

# ONE NATION'S "GULAG" IS ANOTHER NATION'S "FACTORY WITHIN A FENCE": PRISON-LABOR IN THE PEOPLE'S REPUBLIC OF CHINA AND THE UNITED STATES OF AMERICA

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## INTRODUCTION

Every year, the President of the United States ("U.S.") must decide whether to renew the most-favored-nation ("MFN") trade status of the People's Republic of China ("P.R.C.").<sup>1</sup> For each of the past several years, the President's decision has been preceded by intensive lobbying from a coalition of U.S. human-rights groups and labor unions urging the President not to renew the P.R.C.'s MFN status because these groups allege that the P.R.C. exports prisoner-made goods to the U.S. To the human rights groups, such exports are objectionable because, they believe, Chinese prison-laborers work under inhumane conditions and some are actually political prisoners. To the labor unions, the stated concern is that Chinese imports have an unfair competitive advantage over comparable domestic goods due to their cheap, forced-labor component. It seems evident, however, that both parties have broader, more fundamental reasons for wanting MFN status denied the P.R.C., and each has apparently seized upon the prison-labor issue primarily out of recognition that, in addition to providing a common bond between these two unfamiliar allies, the issue plays well on a gut level with the U.S. press and the American public. The Chinese government is also aware of the media appeal of the prison-labor issue. Each year, prior to the U.S. President's MFN decision, it has issued official justifications for its prison-labor policy, publicly denied that prisoner-

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1. See Trade Act of 1974, §§ 402(c)-(d)(1), 19 U.S.C. §§ 2432(c)-(d)(1) (1974).

made goods are exported to the U.S., and released several well-known political prisoners.

The U.S. media first took a major interest in the Chinese prison-labor issue in 1991, when U.S. human-rights activist and former P.R.C. prisoner Harry Hongda Wu returned from a trip to the P.R.C. with clandestine videotapes. In those tapes, labor-camp authorities and others were seen offering the services of prison-laborers to Wu, who had assumed for his trip the identity of an American businessman interested in manufacturing goods for export to the U.S. The tapes were prominently featured on the popular American television program *60 Minutes*<sup>2</sup> and led to an article in the U.S. magazine *Newsweek* branding Chinese prison-labor camps "the last gulag."<sup>3</sup> This article was promptly denounced by the P.R.C. government as "an abominable piece of writing to vilify China,"<sup>4</sup> but the U.S. media attacks were repeated in 1992 and 1993 as the President's MFN decision was debated.

Whether the efforts of American human-rights groups and labor unions, and of their allies in the U.S. media, have had any real impact on the President's annual MFN decision is debatable. In an effort to defuse the persistent controversy, President Bush's Under Secretary of State Arnold L. Kanter and P.R.C. Deputy Foreign Minister Liu Huaqiu signed a brief Memorandum of Understanding in August 1992 whereby the P.R.C. agreed: (1) to investigate any future accusations of the use of prison-labor in the production of its exports; (2) to report on its compliance with U.S. laws prohibiting the import of prisoner-made goods and P.R.C. regulations prohibiting the export of such goods; (3) to furnish information regarding suspected violations of the relevant laws and regulations; and (4) to allow U.S. diplomats to inspect facilities suspected of using prison-labor in exports.<sup>5</sup> Human rights groups quickly termed the agreement vague,<sup>6</sup> while labor unions called it flawed.<sup>7</sup>

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2. *60 Minutes* (CBS television broadcast, Sept. 14, 1991).

3. Charles Lane et al., *The Last Gulag*, *NEWSWEEK*, Sept. 23, 1991, at 26.

4. *Chinese Spokesman on Export of Labor Camp Products to USA*, BBC Summary of World Broadcasts, Sept. 20, 1991, available in LEXIS, Nexis Library, BBCSWB File.

5. *Prohibiting the Import of Chinese Prison Labor Products—Arnold Kanter, Under Secretary for Political Affairs, Statement at the Signing of the Chinese Prison Labor Memorandum of Understanding*, U.S. Department of State Dispatch, Aug. 17, 1992, available in LEXIS, Nexis Library, DSTATE File.

6. Michael Chugani, *China Deal Slammed as Worthless*, *S. CHINA MORNING POST*, Aug. 19, 1992, at 5.

7. Barbara Crossette, *China Signs Agreement with U.S. to Cut Exports Made by Prisoners*, *N.Y. TIMES*, Aug. 8, 1992, at A3.

In May of the following year, President Bill Clinton granted the P.R.C. continued MFN status through July 1994 but simultaneously issued an executive order explicitly making extension beyond that point contingent upon the P.R.C.'s adherence to the 1992 Memorandum of Understanding.<sup>8</sup> Clinton's actions were widely seen as a step back from his fierce campaign criticism of Bush's alleged failure to exert sufficient economic pressure on the P.R.C. through the MFN extension process.<sup>9</sup> Clinton's executive order virtually guarantees, however, that the annual media debate regarding Chinese prison-labor will recur in the spring of 1994.

Unfortunately, one topic almost certain to be missing from that debate is a discussion of U.S. prison-labor and of the mutual admiration that until very recently existed in the U.S. and P.R.C. with regard to each country's prison-labor system. For example, in July 1991, before the broadcasting of the *60 Minutes* story on Chinese prison-labor, the official Chinese press amicably noted that P.R.C. penologists had "carried out academic exchanges with . . . the USA . . . and borrowed [its] useful experiences" with prison-labor.<sup>10</sup> And in late 1981, then Chief Justice of the U.S. Supreme Court Warren Burger had argued for an expansion of American prison industries, which he called "factories within fences," and spoken enthusiastically of his earlier visit to a Chinese prison in which hosiery and casual shoes were being manufactured. With regard to prison industry, Chief Justice Burger implied that the P.R.C., in contrast to the U.S., had "gone about the matter in the correct way."<sup>11</sup>

Also likely to be overlooked in the debate is the fact that the international community officially approves of prison-labor. For example, the United Nations ("U.N.") Standard Minimum Rules for the Treatment of Prisoners actually call for member states to ensure that "[a]ll prisoners under sentence . . . be required to work, subject to their physical and mental fitness."<sup>12</sup> The Standard Minimum Rules represent a longstanding international consensus on the proper minimum treatment of prisoners. They were first adopted by the League of Nations in 1935, and their validity was affirmed by the First United Nations Congress on

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8. Conditions for Renewal of Most-Favored-Nation Status for the People's Republic of China in 1994, Exec. Order No. 12,850, 58 Fed. Reg. 31327-29 (1993).

9. See, e.g., A. M. Rosenthal, *Do Gods Get Angry?*, N. Y. TIMES, June 18, 1993, at A27.

10. *Justice Vice-Minister on Reform-Through-Labour Laws*, BBC Summary of World Broadcasts, Sept. 20, 1991, available in LEXIS, Nexis Library, BBCSWB File.

11. Warren E. Burger, *For the Future: Prisons as Factories, Not as Warehouses*, CRIM. JUST. NEWSL., Jan. 4, 1982, at 2-5 (addressing the Lincoln Bar Ass'n at the U. of Nebraska on Dec. 16, 1981).

12. E.S.C. Res. 663 (XXIV) U.N. ESCOR, 24th Sess., Supp. No. 1, at 11 (1957).

the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955. The Rules were approved by the U.N. Economic and Social Council in its resolutions 663 C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977, and were implicitly reaffirmed by the Council as recently as 1984.<sup>13</sup> One U.N. official has gone so far as to call them "[u]p to now . . . one of the greatest contributions ever made in criminal policy matters."<sup>14</sup>

In short, while the media and others in the U.S. annually fault the P.R.C. for practicing prison-labor, they generally fail to note that the U.S. also engages in this penal policy and that the U.N. specifically advocates it. This seeming paradox leads one naturally to question the extent to which the U.S. and P.R.C. prison-labor systems are actually comparable. In order to answer this question and thereby to determine whether the U.S. criticism of P.R.C. prison-labor has been fair, this article will examine: First, some of the relevant Chinese and American laws; second, a number of general facts and statistics regarding P.R.C. and U.S. prison-labor; third, several of the primary objectives of P.R.C. and U.S. prison-labor; and, fourth, evidence of the extent to which these objectives have been fulfilled.

## I. SURVEY OF PRISON-LABOR LAWS

### A. P.R.C. PRISON-LABOR LAWS

Three legally distinct categories of prisoners comprise the Chinese prison-labor force. The first category consists of prisoners sentenced to "labor reform" (*laogai*)<sup>15</sup> after being formally arrested, tried, and convicted of a crime. The second category is made up of prisoners undergoing "labor re-education" (*laojiao*).<sup>16</sup> Procedurally, this is an administrative rather than criminal sentence and is dispensed by the public security forces rather than the courts. The third category of Chinese prison-laborers consists of prisoners who technically have completed their sentences but, pursuant to an administrative procedure known as "forced job-placement" (*jiuye*),<sup>17</sup> have been retained within the

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13. In 1980, the Sixth U.N. Congress recommended procedures for the effective implementation of the Standard Minimum Rules and these procedures were ultimately adopted by the Economic and Social Council in May 1984. See E.S.C. Res. 1984/47, U.N. ESCOR, 1st Reg. Sess., 21st Plen. Mtg., Supp. No. 1 at 29 (1984).

14. MANUEL LOPEZ-REY, A GUIDE TO UNITED NATIONS CRIMINAL POLICY 21 (1985).

15. *Laogai* can be translated as "reform through labor."

16. *Laojiao* is translated in various sources as "re-education through labor," "labor rehabilitation," or "rehabilitation through labor."

17. *Jiuye* is translated by various authors simply as "job placement."

prison confines to continue their prison-labor as "free" workers.<sup>18</sup>

### 1. Labor Reform

The P.R.C. Constitution lays the groundwork for labor reform of criminals by asserting that "[t]he state maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes *and reforms* criminals."<sup>19</sup> This assertion of the state's obligation to reform prisoners contrasts, for example, with Article 3 of the Organic Law of the People's Courts of the P.R.C., which says only that "[t]he task of the people's courts is to . . . punish all criminals,"<sup>20</sup> and with Article 2 of the Criminal Procedure Law of the P.R.C., which says that "[t]he aim of the Criminal Procedure Law of the People's Republic of China is to ensure that . . . criminals shall be punished."<sup>21</sup>

The 1954 Act of the P.R.C. for Reform Through Labor<sup>22</sup> details some of the specifics of labor reform as a correctional policy. Convicts work without pay for the duration of their sentences. Article 33 of the Act provides that such work can include industrial, agricultural, and mining activities, as well as contributions to large public-works projects such as water conservancy and road construction. Article 30 provides for the inclusion of labor-reform production in the national economic plan. Article 35 states that "plans for the distribution and coordination of criminal labor will be based on the number of criminals in each area and the needs of the nation in production."<sup>23</sup>

Further specifics on labor reform can be found in the Criminal Law of the P.R.C.<sup>24</sup> Article 41 of the Criminal Law states, "A criminal sentenced to fixed-term imprisonment or life impris-

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18. Chinese officials generally do not term either of the latter two categories of individuals "prisoners." However, the overwhelming consensus within the international community is that such individuals are clearly prisoners in fact if not in name.

19. P.R.C. CONST., art. 28 (1982), available in LEXIS, Intlaw Library, Chinalaw File, No. 141 (emphasis added).

20. P.R.C. ORGANIC LAW OF THE PEOPLE'S COURTS, art. 3 (effective Sept. 2, 1983), available in LEXIS, Intlaw Library, Chinalaw File, No. 43.

21. P.R.C. CRIM. PROC. LAW, art. 2 (effective Jan. 1, 1980), available in LEXIS, Intlaw Library, Chinalaw File, No. 40.

22. ZHONGHUA RENMIN GONGHEGUO LAODONG GAIZAO [P.R.C. Act for Reform Through Labor], in ZHONGHUA RENMIN GONGHEGUO XIANXING FAGUI HUIBIAN, 1949-1985, ZHENGFA JUAN JUNSHI JI QITA JUAN [P.R.C. COLLECTION OF LAWS AND REGULATIONS IN FORCE, 1949-1985, POLITICS AND LAW, MILITARY, AND OTHER DOCUMENTS] 157-75 (1987).

