice system, a prevalence of their facilities and a heavier reliance on them from the United States government would mean that the labor structure is maintained. The opposite scenario, which occurred during the Obama administration, is that if private prisons become less of a crutch for the Government and are closed down, the prison labor structure takes a setback. The power is in the hands of the registered voters to determine which course of action is correct.

Conclusion:

Outside of legislation, the structure of prison labor is only as strong as the number of people that are in the prison system, something that criminal justice reformers and scholars have contended for decades. Drug charges, a low-level offense, contribute to the sturdiness of the prison structure. A state that has bucked the system is Oregon, which allowed voters to vote on ballot measure 110, which could determine whether or not certain drug offenses warrant jail time. "Instead of facing arrest, those found by law enforcement with personal-use amounts of drugs would face a civil citation, "like a traffic ticket," and not a criminal citation, said Matt Sutton, spokesman for the Drug Policy Alliance" (Selsky). Other low-level crimes such as drug possession and prostitution are also being reconsidered as the country begins to rethink prison reform and consider who is put in the system.

There is not a widespread abolition movement of labor within the prison system that has gained significant ground, therefore the way that the system is used and applied is the focal

point. With less individuals trapped in the system for crimes that are not a significant debt to society, prison labor would become less exploited. The overarching problem that has persisted is using individuals who are not a significant threat to society for the benefit of the state. Much like Oregon, the City of New York has agitated the status quo by changing what is recognized as a crime by decriminalizing prostitution unlicensed massage (Treisman). Both drug crimes and behavior related to sex work are starting to be re-examined as to whether or not they pose a threat to society that would deem them worthy of time in prison. A long term, practical goal for criminal justice reform is to remove victimless crimes from our purview as needing retribution, in hopes of preventing people from becoming victims of exploitation by the state. It's important to recognize that occasionally, maintaining the status quo is not inherently bad, rather how the status quo is applied can be a significant driver of change, if a complete overhaul of a system does not yet have widespread appeal.

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