23. *Id.* art. 35.

24. P.R.C. CRIM. LAW (effective Jan. 1, 1980), available in LEXIS, Intlaw Library, Chinalaw File, No. 39.

onment shall serve his sentence in prison or another place for reform through labour. Anyone who is able to work shall undergo reform through labour."<sup>25</sup> Articles 43 and 46 outline one of the more imaginative roles that labor reform plays within the Chinese penal system—that of a moral litmus-test for death-row inmates. According to Article 43, "If the immediate execution of a criminal punishable be [sic] death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence; the criminal shall undergo reform through labour and the results shall be observed."<sup>26</sup> Article 46 then states, "If a person sentenced to death with a suspension of execution shows true repentance during the period of suspension, his punishment shall be commuted . . . ; if it is verified that he has resisted reform in a flagrant manner, the death penalty shall be executed . . . ."<sup>27</sup>

The legal institution of labor reform consists of more than merely putting a convict to work. It has an educational component as well. Thus, Article 25 of the Act for Reform Through Labor states, "Labor reform and education of political ideology should be coordinated to make forced labor gradually become voluntary labor in order to reach the goal of reforming criminals into new men."<sup>28</sup> Expounding on this same theme, Article 26 provides, "With regard to criminals, measures such as collective lecturing, individual talks, documents learning, and organized discussions should be constantly and systematically employed to induce self-accusing confessions, to explain current events, and to teach productive skills so that their criminal tendency could be eliminated and new conceptions of morality could be established."<sup>29</sup>

According to a white paper on human rights in the P.R.C. issued by the Chinese government in November 1991 and another on criminal reform in the P.R.C. issued in August 1992, various other provisions of P.R.C. law guarantee that convicts shall work no more than eight hours daily, have time off during holidays, and receive the same food rations and labor and health protection as those received by ordinary employees of state-run enterprises engaged in similar lines of work.<sup>30</sup> The White Paper

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25. *Id.* art. 41.

26. *Id.* art. 43.

27. *Id.* art. 46.

28. P.R.C. Act for Reform Through Labor, *supra* note 22, art. 25.

29. *Id.* art 26.

30. *State Council White Paper on Human Rights in China*, BBC Summary of World Broadcasts, Nov. 8, 1991, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *White Paper on Human Rights*]; *State Council White Paper on Criminal Reform in China*, BBC Summary of World Broadcasts, Aug. 13, 1992, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *White Paper on Criminal Re-*

on Human Rights further states that P.R.C. law mandates bonuses for prisoners who surpass their production quotas and for those who hold "technical titles at and above the middle grade."<sup>31</sup> The White Paper on Criminal Reform states that regulations exist which prohibit the export of products made in the labor-reform program, and that these regulations were reissued in October 1991.<sup>32</sup>

## 2. *Labor Re-education*

The administrative sanction known as labor re-education originated with the 1957 Decision of the State Council Regarding the Question of Labor Re-education.<sup>33</sup> According to the 1957 Decision, labor re-education is imposed "with a view to reforming those persons who are able to work but insist on leading an idle life, violating law and discipline, or will not engage in honest pursuits, into persons who are able to support themselves through their own labour, and to further maintaining public order, thus facilitating socialist construction."<sup>34</sup>

The Decision establishes four categories of persons subject to labor re-education: first, "those who will not engage in honest pursuits, involve themselves in hooliganism, commit larceny, fraud or other acts *for which they are not criminally liable* or violate public security rules and refuse to mend their ways despite repeated admonition;"<sup>35</sup> second, "counterrevolutionaries and anti-socialist reactionaries who commit minor offenses *and are not criminally liable*;"<sup>36</sup> third, "employees of government organs, people's organizations, enterprises and schools who are able-bodied but have refused to work for a long period, violate discipline or jeopardized public order;"<sup>37</sup> and fourth, "persons who refuse to accept work assigned to them or the arrangement made for their employment and settlement after their demobilization from military service, or who decline to take part in manual labor and production despite persuasion, keep behaving disruptively

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form]. A "white paper" is an official government report on any subject. The P.R.C.'s State Council has, within the past several years, issued white papers not only on human rights and criminal reform in the P.R.C. but also, among other things, on the P.R.C.'s relations with Taiwan in 1993 and human rights in Tibet and the P.R.C.'s claim of sovereignty over Tibet in 1992.

31. *Supra* note 30.

32. *Id.*

33. *Decision of the State Council Regarding the Question of Rehabilitation Through Labour* (Aug. 1, 1957), available in LEXIS, Intlaw Library, Chinalaw File, No. 12.

34. *Id.*

35. *Id.* (emphasis added).

36. *Id.* (emphasis added).

37. *Id.*

on purpose, obstruct public officials from performing their duties and refuse to mend their ways despite repeated admonition."<sup>38</sup>

The 1986 Regulations of the P.R.C. on Administrative Penalties for Public Security dictate that administrative sanctions such as labor re-education "be ruled on by the city or county public security bureaus or sub-bureaus or public security organs equivalent to the county level."<sup>39</sup> In rural areas where there is no local police station, town governments may impose administrative sanctions themselves. Article 34 of the 1986 Regulations lists the applicable procedures to be followed in imposing administrative sanctions. These procedures include issuing a summons, interrogating the offender, collecting evidence, and immediately pronouncing a verdict upon the offender.<sup>40</sup> Article 39 provides for appeal to higher public security organs by either the offender or the victim.<sup>41</sup>

The State Council's Supplementary Provisions for Labor Re-education state that "the term of rehabilitation through labour shall be one to three years. When necessary, it may be extended for one more year. Rest shall be allowed on festivals and Sundays."<sup>42</sup> The Decision of the State Council Regarding the Question of Labor Re-education states that labor re-education prisoners "shall be appropriately paid with wages according to the actual work they do" and that "a suitable amount may be deducted from the wages for the support of their dependents or reserved for their own expenses in settling down to a stable life."<sup>43</sup>

### 3. *Forced Job-Placement*

The policy of "keeping many and freeing few" was approved at the Second National Conference in December 1953. Under this policy, 70% of labor-reform prisoners were to be retained within the prison camp to continue working there after the completion of their sentences, while only 30% were to be released.

This specific policy was abandoned after the Third Plenum of the Eleventh Party Congress.<sup>44</sup> However, the 1981 Decision

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38. *Id.*

39. P.R.C. REGULATIONS ON ADMINISTRATIVE PENALTIES FOR PUBLIC SECURITY, art. 33 (effective Jan. 1, 1987), available in LEXIS, Intlaw Library, Chinalaw File, No. 368.

40. *Id.* art. 34.

41. *Id.* art. 39.

42. *Supplementary Provisions of the State Council for Rehabilitation Through Labour* (Nov. 29, 1979), available in LEXIS, Intlaw Library, Chinalaw File, No. 52.

43. *Decision of the State Council Regarding the Question of Rehabilitation Through Labour*, *supra* note 39.

44. See STEVEN W. MOSHER, MADE IN THE CHINESE LAOGAI: CHINA'S USE OF PRISONERS TO PRODUCE GOODS FOR EXPORT 4 (1990).

Regarding the Handling of Criminals Undergoing Labor Reform and Persons Undergoing Rehabilitation Through Labour Who Escape or Commit New Crimes reaffirms the general principle that "criminals who have not reformed after undergoing reform through labour shall be employed at the place of reform after the completion of their term."<sup>45</sup> This Decision further provides that "those who, after being released upon completion of their term of reform, commit minor criminal acts, not qualifying for criminal sanctions, are to be sentenced to rehabilitation through labour. In general they shall be employed at the place of reform after the completion of their terms of re-education and may not return to the large or medium-sized cities where they originally lived."<sup>46</sup> This is effectively a life sentence.

## B. U.S. PRISON-LABOR LAWS

Although not itself requiring that convicts be put to work, the U.S. Constitution clearly sanctions such an eventuality. "Neither Slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subjected to their jurisdiction."<sup>47</sup>

Pursuant to this constitutional language, prisoners in the U.S. are not subject to forced labor before they are convicted of a crime. The Constitution, however, only bars pre-conviction labor if it is involuntary. Several States, therefore, permit voluntary labor by prisoners awaiting trial or sentencing, provided those prisoners have first consented in writing to perform such labor.<sup>48</sup>

### 1. Federal Prison-labor

Within the federal prison system, governmental policy requires that all convicts work. The U.S. Congress has stated: "It is the policy of the Federal Government that convicted inmates confined in Federal prisons, jails, and other detention facilities shall work. The type of work in which they will be involved shall be dictated by appropriate security considerations and by the health of the prisoner involved."<sup>49</sup>

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45. *Decision of the Standing Comm. of the National People's Cong. Regarding the Handling of Criminals Undergoing Reform Through Labour and Persons Undergoing Rehabilitation Through Labour Who Escape or Commit New Crimes* (Jul. 10, 1981), available in LEXIS, Intlaw Library, Chinalaw File, No. 93.

46. *Id.*

47. U.S. CONST. amend. XIII, § 1 (emphasis added).

48. See, e.g., ARIZ. REV. STAT. ANN. §§ 31-141(D) (1988).

49. Crime Control Act, Pub. L. No. 101-647, Title XXIX, § 2905, 104 Stat. 4914 (1990) (noted as "other provision" at 18 U.S.C. § 4121 (1993)).

Since 1937, prison-labor in American federal prisons has been controlled by Federal Prison Industries, Inc. ("FPI"), a governmental corporation of the District of Columbia. FPI is also popularly known as UNICOR. FPI's enabling legislation has remained largely unchanged since its enactment in 1934.<sup>50</sup> The enabling legislation requires FPI to operate on the "state-use" principle, selling the goods that it produces only to federal departments and agencies. Sale to the public in competition with private enterprise is prohibited.<sup>51</sup> Federal departments and agencies must purchase FPI products to meet their requirements as long as FPI's prices are competitive.<sup>52</sup>

The enabling legislation also requires FPI to "provide employment for the greatest number of inmates in the United States penal and correctional institutions who are eligible to work as is reasonably possible."<sup>53</sup> FPI is permitted, but not required, to provide for the vocational training of qualified inmates.<sup>54</sup> However, employment is to be of a type that "will give the inmates of federal penal and correctional institutions a maximum opportunity to acquire a knowledge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release."<sup>55</sup>

The enabling legislation allows for, but does not mandate, prison-laborers to be paid wages and to be compensated for their injuries.<sup>56</sup> FPI's own regulations state that "[i]nmate pay is based upon the grade of the job performed. An inmate assigned to Federal Prison Industries, Inc., is classified in one of four grades, based upon job assignment and level of skill."<sup>57</sup> Inmates receive compensation at twice their ordinary rate for overtime work.<sup>58</sup> In addition, they accrue paid vacation time and longevity bonuses for time assigned to FPI.<sup>59</sup> FPI laborers benefit from the following paid federal holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day (!), Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas.<sup>60</sup>

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50. See 18 U.S.C. §§ 4121-28 (1993). As stated by one FPI official, "[t]he solutions written into th[is] legislation have stood the test of time, and will help carry us into the future." Gerald M. Farkas, *Teaching Prisoners About Living on the Outside*, JUDGES' J., Winter 1986, at 17, 19.

51. 18 U.S.C. § 4122(a) (1993).

52. *Id.* § 4124.

53. *Id.* § 4122(b)(1).

54. *Id.* § 4122(c).

55. *Id.* § 4123.

56. *Id.* § 4126(a)(4).

57. 28 C.F.R. § 345.14 (1992).

58. *Id.* § 345.19.

59. *Id.* § 345.11.

60. *Id.* § 345.23.

FPI may only utilize federal prison-labor for industrial production. Federal inmates not employed by FPI work mostly within the confines of the prison and perform laundry, janitorial, culinary, office, and maintenance duties. Other inmates may be engaged in the construction or repair of public works outside the prison.<sup>61</sup>

## 2. State Prison-labor

This article does not purport to provide a detailed analysis of each individual State's prison-labor laws. However, the following is a brief survey of the federal laws restricting the scope of State prison-labor and a summary of the historical context in which these laws were enacted. In addition, some individual State prison-labor laws will be briefly referenced later in this article by way of example.

During the nineteenth century, State prison factories essentially constituted "an exploitative revenue-producing program for state legislatures."<sup>62</sup> Most States ran their prison-labor systems on the "contract" principle, which allowed private entrepreneurs to operate factories in State prisons while paying the State for the use of its prisoners' labor. By the end of the nineteenth century, however, the combination of unfair treatment of prisoners and unfair competition with free-world labor and manufacturers motivated some States to pass laws limiting prison industry.<sup>63</sup>

In 1929, mounting pressure on Congress from business and labor organizations resulted in the enactment of the Hawes-Cooper Act, the first federal law aimed at curbing State prison-industries.<sup>64</sup> The Hawes-Cooper Act established that "[g]oods, wares, and merchandise produced or mined in a penal institution or by a prisoner . . . and transported into and used, sold, or stored in a State or territory or possession of the United States [other than for governmental use], are subject to the laws of that State, territory or possession."<sup>65</sup> The Act thereby enabled States that had already prohibited the sale of prisoner-made goods manufactured by in-State prison enterprises also to prohibit the sale of prisoner-made goods imported from out-of-State prison enterprises, despite the usual constitutional proscription of State interference with interstate commerce.

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61. 18 U.S.C. § 4125 (1993).

62. BARBARA J. AUERBACH ET AL., U.S. DEP'T OF JUSTICE, WORK IN AMERICAN PRISONS: THE PRIVATE SECTOR GETS INVOLVED 71 (1988).

63. *Id.*

64. Hawes-Cooper Act, ch. 79, §§ 1-2, 45 Stat. 1084 (1929) (codified as amended at 49 U.S.C. § 11507 (1992)).

65. *Id.*

In an effort to strengthen the Hawes-Cooper Act, Congress passed the Ashurst-Sumners Act in 1935.<sup>66</sup> This Act permitted States that had already prohibited the sale of prisoner-made goods within their borders to exclude even the importation of prisoner-made goods. Due to enforcement problems, the Ashurst-Sumners Act was eventually superseded by the Sumners-Ashurst Act in 1940.<sup>67</sup> This Act remains effective today and prohibits altogether the interstate transfer of prisoner-made goods: "Whoever knowingly transports *in interstate commerce or from any foreign country into the United States* [other than for governmental use] any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners . . . shall be fined not more than \$50,000 or imprisoned not more than two years, or both."<sup>68</sup> Thus, prisoner-made goods in effect can be sold only in their State of production. With no possibility of selling prisoner-made goods out of State, private manufacturers quickly lost interest in employing prisoners, even in those States where such employment remained legal under State law.

However, by 1979 the political winds had shifted and Congress concluded that a renewed involvement by the private sector in State prison industries was actually desirable so as to "overcome state prison industry problems of limited market, unskilled staff and workers, undercapitalized plant and equipment, and an atmosphere more akin to a sheltered workshop than a factory; and . . . [provide] a pay system for prisoners based on productivity, rather than the stipend system, . . . to bring a healthy, free-world reality to the lives of inmate workers and the institutions in which they live."<sup>69</sup> As a result of this policy shift, Congress cautiously passed the Percy Amendment to the Sumners-Ashurst Act.<sup>70</sup>

The Percy Amendment, in its current incarnation, excepts from the restrictions of the Sumners-Ashurst Act prisoner-made goods produced by up to fifty non-federal prison pilot projects designated by the Director of the Bureau of Justice Assistance. In order to satisfy humanitarian, labor, and industrial critics of prison-labor, the Amendment requires that prisoner-employees

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66. Ashurst-Sumners Act, ch. 412, § 1, 49 Stat. 494 (1935) (codified as amended at 18 U.S.C. § 1761 (1992)).

67. Sumners-Ashurst Act, ch. 872, 54 Stat. 1134 (1940) (codified as amended at 18 U.S.C. § 1761 (1992)).

68. 18 U.S.C. 1761(a) (1993) (emphasis added). Another federal statute likewise bars the entry of prison goods from abroad. See 19 U.S.C. § 1307 (1993) ("Convict Made Goods: Importation Prohibited").

69. AUERBACH, *supra* note 62, at 10.

70. Percy Amendment, Pub. L. 96-157, § 2, 93 Stat. 1215 (1979) (codified as amended at 18 U.S.C. § 1761(c) (1992)).

of the pilot projects: (1) receive "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed," subject to deductions for taxes, room and board, family support, and victim compensation; (2) have "the right to participate in benefits made available by the Federal or State government to other individuals on the basis of their employment, such as workmen's compensation;" and (3) "have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages."<sup>71</sup>

The Percy Amendment has thus partially restored the States' prerogative to allow State inmates to work for private manufacturers, a prerogative that many States had once abused. This has provided the States with increased flexibility in determining how their prisoners can best be put to work.<sup>72</sup>

### C. COMPARATIVE ANALYSIS

In a broad sense, P.R.C. and U.S. federal prison-labor laws are surprisingly similar. Both nations have laws requiring rather than simply permitting prisoners to work. Moreover, the laws of each nation predicate this requirement principally on the desirability of providing an opportunity for prisoners to reform themselves through their own prison-labor. It is worth mentioning that, in this respect, both nations are in accord with the U.N. Standard Minimum Rules for the Treatment of Prisoners, which call for member states to require prisoners to work and stress that "[t]he interests of the prisoners and of their vocational training . . . must not be subordinated to the purpose of making a financial profit from an industry in the institution."<sup>73</sup>

Furthermore, both the P.R.C. and the U.S. are alike in permitting at least some prisoner-made goods to be sold on the private market, although one difference is the state-use limitation that legally restricts the sale of American federal prisoner-made goods and, for the most part, State prisoner-made goods as well. Under U.S. law, no prisoner-made goods can be sold in the private market unless the prisoners that manufactured them were, per the Percy Amendment, paid market wages. Chinese law, by

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71. *Id.*

72. The State of Washington, for example, now has five classes of prison work programs. Class I consists of private employers providing equipment, management, supervision, and training for prisoner-employees who are paid fair market wages. Class II consists of traditional state-use prison industries. Class III corresponds to institutional-support positions. Finally, classes IV and V are comprised of construction jobs and maintenance of public works. See WASH. REV. CODE § 72.09.100 (1991); Warren Chan, *A Return to the Work Ethic*, JUDGES' J., Winter 1988, at 29.

73. E.S.C. Res. 663 (XXIV) U.N. ESCOR, 24th Sess., Supp. No. 1, at 11 (1957).

contrast, does not restrict the access of its prisoner-made goods at least so far as the domestic market is concerned.

A more significant difference between the two nations' prison-labor laws lies in the apparent lack of due process associated with the P.R.C. sentences of labor re-education and forced job-placement. In the case of labor re-education, this scarcity of procedural safeguards opens the door for the indiscriminate incarceration of all sorts of essentially non-criminal societal elements at the whim of local police. With respect to forced job-placement, this due process shortcoming conjures up the specter of lifetime imprisonment of persons who have already completed their prison sentences. However, it is important to note that the lack of due process is a problem which affects the P.R.C.'s overall system of criminal justice and is not particular to its prison-labor system. Thus, in the context of this article, the problem is not that the P.R.C.'s laws require its prisoners to work, but rather that its laws do not set up adequate procedural safeguards for determining who is to become, or to remain, a prisoner. The existence of such a problem may itself militate against the perpetuation of the MFN trade status for the P.R.C. However, it is only tangentially related to the prison-labor issue upon which the U.S. opponents of the P.R.C.'s MFN status have seized.

## II. FACTS AND STATISTICS REGARDING PRISON-LABOR

Part I of this paper focused exclusively on the prison-labor laws in the P.R.C. and the U.S. However, these laws are of course merely a formal framework around which the prison-labor system in each country has been constructed in practice. It is, therefore, useful at this juncture to look at a few revealing facts and statistics about the real-world institutions of prison-labor in the P.R.C. and the U.S.

### A. P.R.C. PRISON-LABOR

The Chinese government does not publicize most of its own official prison-labor statistics. Nevertheless, one can reach a fairly deep understanding of the scope of P.R.C. prison-labor by surveying the few officially released statistics along with the various estimates published by human-rights groups, the U.S. State Department, and other sources outside the P.R.C.

Estimates of the number of prisons and labor camps in the P.R.C. range from 1000 to 5000.<sup>74</sup> Labor camps can be (1) Labor Reform Discipline Production Detachments (functionally

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74. MOSHER, *supra* note 44, at 6.

equivalent to prisons), (2) Labor Re-education Camps, (3) Forced-Job-Placement Camps, or (4) Juvenile Offender Disciplinary Camps.<sup>75</sup> All four categories of labor camps can be integrated into a single prison. For example, Beijing Municipality's Tuanhe Farm simultaneously holds labor-reform prisoners, labor re-education prisoners, forced-job-placement personnel, and juvenile offenders.<sup>76</sup>

Some groups of labor-reform prisoners are contracted out to state and foreign-owned enterprises. These groups are euphemistically called "special schools." Their number has been estimated at between 1200 and 1300.<sup>77</sup>

According to the Chinese government, there are only 200 to 300 forced-job-placement personnel,<sup>78</sup> 1.2 million labor-reform prisoners, and 180,000 labor re-education prisoners in the P.R.C.<sup>79</sup> Human-rights groups, on the other hand, estimate the total number of prison-laborers in the P.R.C. to exceed 10 million.<sup>80</sup> Of those, about one half are said to be forced-job-placement personnel, one quarter labor-reform prisoners, and one quarter labor re-education prisoners.<sup>81</sup> Although several years ago it was not clear whether P.R.C. political prisoners were actually engaged in prison-labor,<sup>82</sup> it has since been confirmed by at least one Chinese official that some 100,000 political prisoners are in fact so engaged.<sup>83</sup> The U.S. State Department has recently concluded that Chinese political prisoners are required to work.<sup>84</sup>

The output of P.R.C. prisons and labor camps includes soybeans, tea, fruit, rice, wheat, oil products, corn, lead, zinc, tin, gold, copper, mercury, coal, iron, sulphur, asbestos, phosphorous, automobiles, machine tools, electronic components and instru-

75. Harry Hongda Wu, *Laogai: The Chinese Gulag*, HUMAN RIGHTS TRIB., Feb. 1991, at 3. The instant article does not discuss the Juvenile Offender Disciplinary Camps.

76. *Id.* at 5.

77. MOSHER, *supra* note 30, at 7.

78. 1991 *Human Rights Report: China*, 1992 U.S. Dep't of State, Feb. 1992, available in LEXIS, Intlaw Library, DSTATE File [hereinafter 1991 *Human Rights Report*].

79. *Justice Minister on Release Conditions for Pro-Democracy Activists*, BBC Summary of World Broadcasts, Mar. 18, 1993, available in LEXIS, Nexis Library, BBCSWB File.

80. MOSHER, *supra* note 44, at 8.

81. *Id.*

82. The feeling among many persons familiar with conditions inside P.R.C. prisons then was that political prisoners were more likely to serve out their sentences in solitary confinement and the torture chamber than in a prison factory.

83. *China Has 100,000 Political Prisoners, Union Chief Says*, Japan Economic Newswire, May 7, 1992, available in LEXIS, Nexis Library, JEN File.

84. 1991 *Human Rights Report*, *supra* note 78.

ments, chemical products, recycled rubber, cotton cloth, fans, and ceramic products.<sup>85</sup> Chinese prisoner-made goods can sometimes be identified as such by their trade names. These names might include the Chinese word for "new life" (*xinsheng*), as seen for example in the company names of the Shenyang New Life Rubber Plant, which manufactures rubber boots, and the Shenyang New Life Aromatics Factory, which manufactures perfumes and other cosmetics.<sup>86</sup>

By the early 1980s, prison-labor reportedly accounted for one-third of the total Chinese national output of tea, one-fourth of the total national output of asbestos, and one-fifth of the total national output of mercury. It also produced over 12,000,000 tons of coal, over 16,000 tons of cast steel pipes, over 500,000,000 kilograms of grain, 6000 machine tools, and 6000 agricultural irrigation pumps.<sup>87</sup> During the 1980s, the total output of prison-labor reportedly increased by 56%.<sup>88</sup> According to the P.R.C.'s official White Paper on Criminal Reform, however, the annual output value of labor-reform prisoners in 1990 still constituted only about 0.08% of the P.R.C.'s total industrial and agricultural production output value for that year.<sup>89</sup>

In the realm of public works, Chinese prison-laborers have built hydroelectric dams, railroads, drainage canals, and highways throughout the past forty years. They have also built automobile, elevator, and machine tool factories, as well as lead and electric welder plants.<sup>90</sup>

Although P.R.C. law prohibits the export of prisoner-made goods, human-rights groups had estimated prior to the signing of the 1992 Memorandum of Understanding that perhaps \$100 million worth of Chinese prison goods were being exported annually to the U.S. alone.<sup>91</sup> These goods were said to include textiles, wines, teas, and machinery.<sup>92</sup> Since the Memorandum of Understanding was signed, the U.S. has brought to the P.R.C.'s attention sixteen cases of alleged use of prison-labor in goods exported to the U.S., and the P.R.C. has admitted that four of the institutions involved had used prison-labor in manufacturing ex-

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85. Wu, *supra* note 75, at 4. This is, of course, in addition to the socks and shoes whose manufacture Chief Justice Burger once witnessed approvingly. See *supra* note 11 and accompanying text.

86. Jasper Becker, *Crimes of Punishment*, THE TIMES, Mar. 6, 1993, Saturday Rev., at 10.

87. *Id.*

88. *Id.*

89. *White Paper on Criminal Reform*, *supra* note 30, at § IV.

90. MOSHER, *supra* note 44, at 2.

91. *Id.* at 1.

92. *Id.*

port goods.<sup>93</sup> It seems likely, however, that the overall volume of prisoner-made exports has decreased substantially over the past several years, with internal P.R.C. official documents revealing that the P.R.C. State Council has had to provide compensation to prison-labor enterprises "because of losses suffered because of the ban on exporting prison-made goods."<sup>94</sup>

According to the U.S. State Department, both labor-reform and labor-re-education prisoners spend a maximum of six hours per day working and three hours per day studying.<sup>95</sup> According to the official Chinese press, prisoners spend eight hours per day working and three hours per day on political studies.<sup>96</sup> However, according to a note allegedly smuggled out of a Manchurian matchbox factory by six jailed Chinese dissidents, prisoners must meet a daily production quota and regularly work from 8:00 a.m. to 10:00 p.m.<sup>97</sup> One former labor re-education prisoner has stated that she spent at least ten hours per day sewing in a prison factory, with a short break for lunch if there were no big orders pending.<sup>98</sup>

The U.S. State Department has reported that "[c]onditions in all types of Chinese penal institutions are harsh and frequently degrading. The emphasis on obtaining confessions leads to widespread abuses . . . [such as] the use of cattle prods, electrodes, prolonged periods of solitary confinement, and incommunicado detention, beatings, [and] shackles."<sup>99</sup> According to a release by the human-rights group Asia Watch, problem prisoners "receive only basic foodstuffs, . . . may not receive visitors or letters, . . . are subjected to both physical punishment and 'disguised physical punishment,' . . . are forced to perform excess manual labor, . . . [and] receive insufficient sleeping time."<sup>100</sup> By contrast, the P.R.C. White Paper on Human Rights states that prisoners have

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93. *White House Briefing with Winston Lord, Assistant Secretary of State for East Asian and Pacific Affairs Re: Conditions on MFN for China*, Federal News Service, May 28, 1993, available in LEXIS, Nexis Library, Fednew File.

94. *China Ban on Prison Exports Said to Cost It Money*, REUTERS LIBR. REP., Oct. 13, 1992, available in LEXIS, Nexis Library, Lbyrpt File (quoting Central Document No. 7, issued to provincial and military leaders).

95. *1991 Human Rights Report*, supra note 78.

96. *Beijing Prison Boasts Low Recidivism Rate*, Xinhua General Overseas News Service, Jan. 30, 1991, available in LEXIS, Nexis Library, Xinhua File.

97. Uli Schmetzer, *China Hounds Dissidents Before Arrival of Baker*, CHI. TRIB., Nov. 9, 1991, at 1.

98. Peter Woolrich & Quinton Chan, *Life Inside China's Conveyor Belt Jails*, S. CHINA MORNING POST, Aug. 16, 1992, at 3.

99. *1991 Human Rights Report*, supra note 78.

100. *Isuzu Signed Contract with China's Prison-Run Plant*, Kyodo News Service, Dec. 6, 1991, available in LEXIS, Nexis Library, JEN File (quoting pieces taken from a classified journal for P.R.C. officials entitled *Theoretical Studies in Labor Reform and Education through Labor*).

“the right of immunity from insult to their dignity and from infringement of personal security . . . [as well as] the right to contact family members and other relatives regularly by correspondence or visits . . . . [P]risoners can read newspapers, magazines and books, watch television, listen to the radio, and take part in recreational and sports activities that are beneficial to the body and mind.”<sup>101</sup>

## B. U.S. PRISON-LABOR

### 1. Federal Prison-labor

The American federal prison system currently holds about 85,000 inmates.<sup>102</sup> Of these, about 19%, or 16,000 inmates, are employed by FPI in its eighty-nine factories,<sup>103</sup> with the absolute number of prisoner-employees increasing by approximately 50% every five years.<sup>104</sup> The “super maximum security” U.S. federal prison at Marion, Illinois, holds most of those U.S. convicts who consider themselves to be political prisoners.<sup>105</sup> However, Marion has no work program.<sup>106</sup>

FPI prison-laborers produce a wide variety of goods, ranging from combat boots, eyeglasses, blankets, transmission parts, clocks, and light fixtures,<sup>107</sup> to beds, camouflage trousers, stretchers, tarpaulins, helmets, radar and generator sets, mine detection units, and cables,<sup>108</sup> as well as to sheets, curtains, safety glasses,

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101. *White Paper on Human Rights*, *supra* note 30, at § IV; see also *White Paper on Criminal Reform*, *supra* note 30, at § II.

102. John Hanchette, *Crime and the Cost of Punishment—NASA News, Smokey Bear: Products of Prison Labor*, Gannett News Service, June 27, 1993, available in LEXIS, Nexis Library, GNS File.

103. *Id.*

104. *Id.*

105. Russell Miller, *The Toughest Jail in the World*, SUNDAY TIMES, May 23, 1993, News Rev., at 1. Attempting to define what constitutes a “political prisoner” is a complex task well beyond the scope of this article. However, it has been somewhat persuasively argued that a number of U.S. federal convicts appear, at least in part, to be political prisoners. Such prisoners include current or former Marion inmates Edwin Wilson, who, as a CIA agent, sold weapons to Libya; Jonathan Pollard, who received a life sentence for spying for the Israelis; and former naval intelligence officer John Walker, who sold military secrets to the Soviet Union. Wilson and Walker are each reportedly held in solitary confinement within Marion’s K Unit — a block of cells, located beneath the prison hospital and isolated from the rest of the penitentiary, to which reporters are denied access and within which are held “inmates . . . who have breached positions of trust within the government and are serving very long sentences.” *Id.* Public pressure from within the U.S. and abroad recently forced Pollard’s transfer from the K Unit to a medium-security federal prison, in June 1993. *Id.*

106. *Id.*

107. Sharon LaFraniere, *Study Cites Benefits of Prior Job Training: Recidivism Lower in Inmates Who Work*, WASH. POST, Jan. 2, 1992, at A21.

108. Andrew J. Bates, *U.S. Prison Industries Under Attack*, NAT’L J., Aug. 17, 1991, at 2038.

and business forms.<sup>109</sup> FPI laborers have supplied such diverse products as signs for the U.S. Capitol Mall, electronic circuit boards for Air Force guided missiles, woolen blankets for the military, and canvas bags for the U.S. Postal Service.<sup>110</sup> They have built bookcases for the White House legal library and office furniture for the heads of federal agencies.<sup>111</sup> They reportedly played a key role in manufacturing military supplies during the Gulf War<sup>112</sup> and have recently begun undertaking data-processing responsibilities in five pilot projects.<sup>113</sup>

In all, inmates were manufacturing 140 different products for FPI by the mid-1980s. According to FPI officials, no private industrial corporation can claim such great diversity in its product line: "Except maybe General Electric, there's nothing else like it."<sup>114</sup>

FPI pays wages averaging \$0.78 per hour to the prisoners that it employs.<sup>115</sup> Critics of FPI have termed these low wages "exploitati[ve]" and "the secret of [FPI's] immense profitability."<sup>116</sup> A report issued by the accounting firm Deloitte & Touche for the Federal Bureau of Prisons, which oversees FPI, has estimated that approximately 4000 civilian workers have been displaced as a result of the industrial activities of FPI.<sup>117</sup> A recent U.S. General Accounting Office report determined that paying inmates the U.S. minimum wage of \$4.25 per hour would greatly increase the expenses associated with prison-industry programs and force prison officials to scale back such programs drastically.<sup>118</sup>

Overall, FPI is seen by most observers as a successful enterprise. For example, a study by independent experts in public administration ranked the Federal Bureau of Prisons among the

109. Jacqueline Hendricks, *Letter to the Editor*, L.A. TIMES, Apr. 26, 1990, at B6.

110. Bob Rast, *Prison Work Programs to Incubate Inventions*, WASH. POST, Jan. 21, 1985, Wash. Bus., at 1.

111. *Id.*

112. Bates, *supra* note 108.

113. Karen D. Schwartz, *Govt. Goes to Jail to Get CALS Documents Converted; Federal Prison Industries, Inc. Offers Inmate Labor for Data Processing*, GOV'T COMPUTER NEWS, Oct. 26, 1992, at 49.

114. Rast, *supra* note 110, at Wash. Bus. 29.

115. Hanchette, *supra* note 102. The hourly wages paid by FPI vary from a minimum of \$0.23 to a maximum of \$1.15. *Id.*

116. John J. Washburn, *Businesses Behind Bars: The Case for Prisoner Entrepreneurship*, 13 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 117, 123 n.67 (1987).

117. Jim Bencivenga, *Massachusetts Governor Plans to Put More Convicts to Work*, CHRISTIAN SCI. MONITOR, Oct. 22, 1991, at U.S. 7.

118. *Cost of Paying Minimum Wage to Inmates Predicted Prohibitive*, 31 GOV'T EMPL. REL. REP. (BNA) No. 1521, at 875 (June 28, 1993).

best-run agencies of the federal government.<sup>119</sup> At least one penologist, however, has deemed FPI a "failure."<sup>120</sup>

## 2. State Prison-labor

By 1992, the U.S. adult State-prison population had reached 712,000 inmates,<sup>121</sup> up from 650,000 only three years earlier.<sup>122</sup> About 68% of State inmates were employed in some capacity within the prison,<sup>123</sup> with about 8% employed specifically in prison industries.<sup>124</sup> Only about 1000 State prisoners currently work in privately operated prison-labor programs federally certified pursuant to the Percy Amendment.<sup>125</sup>

State prison-laborers produce such goods as license plates, office furniture, farm machinery, lingerie, road barriers, metal products, wire products, window blinds, heating elements, garments, road signs, fishing lures, stone tiles, water beds, and output chokes.<sup>126</sup> According to U.S. officials, some of those goods are exported. During the June 1992 congressional hearings concerning the P.R.C.'s MFN status, Rep. Philip Crane (R-IL) asked then Under Secretary of State Arnold Kanter whether the U.S. exports any prisoner-made products. Mr. Kanter responded, "I'm informed that we have a very small quantity of prison-labor products that end up in the export stream, but I would emphasize that in contrast to China we have no law prohibiting the export of products produced with prison-labor."<sup>127</sup>

In addition to manufacturing goods, State prisoners also undertake such tasks as microfilming, printing, bookbinding, industry drafting, material salvage,<sup>128</sup> removal of asbestos and underground storage tanks,<sup>129</sup> and cutting new Cadillacs and

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119. John J. DiIulio, Jr., *Mission Possible: Reform the Penal System Should Learn from the Federal Bureau of Prisons, Which Run Cost-Effective Programs*, NEWSDAY, Feb. 20, 1991, at 91.

120. Washburn, *supra* note 116, at 124.

121. Hanchette, *supra* note 102.

122. Frederick M. Biddle, *Business Behind Bars: More Businesses Look to Prisons as a Source of Cheap Labor*, BOSTON GLOBE, Sept. 3, 1989, at 33.

123. Hanchette, *supra* note 102.

124. Biddle, *supra* note 122.

125. Ellen Shubart, *Private Firms, Prison Labor: In Some Facilities, Private Sector Contracts Give Inmates Marketable Work Experience*, CITY & ST., Feb. 1-14, 1993, at GM2.

126. *Id.* at Table II.

127. *The Extension of Most-Favored-Nation Treatment to the Products of the People's Republic of China, and for Other Purposes: Hearings on H.R. 5318 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 102d Cong., 2d Sess. 64 (June 29, 1992) (statement of Arnold Kanter, then Under Secretary of State for Political Affairs, U.S. Department of State).*

128. *Id.*

129. Pat Matuska, *Bill Promoting Use of Prison Labor Draws Fire*, SEATTLE TIMES, Apr. 15, 1993, at D1.

Lincolns in half to reassemble them as stretch limousines.<sup>130</sup> Inmates staff phone lines and book reservations for Trans World Airlines and Best Western International at prison computer terminals.<sup>131</sup> They have been employed as telemarketers by AT&T, and they staff State-tourism toll-free telephone lines in at least one dozen States.<sup>132</sup>

State prison-laborers currently earn an average salary of \$0.56 per hour,<sup>133</sup> and in recent years have earned anywhere from \$0.25 to \$12.00 per hour.<sup>134</sup> In accordance with the Percy Amendment, inmates working for private-sector employers are to be paid a market wage. For example, several years ago TWA prisoner-employees reportedly made \$5.67 per hour, while Best Western prisoner-employees made between \$4.50 and \$5.04 per hour.<sup>135</sup>

The use of prisoners to build and maintain public works, although still common in Southern and rural States, has been abandoned in most parts of the country due to security concerns and the strong opposition of private and public employee unions.<sup>136</sup> However, States such as Massachusetts and California have recently begun to try out the "chain gang" concept anew.<sup>137</sup> Massachusetts inmate crews pick up street litter, clean cemeteries, and undertake small painting projects, while in California, forestry crews comprised of prisoners have battled forest fires and medflies. In Georgia, ten State prisons have their own farms where prisoners raise some 1900 head of cattle and a variety of fruits and vegetables, as well as pigs, chickens, and cows.<sup>138</sup> Food that is not used by the prison that produces it is sent to other prisons within the State.<sup>139</sup>

In 1991, Human Rights Watch released a report on conditions in American prisons, based on its visits to twenty jails and

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130. Biddle, *supra* note 122, at 33.

131. *States Look for Prisoners to Pay Their Own Way*, Nat'l Pub. Radio, Morning Edition (Jan. 19, 1993), available in LEXIS, Nexis Library, NPR File. Note, however, that prisoners with a history of forgery or credit-card fraud are not employed in this capacity. Matt O'Connor, *Firms, Prisons Join to Unlock Labor Pool*, CHI. TRIB., Dec. 13, 1987, at Bus. 1.

132. *States Look for Prisoners to Pay Their Own Way*, *supra* note 131.

133. Hanchette, *supra* note 102.

134. AUERBACH, *supra* note 62, at 17.

135. *Id.* Wages paid by private-sector employers are of course subject to the various deductions discussed earlier in this article. See *supra* text accompanying note 71.

136. Bencivenga, *supra* note 117.

137. For the Massachusetts program, see *id.*; for the California program, see *Road Camps Revisited*, CAL. LAW., Nov. 1982, at 22.

138. *Farm Chores Keep Prisoners Busy, Save State Money—Georgia Inmates Produce Own Food*, ATLANTA J. & CONST., June 15, 1992, at C3.

139. *Id.*

prisons across the U.S.<sup>140</sup> While generally favorable, the report cited problems including severe overcrowding and the use of punishments such as physical restraints, lack of family contact, and food deprivation. For example, in at least one Oregon prison, troublesome inmates were reportedly stripped of all their clothing and bedding and then encouraged to "earn" the articles back piece by piece through good behavior. Such inmates, in extreme cases, were also said to have been restrained in leg irons and belly chains. And in at least one city jail in Los Angeles, problem inmates were reportedly fed only tasteless blocks of nutritional substance, twice daily, as a form of punishment.<sup>141</sup>

### C. COMPARATIVE ANALYSIS

Just as the prison-labor laws on the books in the P.R.C. and U.S. bear a broad resemblance to each other, so too do the realities of prison-labor in each country. Prison-labor in both the P.R.C. and the U.S. consists of a hodgepodge mix of prison industry, agriculture, public works, institutional-support services, and miscellaneous other pursuits.

Perhaps the most obvious difference between P.R.C. and U.S. prison-labor is one of scale. The P.R.C. has a much larger national population than the U.S. and also seemingly has a much larger prison population. Because the P.R.C. also apparently succeeds in putting a much larger percentage of its inmates to work in non-institutional-support capacities than does the U.S., the total output of Chinese prison-laborers is seemingly substantially greater than that of their American counterparts.

Furthermore, despite the Chinese government's claim that its "prison labour products are mostly used to meet the needs within the prison system, and only a small quantity enters the domestic market through normal channels,"<sup>142</sup> it seems likely that a greater percentage of Chinese prisoner-made goods is sold on the open market than that of U.S. prisoner-made goods, the bulk of which are purchased by the federal and State governments. However, this fact alone hardly presents cause for media criticism of Chinese prison-labor in the U.S., since an express motivation for the U.S. Congress' adoption of the Percy Amendment in 1979 was the belief that selling prisoner-made goods on the open market would actually benefit prisoners by injecting much needed capital and expertise into prison factories.

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140. Stephanie Chavez, *Rights Group Cites Prison Cruelty*, L.A. TIMES, Nov. 14, 1991, at A3.

141. *Id.*

142. *White Paper on Human Rights*, *supra* note 30, at § IV.

It also seems likely that a greater volume of P.R.C. than U.S. prisoner-made goods is exported to foreign countries. However, it is important to realize that, as a percentage of total P.R.C. exports, the amount of prison goods exported is almost insignificant and also that the P.R.C. government seems to be making genuine efforts to reduce or eliminate the export of such goods at least to the United States. As noted earlier, prior to the signing of the 1992 Memorandum of Understanding human-rights groups had estimated that perhaps \$100 million worth of Chinese prison goods was then being exported to the U.S. annually.<sup>143</sup> Even assuming that this was an accurate figure and that, contrary to appearances, this level of prison exports was again achieved in 1992, the \$100 million figure would still have represented less than 0.4% of the approximately \$25.8 billion in goods that the P.R.C. exported to the U.S. in that year. Moreover, the fact that the U.S. exports prisoner-made goods at all necessarily undercuts the legitimacy of any moral condemnation of the P.R.C. in this regard by the U.S. media, human-rights groups, and labor unions.

Probably the most significant factual differences between P.R.C. and U.S. prison-labor lie then with the apparently sub-standard conditions that prevail in Chinese prisons and with the now-confirmed employment of political prisoners within those institutions. However, here again it is important to note that these are not so much criticisms of P.R.C. prison-labor as of the entire P.R.C. criminal-justice system. Torture and cruel treatment of prisoners would presumably occur in Chinese prisons even if the inmates were not engaged in productive labor. Moreover, similar problems exist to some extent in American prisons, which also suffer notoriously from overcrowding and inmate violence. And while it is inexcusable that the P.R.C. imprisons its political dissidents, there is actually every indication that, once imprisoned, such dissidents would much rather work than not.<sup>144</sup> Indeed, arguably, it is the U.S. that violates the pro-prison-labor mandate of the U.N. Standard Minimum Rules for the Treatment of Prisoners by refusing to allow its own political prisoners at the Marion federal penitentiary to work.

### III. OBJECTIVES OF PRISON-LABOR

Parts I and II of this article examined the P.R.C.'s prison-labor laws and their factual application, showing that they are substantially comparable to their U.S. counterparts. Part III pro-

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143. See *supra* note 91.

144. See, e.g., *Hong Kong Asia Television Interview with Dissident Wang Xizhe*, BBC Summary of World Broadcasts, Feb. 12, 1993, available in LEXIS, Nexis Library, BBCSWB File.

ceeds further and examines the extent to which the P.R.C.'s objectives in instituting prison-labor actually mirror those of the U.S. Part IV will in turn attempt to ascertain the level of Chinese and American success in the implementation of those objectives.

On a theoretical level, an inmate sentenced to perform prison-labor has effectively been given two sentences, the first being "imprisonment" and the second "labor." The objectives of sentencing a person to "imprisonment" have traditionally been to punish the offender and to deter future offenses by the instant offender (specific deterrence) or by other individuals (general deterrence). The discussion below will focus on the objectives behind the "labor" component of prison-labor. These objectives are less obvious but are summed up by four general rationales: (1) the labor itself serves as punishment for the offender and will itself provide specific and general deterrence; (2) prison-labor generates revenue for the correctional system and, possibly, for other segments of the government; (3) prison-labor reduces the idleness of prison life and thereby leads to a more satisfied, less violence-prone inmate population; and (4) the very act of performing an honest day's work will reform a prisoner's criminal attitude. This reform will be greater if the prisoner acquires specific vocational skills that can be put to use after release from prison.

## A. P.R.C. PRISON-LABOR

### 1. *Punitive/Deterrent Objectives*

As discussed above, although P.R.C. prison-labor laws tend overall to stress rehabilitation of criminals as the rationale for prison-labor, punishment is sometimes their sole stated goal.<sup>145</sup> Moreover, Chinese officials occasionally single out for discussion the punitive objectives of prison-labor. For example, the P.R.C.'s first Public Security Ministry Chief stated in 1954 that "the process of labor reform of criminals . . . is essentially an effective method of purging and eliminating all criminals."<sup>146</sup> More recently, Chinese Premier Li Peng suggested the benefits of prison-labor in "giving a heavier hand to various crimes, including those harmful to the country's construction and reform."<sup>147</sup> The official Chinese press suggested earlier this year that building more

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145. See *supra* text accompanying notes 20-21.

146. Wu, *supra* note 75, at 3.

147. *Li Peng Meets Participants in Conference on Work of Reforming Criminals*, Xinhua General Overseas News Service, Dec. 10, 1988, available in LEXIS, Nexis Library, Xinhua File.

labor camps in remote border areas "would help provide for the stability of social order in the rest of China."<sup>148</sup>

In general, however, punitive objectives are never officially mentioned without simultaneous reference to rehabilitative objectives. For example, the P.R.C. Constitution states that the government's objective is to "punish and reform criminals."<sup>149</sup> Similarly, the Chinese government's White Paper on Human Rights states that Chinese prison-labor is "not simply for the purpose of punishment; it is a humanitarian policy conducive to the reform . . . of the criminals."<sup>150</sup> Along these same lines, P.R.C. Justice Minister Cai Cheng has said that Chinese prison-labor "combines punishment with reform,"<sup>151</sup> and a P.R.C. prison administrator has stated that the intent behind prison-labor is "to combine punishment with ideological reform."<sup>152</sup>

Incredibly, the official White Paper on Criminal Reform, in what can perhaps be seen as an indication of the P.R.C.'s sensitization to the international debate over its use of prison-labor, explicitly renounces punitive goals entirely. It states that "[t]he Chinese government opposes the use of labour as a means of punishing criminals, as well as the use of heavy labour as a means to maltreat prisoners. China faithfully practices the use of forced labour as a reform method rather than as a method for punishment."<sup>153</sup>

In a twist on criminal-deterrence objectives, critics of Chinese prison-labor claim that deterrence of political dissent is perhaps the primary goal of Chinese prison-labor. According to Harry Hongda Wu, who spent nineteen years incarcerated in the P.R.C., "[t]he labor-reform camps are the reason China is so stable."<sup>154</sup> Further, others have similarly stated that "[t]he camp system serves the dictatorship. The camp is its tool, its weapon. Deng Xiaoping cannot exist without the camps."<sup>155</sup>

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148. *China Moots Sending Young Criminals to Border*, The Reuter Library Report, Jan. 19, 1993, available in LEXIS, Nexis Library, Reuter File.

149. P.R.C. CONST. art. 28 (1982), available in LEXIS, Intlaw Library, Chinalaw File, No. 141.

150. *White Paper on Human Rights*, supra note 30, at § IV.

151. *Justice Minister Praises Reform-Through-Labour System*, BBC Summary of World Broadcasts, Sept. 26, 1991, available in LEXIS, Nexis Library, BBCSWB File.

152. *Beijing Prisoners Attend Lecture on Policy Reform*, Xinhua General Overseas News Service, Nov. 18, 1981, available in LEXIS, Nexis Library, Xinhua File.

153. *White Paper on Criminal Reform*, supra note 30, at § III.

154. Lane, supra note 3.

155. Andrew Higgins, *Question Raised About China Exports Made by Prisoners*, TORONTO STAR, Oct. 7, 1991, at D7.

## 2. *Financial Objectives*

Like punitive/deterrent objectives, financial objectives are officially de-emphasized by the P.R.C. as a motivation for the practice of prison-labor. Thus, for example, official Chinese penal policy is said to stress "reform first, production second."<sup>156</sup>

Although the output of prison-labor is included in the Chinese national economic plan and is under the central direction of the Bureau of Production,<sup>157</sup> any acknowledgment of the financial benefits derived from prison-labor has been largely taboo among Chinese officials. However, in the early 1950s, the P.R.C.'s Public Security Ministry Chief told the People's Congress that "from the economic point of view, we cannot fail to see that these reprieved anti-revolutionary criminals are no less than a source of labour. If we organize them and force them to serve the State . . . they will, of course, contribute something to the productive enterprises of the State."<sup>158</sup> Later, in 1954, this same official explained that "labor-reform production directly aids in the development of the nation's economy . . . . It is a dependable source of wealth."<sup>159</sup>

Recently, the P.R.C. government has stated that "profit from [prison-labor] is mainly used for improving the prisoners' living conditions, upgrading their common living areas and facilities and maintaining production."<sup>160</sup> Moreover, the government has admitted that the profit derived from prison-labor "has played a positive role in reducing the burden [of administering a penal system] on the state and the people."<sup>161</sup> The U.S. State Department likewise views Chinese prison-labor as "an integral part of the [P.R.C. penal] system . . . to help support the facilities."<sup>162</sup>

By contrast, some human rights activists believe that the revenue earned from prison-labor exceeds that needed to run the labor camps themselves. This belief finds some support in occasional stories published in the official Chinese press. For example, at the 1986 Symposium on Labor-Reform Jurisprudence, members of the Chinese Law Society reportedly expressed opposition to the government's insistence that labor camps not only

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156. 1991 *Human Rights Report*, *supra* note 78.

157. Wu, *supra* note 75, at 4.

158. ASIAN PEOPLES' ANTI-COMMUNIST LEAGUE, BLOOD AND TEARS OF SLAVE LABOUR ON THE CHINESE MAINLAND 15 (Chinese Federation of Labour, Taipei ed., 1957) [hereinafter BLOOD AND TEARS].

159. Wu, *supra* note 75, at 3.

160. *White Paper on Criminal Reform*, *supra* note 30, at § III.

161. *Id.*

162. 1991 *Human Rights Report*, *supra* note 78.

achieve economic self-sufficiency but also turn a profit for the state.<sup>163</sup>

### 3. *Administrative Objectives*

Chinese officials rarely take public notice of the administrative benefits to be derived from prison-labor. Perhaps they see such benefits as negligible. More likely, however, they see them as self-evident and thus not worthy of extensive discussion.

The White Paper on Human Rights briefly acknowledges the role that prison-labor plays in reducing idleness, although that document focuses its attention on the benefits to the prisoners themselves rather than to the authorities. It states that Chinese prison-labor "enables criminals in custody to stay healthy through a regular working life and avoid feelings of depression and apathy resulting from a prolonged monotonous and idle prison life."<sup>164</sup>

The White Paper on Criminal Reform similarly notes that "having prisoners engage in an appropriate form of labour enables them to stay physically fit, which helps to ward off depression, listlessness, [and] demoralization."<sup>165</sup> It goes further than the White Paper on Human Rights, however, by acknowledging that prison-labor reduces an inmate's "thoughts of escape, suicide or further criminal activity, ideas which spring from the monotony of prison life over many years."<sup>166</sup>

### 4. *Rehabilitative Objectives*

Rehabilitation of criminals is far and away the dominant stated goal of prison-labor in the P.R.C. This goal is reflected in two of the names associated with P.R.C. prison-labor, namely "labor reform" and "labor re-education." Recognition of the power of labor to rehabilitate prisoners dates back to Mao Zedong, who in 1949 wrote that imprisoned reactionaries and their henchmen must "reform themselves through labour. If they are not willing to work, the people's state will force them to do so."<sup>167</sup>

In the spirit of Mao, the P.R.C. government still asserts that an honest day's work, irrespective of any vocational skills that such work might impart, can transform criminals and other social undesirables into good citizens. According to the White Paper on Criminal Reform, "productive labour helps criminals realize

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163. MOSHER, *supra* note 30, at 13.

164. *White Paper on Human Rights*, *supra* note 30, at § IV.

165. *White Paper on Criminal Reform*, *supra* note 30, at § III.

166. *Id.*

167. BLOOD AND TEARS, *supra* note 158, at 12.

that social wealth does not come easily, fosters a love for work and become accustomed [sic] to it, instills the idea of 'no work, no food' in their minds and helps them overcome bad habits such as sloth, aversion to work and hedonism."<sup>168</sup> The White Paper on Human Rights likewise states that prison-labor "is designed to help those serving prison terms mend their old ways by acquiring the labour habit and fostering a sense of social responsibility, discipline and obedience to the law."<sup>169</sup>

This belief in the transformative power of prison-labor was echoed in the P.R.C. Ministry of Justice's statement that such labor is "designed to change [prisoners'] old preferences for leisure over work"<sup>170</sup> and in a prison administrator's assertion that "labor can reform [prisoners'] decadent ideas of getting something without working for it—a major cause of crime."<sup>171</sup> Along similar lines, a Chinese Vice Minister of Public Security told a gathering of Chinese penologists that "many of the criminals committed offenses because they are lazy and hate to work . . . . Their ideology can be effectively remolded only when they take part in productive labor under strict administration."<sup>172</sup> Finally, the official Chinese press has recently stated that "[n]inety percent of youthful offenders, all born under the [Communist] red flag, don't appreciate today's lifestyle . . . . They love leisure and hate work. After harsh labour, perhaps we could change their thinking."<sup>173</sup>

The idea that labor reforms prisoners is further reflected in the practice, adopted by Chinese prison administrators, of determining the degree to which a prisoner has reformed by evaluating the quality and quantity of his work product. A prisoner whose output is of poor quality is said not to have truly reformed.<sup>174</sup> One whose output fails to meet the daily quota is said to have a "lazy labor attitude."<sup>175</sup>

Complementing the belief that the very act of labor rehabilitates prisoners is the notion that labor imparts valuable vocational skills to prisoners. The P.R.C. government has stated that "productive labour enables prisoners to acquire productive skills and knowledge which make it possible for them to earn a living when they have served their sentence. This makes it unlikely they will return to crime because of lingering bad habits or lack

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168. *White Paper on Criminal Reform*, *supra* note 30, at § III.

169. *White Paper on Human Rights*, *supra* note 30, at § IV.

170. [Item No. 122457], Xinhua General Overseas News Service, Dec. 24, 1985, available in LEXIS, Nexis Library, Xinhua File.

171. *Beijing Prison Boasts Low Recidivism Rate*, *supra* note 96.

172. *China to Strengthen Criminal Rehabilitation*, Xinhua General Overseas News Service, Sept. 10, 1981, available in LEXIS, Nexis Library, Xinhua File.

173. *China Moots Sending Young Criminal to Border*, *supra* note 148.

174. Wu, *supra* note 75, at 5.

175. *Id.*

of job skills."<sup>176</sup> The government has similarly written that prison-labor "helps [prisoners] learn productive skills . . . so that they can find a job after being released from prison and avoid committing new crimes because of difficulties in making a living."<sup>177</sup>

In an effort to supplement the informal vocational training that prisoners receive on the job, the P.R.C. also provides prisoners with formal vocational classes and certificate programs.<sup>178</sup> These classes comprise only one component of the vigorous educational regimen to which Chinese prison-laborers are subjected—a regimen that also includes classes in general education, culture, law, morality, socialist ethics, and patriotism.<sup>179</sup> The ultimate goal of such classes is to "reform the 'black sheep' of society into useful people who abide by the law, observe discipline, and are useful to the four modernizations."<sup>180</sup>

Critics of Chinese prison-labor, however, liken such "thought reform" (the official Chinese term) to brainwashing. They find particularly troubling the government's emphasis on confessions and the fact that a prisoner who fails to acknowledge his crimes and submit to reform can expect a harsh response from the prison administrators.<sup>181</sup> Moreover, one former labor re-education prisoner recently told a reporter that her experience with prison-labor "was not re-education. It was just a production line. All the courses were just a fake."<sup>182</sup>

## B. U.S. PRISON-LABOR

### 1. Punitive/Deterrent Objectives

In eighteenth and early nineteenth century America, punishment and deterrence were the dominant objectives of prison-labor, as prisoners strained at physically challenging, often make-work tasks designed specifically to punish them and to deter future offenses.<sup>183</sup>

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176. *White Paper on Criminal Reform*, *supra* note 30, at § III.

177. *White Paper on Human Rights*, *supra* note 30, at § IV.

178. *White Paper on Criminal Reform*, *supra* note 30, at § III.

179. [Item No. 062566], Xinhua General Overseas News Service, June 25, 1985, available in LEXIS, Nexis Library, Xinhua File; see also *White Paper on Criminal Reform*, *supra* note 30, at § III (detailing the reform process employed).

180. *Law Society Calls for Law on Reform Through Labour*, BBC Summary of World Broadcasts, Nov. 26, 1986, available in LEXIS, Nexis Library, BBCSWB File (translating the text of a speech by Mao Lei given on Nov. 17, 1986).

181. Wu, *supra* note 75, at 5.

182. Woolrich & Chan, *supra* note 98.

183. See generally Christopher R. Adamson, *Hard Labor and Solitary Confinement: Effects of the Business Cycle and Labor Supply on Prison Discipline in the United States, 1790-1835*, 6 RES. IN L., DEVIANCE AND SOC. CONTROL 19 (1984).

Today, however, punishment and deterrence remain important, but no longer dominant rationales for the practice of prison-labor in the U.S. Evidence of the desire to punish inmates can still be found in the public perception that criminals deserve to be treated harshly. For example, national public-opinion polls have shown that 87% of the U.S. general population favors "harsher sentences for those convicted of crimes," and 83% feels that "the courts have been too easy in dealing with criminals."<sup>184</sup> American correction officials generally recognize the negative "Holiday Inn" perception held by the public that prison life is a life of leisure and see prison-labor as a means of combatting that perception.<sup>185</sup>

Further evidence of an intent to use prison-labor as a means of punishment can be found in the observation that American prisoners are paid only trifling wages. It can also be found simply by noting the boring, monotonous nature of the work that many prisoners are required to perform and the fact that interesting work is assigned to well-behaved prisoners while it is denied those who misbehave.<sup>186</sup>

Perhaps nothing more clearly illustrates the survival of punishment as a goal of prison-labor than does the continued existence of "hard labor" as a penal sentence in many southern and rural states. For example, in Alabama a person can still be sentenced to hard labor for, among other offenses, selling a diseased animal,<sup>187</sup> permitting livestock to run at large,<sup>188</sup> making a contract for future delivery when actual delivery was not intended,<sup>189</sup> catching fish in a private pond without authorization,<sup>190</sup> and being intoxicated at a polling place on election day.<sup>191</sup>

## 2. *Financial Objectives*

As discussed earlier, the naked, exploitative emphasis on the financial benefits of U.S. prison-labor during the late nineteenth and early twentieth century ultimately led to the enactment of

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(tracing the early history of U.S. prison-labor, its objectives, and its adaptation to the changing economic conjuncture).

184. Francis T. Cullen & Lawrence F. Travis III, *Work as an Avenue of Prison Reform*, 10 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 45, 47 (1984).

185. See Jim Bencivenga, *New York Enforces Inmate Labor*, *CHRISTIAN SCI. MONITOR*, Feb. 4, 1992, at 12.

186. Josephine R. Potuto, *The Modern Prison: Let's Make It a Factory for Change*, 18 *U. TOL. L. REV.* 51, 54 (1986)..

187. *ALA. CODE* § 3-1-21 (1975).

188. *Id.* § 3-5-2.

189. *Id.* § 8-1-125.

190. *Id.* § 9-11-91.

191. *Id.* § 11-46-68.

various State and federal controls on prisoner-made goods.<sup>192</sup> Nonetheless, even today financial considerations still provide at least partial motivation for the practice of U.S. prison-labor, as is readily illustrated by assertions such as Chief Justice Burger's that "[c]reating [more] prison industries . . . would accomplish the . . . objective of . . . taking off the backs of the American taxpayers the enormous load of maintaining the prison system of this country."<sup>193</sup>

FPI itself openly acknowledges the financial aspirations of its prison-industry program. According to one of its officials, "there have always been strong economic arguments for [prison-labor]. In addition, the public believes that inmates should earn the cost of their maintenance, that they should pull their own weight and not be allowed to idly live at the expense of the taxpayer."<sup>194</sup> This same official has suggested that "[i]f we view prison industries as a business, then there is nothing wrong with making a profit, if those profits are reinvested in the best interests of the taxpayer, the Department of Corrections and the controlling government."<sup>195</sup> Indeed, prison officials from nineteen federal and State prisons with prison-industry programs recently told the U.S. General Accounting Office that they oppose raising inmate wages to the federal minimum-wage level because, among other reasons, doing so would eliminate or reduce the profits derived from such programs.<sup>196</sup>

Advocates of private-sector prison industries frequently emphasize the value of deductions made from the "real-world wages" of prisoner-employees.<sup>197</sup> As discussed earlier, such deductions benefit the prisoner's family, the prisoner's victim, the state and federal governments (which deduct taxes), and the prison itself (which deducts room and board). Proponents of private-sector prison industries also point out the benefits to private industry of access to a work force that can meet its fluctuating production and service needs.<sup>198</sup>

### 3. *Administrative Objectives*

Administrative objectives constitute a major reason why U.S. penologists support the practice of prison-labor. Such penologists believe that inmate idleness "generates prison manage-

192. See *supra* notes 62-63 and accompanying text.

193. Burger, *supra* note 11, at 5.

194. Farkas, *supra* note 50, at 18.

195. *Id.* at 50.

196. *Cost of Paying Minimum Wages to Inmates Predicted Prohibitive*, *supra* note 118.

197. See, e.g., AUERBACH, *supra* note 62, at ch. 1.

198. *Id.*

ment difficulties since prison idle time often is put to unacceptable uses. Prisoner employment, then, expressly is used to help fill the prisoner's day."<sup>199</sup>

Some American penologists also suggest that prison-labor gives inmates a stake in prison stability: "Prison equilibrium is bolstered by the availability of opportunities that will give inmates some reason to conform . . . . [W]ork programs that furnish inmates with activity, wages, the chance for self-respect, and hence the desire to conform will ultimately best serve the pragmatic interests of those supervising the society of captives."<sup>200</sup> In addition, at least one State prison official thinks that work functions as a "reward" for good behavior within the prison confines.<sup>201</sup>

FPI has stated as one of its official goals the reduction of prisoner idleness.<sup>202</sup> One FPI official has gone so far as to say that "[t]he biggest problem that's facing prisons today is idleness, and idleness breeds management problems, particularly when [prisons] are overcrowded. One of the best ways we know to reduce idleness is to employ inmates, so that's where prison industries play a significant role."<sup>203</sup> U.S. Rep. William Hughes (D-NJ), chairman of the U.S. House of Representatives subcommittee that oversees the federal prisons, has recently reaffirmed his belief that FPI is a critical component of the federal prisons because "[i]f we don't keep [inmates] busy, we have a real problem. . . . [I]t would be ludicrous for us basically to operate without some form of prison industries."<sup>204</sup>

Prison staff can be even more direct. One federal-prison warden rhetorically asked a reporter, "How long can you expect people to sit around with nothing to do? When you get inmate idleness, you get discontent, and that breeds rebelliousness . . . . If they burn this place down, it would cost \$30 million to rebuild."<sup>205</sup>

#### 4. *Rehabilitative Objectives*

Rehabilitative objectives are probably the single greatest motivating factor for the practice of prison-labor in the U.S. As

199. Potuto, *supra* note 186, at 55.

200. Cullen & Travis, *supra* note 184, at 63.

201. Shubart, *supra* note 125.

202. Washburn, *supra* note 116, at 124.

203. Rast, *supra* note 110.

204. Keith White, *Swimmer Seeks to Keep More Defense Work for Cherokee Nation*, Gannett News Service, Mar. 11, 1993, available in LEXIS, Nexis Library, GNS File.

205. Michael Isikoff, *Does Inmate Labor Work?*, WASH. POST, Nov. 12, 1990, at A1, A9 (citation omitted).

discussed above, most U.S. prison-labor laws are explicitly geared toward rehabilitative ends. Moreover, public-opinion polls suggest that 74% of the American public believes that "rehabilitation" should be the "main emphasis" of imprisonment, while only 21% prefers "punishing prisoners."<sup>206</sup> Rehabilitative goals are even more dominant among penologists, the legal community, legislators, and inmates.<sup>207</sup>

More specifically, "fully 94% of those contacted [by a 1982 Gallup poll] believed that it was a 'good idea' to 'require prisoners to have a skill or to learn a trade and to fit them for jobs before they are released from prison.'"<sup>208</sup> Also, "vocational training [was] the best way to rehabilitate" according to 79.4% of legislators, 67.1% of judges, 73.7% of lawyers, 75% of correctional administrators, and 96.8% of prison guards.<sup>209</sup> Furthermore, "86% of inmates, the most directly interested parties, 'see the merits' of work training."<sup>210</sup>

As noted previously, prison-labor is rehabilitative both to the extent that it imparts proper work habits and to the extent that it teaches specific work skills to prison-laborers.<sup>211</sup> A pervasive American belief in the former is illustrated by the following statement from Chief Justice Burger.

We do not need the help of behavioral scientists to understand that human beings who are producing useful goods for the market place—who are being productive—are more likely to develop the self-esteem essential to a normal, integrated personality. In place of the sense of hopelessness that is the common lot of prison inmates, [the prison industry] could provide training in skills and work habits that could make many prisoners better able to cope with life on their return to freedom.<sup>212</sup>

As for the useful skills that prison industry teaches an inmate, Burger has suggested that "[i]f you can take an individual and train him so he can do something a little more useful than stamping license plates, he's a little less likely to go back [into prison] . . . This isn't for the benefit of the criminal community. It's for the benefit of you and me."<sup>213</sup>

Studies have indicated that "70 to 80 percent of all prisoners in the U.S. have no marketable employment skills."<sup>214</sup> Rather

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206. Cullen & Travis, *supra* note 184, at 48.

207. *Id.* at 49.

208. *Id.* at 52.

209. *Id.*

210. *Id.*

211. See *supra* notes 67-68 and accompanying text.

212. Burger, *supra* note 11, at 4.

213. Isikoff, *supra* note 205, at A1.

214. Potuto, *supra* note 186, at 57.

than rely exclusively on prison-labor itself to teach prisoners such skills, the American federal prison system has instituted a mandatory, remedial education program that includes offerings in vocational training.<sup>215</sup> FPI prison-laborers must make progress in their classes before they are promoted to better and higher-paying FPI positions.<sup>216</sup> In the State prisons, inmates who refuse to participate in remedial and vocational educational classes are likely to have their parole applications denied.<sup>217</sup>

### C. COMPARATIVE ANALYSIS

Both the P.R.C. and the U.S. seek, at least to some extent, to achieve punitive/deterrent, financial, administrative, and rehabilitative goals through their practice of prison-labor. Moreover, it seems that rehabilitation is the dominant goal in each country as evidenced by legislation as well as official and unofficial statements. Both nations seem truly to believe in the power of labor to transform social transgressors into disciplined, productive members of society with the skills to contribute to national strength and prosperity, and in this respect each is in accord with the spirit of the U.N. Standard Minimum Rules.

There are differences, however, in the priorities that the P.R.C. and the U.S. place upon their lesser motivations for practicing prison-labor. In the U.S., penologists, prison administrators, and legislators value highly the administrative benefits that prison-labor provides in overcrowded, violent American prisons and most see this as the second-most compelling reason for operating prison-labor programs. U.S. officials are also quick to point out the financial benefits—and, sometimes, the punitive benefits—to be derived from prison-labor, seemingly in an effort to win support from the American public, whom they (wrongly) believe to have little sympathy for the concept of helping criminals rehabilitate themselves. This official belief is reflected in statements such as the following, by one State legislator, that “[t]he public will not tolerate anything that smacks of coddling criminals.”<sup>218</sup>

By contrast, the authoritarian P.R.C. government has comparatively little need to rally the public behind the idea of prison-labor. Accordingly, official Chinese statements generally emphasize only the reformative capacity of prison-labor—an orthodox stress rooted in Mao Zedong’s own philosophy of prison-labor.

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215. Farkas, *supra* note 50, at 50.

216. *Id.*

217. Bencivenga, *supra* note 185.

218. Mark Thompson, *Factories in Prisons? The Idea Has Appeal, but Also Obstacles*, 15 CRIM. JUST. NEWSL., July 2, 1984, at 3.

Other objectives for the practice of prison-labor are fairly well ignored, almost to the point of absurdity.

As the rulers of a developing nation, it seems likely, however, that P.R.C. officials have in practice come to rely upon the financial benefits to be derived from prison-labor, if only—as they themselves claim—to help support the country's extensive prison network. This reliance is demonstrated by the extent to which prison-labor is integrated into the Chinese economy and by the sheer volume of the output of Chinese prison-labor. Although rehabilitative objectives seemingly remain the primary impetus for prison-labor in the P.R.C., financial objectives would appear to be a close second.<sup>219</sup> Administrative and punitive motives apparently fall somewhere behind in the ranking.

#### IV. EXTENT TO WHICH OBJECTIVES OF PRISON-LABOR HAVE BEEN FULFILLED

The next step in this article's analysis of P.R.C. and U.S. prison-labor is an examination of whether the objectives of prison-labor discussed above have been fulfilled in each of the two countries. Because punitive/deterrent objectives are de-emphasized in both the P.R.C. and the U.S., and because it is realistically impossible to determine the success of prison-labor in punishing criminals and deterring crime, punishment and deterrence will not be discussed here. Instead, the focus will be exclusively on the realization of financial, administrative, and rehabilitative objectives.

##### A. P.R.C. PRISON-LABOR

###### 1. *Financial Objectives*

Ever since the international community began several years ago to focus on the widespread use of prison-labor in the P.R.C., the Chinese government has consistently downplayed the financial success of its prison-labor system. The official position on this issue is that "[labor camps] organize production to meet their own needs and exchange surplus products with other domestic units for the necessary products and materials they need. A very small proportion of prison-made surplus products enter the domestic market through normal channels. The income from these products is used to improve the life and welfare conditions of the

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219. Indeed, some critics of the P.R.C. prison-labor system have taken to calling it "Gulag Inc." *Communist China Turns Prisons Into "Gulag Inc.,"* Central News Agency, June 18, 1992, available in LEXIS, Nexis Library, CENEWS File (quoting from a report filed by Ms. Jan Wong and published in the *TORONTO GLOBE AND MAIL*, June 16, 1992).

prisoners.”<sup>220</sup> According to the P.R.C. government’s White Paper on Criminal Reform, “claim[s] that ‘China’s prison products constitute the pillar of the Chinese national economy’ . . . could [not] be further from the truth.”<sup>221</sup>

Critics of Chinese prison-labor contend, however, that profits have not been as minimal as the P.R.C. government contends. Such critics point out that P.R.C. penologists have previously claimed that the costs associated with prison production are 10 to 20% lower than those in ordinary factories.<sup>222</sup> One prison official stated in the mid-1980s that his labor camp had generated \$326,000 in annual profit. This profit was reportedly distributed as follows: 60% to the government, 32% to the guards as bonuses, and 8% to the prisoners as bonuses of an average of \$10 each.<sup>223</sup>

According to the official Chinese press, the semiannual gross output of Chinese labor-reform camps during the late 1980s was \$775 million.<sup>224</sup> Of this amount (which did not include production by labor re-education prisoners), \$120 million in profits and taxes was given to the government.<sup>225</sup> Extrapolating from these figures, it has been calculated that labor-reform prisoners were responsible for 0.3% of China’s total GNP in the late 1980s, with one-sixth of this amount going to the P.R.C. government in the form of profits and taxes.<sup>226</sup>

## 2. *Administrative Objectives*

Because the Chinese government’s administrative motivations for practicing prison-labor seem to be relatively weak, there has apparently been little or no official attempt to show that prison-labor has led to prison harmony. P.R.C. Minister of Justice Cai Cheng has stated that “China’s prisons enjoy good and stable order.”<sup>227</sup> Minister Cai made this statement in the midst of a discussion on prison-labor, but he did not expressly link prison stability to prison-labor. The White Paper on Criminal Reform says that prison-labor has taught Chinese inmates self-discipline and that, consequently, many prison-laborers earn

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220. *Mofert Spokesman on So-Called Chinese Exports of Prison-Made Products*, Xinhua General Overseas News Service, May 9, 1991, available in LEXIS, Nexis Library, Xinhua File.

221. *White Paper on Criminal Reform*, *supra* note 30, at § III.

222. *United States: Rights Group Accuses China of Using Forced Labor*, Inter Press Service, Apr. 19, 1991, available in LEXIS, Nexis Library, Inpres File.

223. MOSHER, *supra* note 44, at 11.

224. *Id.* at 12.

225. *Id.*

226. *Id.*

227. *China Tries [sic] to Reduce Crimes*, Xinhua General Overseas News Service, Sept. 17, 1991, available in LEXIS, Nexis Library, Xinhua File.

early releases for "outstanding behaviour" during their prison terms.<sup>228</sup> It is not clear, however, whether this statement relates more to the issue of administrative than rehabilitative success.

Occasional articles in the official Chinese press have attempted to show that prisoners enjoy having the opportunity to work and, especially, to earn bonuses by exceeding their production quotas. One inmate, for example, reportedly saved 330 yuan for his elderly mother and was quoted as follows: "This is only part of the bonuses I have got for the work I did last year. The years I have spent here have certainly done me a lot of good."<sup>229</sup>

### 3. *Rehabilitative Objectives*

P.R.C. officials frequently cite the low recidivism rate of released prison-laborers, and it was with reference to this rate that the *Legal Daily* has called China's labor camps "a miracle on earth."<sup>230</sup> The official recidivism rate for released labor-reform prisoners "has for many years stood at 6 to 8%."<sup>231</sup> The rate is approximately 4% for former labor-reform prisoners who find jobs and 25% for those who do not.<sup>232</sup> One prison in southern Beijing has claimed its 5% recidivism rate to be the lowest of any prison in the world.<sup>233</sup> After crushing the June 1989 political protests in Beijing, the Chinese government proudly stated that only 7.3% of the people arrested for their involvement in the protests were former labor-reform prisoners. According to the government, "several released convicts even made contributions to quelling the riots."<sup>234</sup> A recent study of 720 former labor-reform prisoners with technical skills conducted in Shandong Province reportedly showed that 96% had "found employment soon after returning to society."<sup>235</sup> And in Liaoning Province, a study of 124 former labor-reform inmates who received technical proficiency certificates while in prison, revealed that all had found employment and none had committed new crimes.<sup>236</sup>

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228. *White Paper on Criminal Reform*, *supra* note 30, at § III.

229. *Prisoners Get Bonus for Good Work*, Xinhua General Overseas News Service, Feb. 12, 1985, available in LEXIS, Nexis Library, Xinhua File.

230. William Kazer, *China Labor Camps Held Two Million in a Decade*, Reuter News Reports, Oct. 12, 1989, available in LEXIS, Nexis Library, Reuter File.

231. *White Paper on Human Rights*, *supra* note 30, at § IV; *White Paper on Criminal Reform*, *supra* note 30, at § I.

232. *Jurists Call for Renewing Chances to Ex-Prisoners*, Xinhua General Overseas News Service, Dec. 9, 1986, available in LEXIS, Nexis Library, Xinhua File.

233. *Beijing Prison Boasts Low Recidivism Rate*, *supra* note 96.

234. *Beijing's Convict Assistance Program to Be Spread*, Xinhua General Overseas News Service, Nov. 29, 1989, available in LEXIS, Nexis Library, Xinhua File.

235. *White Paper on Criminal Reform*, *supra* note 30, at § IV.

236. *Id.*

The official recidivism rate for released labor re-education prisoners is 7%.<sup>237</sup> The practice of labor re-education, according to P.R.C. officials, "has done what families, workplaces and schools cannot do to prevent those who have dabbled in crime from committing further anti-social actions and breaking the law and to turn them into constructive members of society."<sup>238</sup>

Reports in the Hong Kong press, however, dispute the official Chinese statistics on recidivism. One Hong Kong newspaper has cited "sources from the Mainland's judicial circles" for the proposition that released labor-reform and labor re-education prisoners have a combined recidivism rate of 83%.<sup>239</sup> According to this report, 58.9% of former prisoners repeat offenses within one year of release, while an additional 15.7% repeat offenses within two years, and a further 8.4% repeat offenses within three years.<sup>240</sup> In Canton, released prisoners are said to be involved in 53.5% of all local criminal cases and 76.6% of "major" cases.<sup>241</sup> It is impossible to reconcile these numbers with the official P.R.C. statistics, although there is insufficient evidence at this time to determine which figures are more accurate.

Critical reports such as those out of Hong Kong provide a contrast to the cheery interviews with reformed prisoners that sometimes appear in the official Chinese press. One prisoner, for example, was quoted on the P.R.C. newswire as follows: "The prison officials strictly abide by the party's policies. Never once in the past twenty years have they beaten or insulted me. I was illiterate before, and now I can read and write. I have also learned to repair machines. When I am released, I will work hard for the people in expiation of my crimes."<sup>242</sup> Another prisoner, whose most "unforgettable experience" in prison was being taken to the doctor by warders after developing a fever at midnight, stated that he is "looking forward to getting out of prison as soon as possible and turning over a new leaf."<sup>243</sup> Still another inmate, described as a "really lucky fellow," told a reporter that prison-labor has taught him that "as long as you work hard, there is nothing that cannot be done."<sup>244</sup>

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237. *White Paper on Human Rights*, *supra* note 30, at § IV.

238. *Id.*

239. *Ming Pao Reports on High Recurrence Rate of Reform-Through-Labour Criminals*, BBC Summary of World Broadcasts, Sept. 26, 1991, available in LEXIS, Nexis Library, BBCSWB File.

240. *Id.*

241. *Id.*

242. *Peking Prison Transforms Criminals into New People*, Xinhua General Overseas News Service, Feb. 21, 1978, available in LEXIS, Nexis Library, Xinhua File.

243. *Beijing Prison Boasts Low Recidivism Rate*, *supra* note 96.

244. *Id.*

Interviews in the official Chinese press with reformed prisoners are frequently accompanied by stories of ex-prisoners who have used their prison-labor experience to build a new life outside the prison walls. For example, one former inmate reportedly learned how to make soy sauce while in prison and, after his release, set up a factory that is today "one of China's biggest producers of soy sauce, sesame oil, pungent sauce, and chili oil."<sup>245</sup> He is now famous as a "soy sauce magnate and national outstanding peasant entrepreneur."<sup>246</sup> Former prisoners reportedly make up one-fifth of the work force at a particular Beijing boiler factory. As one of these ex-convicts, who earns the highest salary in the factory, told the press: "I have a happy family . . . I'm satisfied with my life and job."<sup>247</sup>

Despite such success stories, it seems clear that at least some members of the Chinese public are reluctant to accept former prisoners as truly rehabilitated. A former Vice Minister of Justice told a conference of Chinese penologists in the mid-1980s that "society has a strong feeling against these people, as if they will never be able to turn a new leaf once they go astray. This concept should be corrected . . . A society like ours should be more lenient to them to demonstrate the superiority of our system."<sup>248</sup>

## B. U.S. PRISON-LABOR

### 1. *Financial Objectives*

Since it began operating in 1937, FPI has always had strong, growing sales to the federal departments and agencies obligated by law to purchase its output. In the fiscal year 1992, FPI reported gross sales of \$417 million, up from \$334 million only three years earlier.<sup>249</sup> This figure represented approximately 0.007% of the \$6 trillion U.S. G.N.P. for 1992. Historically, about one half of all of FPI's sales have been to the U.S. Department of Defense.<sup>250</sup> Indeed, because of its role as a supplier to the military, FPI can trace peak periods of sales and profits to the various wars that have occurred throughout its history.<sup>251</sup> Dur-

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245. *Feature: Yesterday's Convict, Today's Well-Known*, Xinhua General Overseas News Service, Oct. 31, 1989, available in LEXIS, Nexis Library, Xinhua File.

246. *Id.*

247. *Boiler Factory Successful with Ex-Convicts*, Xinhua General Overseas News Service, Feb. 8, 1983, available in LEXIS, Nexis Library, Xinhua File.

248. *Jurists Call for Renewing Chances to Ex-Prisoners*, *supra* note 232.

249. Hanchette, *supra* note 206.

250. Bates, *supra* note 213, at 2039.

251. Washburn, *supra* note 116, at 123-24 n.67.

ing the Gulf War, for example, its prisoner-employees reportedly "work[ed] around the clock."<sup>252</sup>

FPI has been called "far and away the most profitable line of business in the country," routinely earning profits at twice the average rate of all American industries.<sup>253</sup> In the late 1980s, for example, FPI reported an average of \$34.2 million in annual profit earned on annual sales of \$271.4 million.<sup>254</sup> Critics charge, however, that FPI's profitability is at least partially due to price gouging.<sup>255</sup> Although federal departments and agencies are not obligated to purchase FPI goods that are priced above market, in 1990 FPI reportedly sold file cabinets and conference tables that were respectively priced \$204.85 and \$207.40 above their private-sector equivalents.<sup>256</sup> According to one critic, "It costs the taxpayer millions of dollars in hidden subsidies to agencies that have to purchase from Federal Prison Industries."<sup>257</sup>

In defense of their program, FPI officials note that its profitability is limited by the lack of skills of its workforce, inmate turnover, inefficient equipment, capital-investment constraints, the need to diversify, procurement constraints, security issues, and inmate "featherbedding."<sup>258</sup> Stressing the difficulty of turning a profit while, for example, employing 130 inmates in a plant designed to be operated by 100 workers, one official has stated that FPI "operate[s] on a contradiction. We take the position that Federal Prison Industries should employ as many inmates as possible [while still attempting to earn a profit]. I would be dishonest if I didn't say we featherbed."<sup>259</sup>

According to its officials, FPI's profits are reinvested in new manufacturing facilities and equipment. Some profits also go to support inmate education and vocational training, and even to pay the wages of prisoners employed in institutional-support capacities within the federal prisons.<sup>260</sup>

Meanwhile, annual sales from State prison-industries were exceeding \$600 million by the late 1980s.<sup>261</sup> These industries, like

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252. Bencivenga, *supra* note 117.

253. Washburn, *supra* note 116, at 123 n.67.

254. *Hearings on H.R. 4021 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 98 (1988) (statement of income information on FPI by J. Michael Quinlan, Director).

255. Bencivenga, *supra* note 117.

256. *Id.*

257. Hanchette, *supra* note 102.

258. Robert C. Grieser, *Do Correctional Industries Adversely Impact the Private Sector?*, *FED. PROBATION*, Mar. 1989, at 18, 20.

259. Rast, *supra* note 110.

260. *Id.*

261. Biddle, *supra* note 122.

their federal counterparts, are frequently quite profitable. For example, in the late 1980s New Hampshire's prison factories generated an average of \$303,000 in annual profit on annual sales of \$1.12 million, for an impressive net profit of 27%.<sup>262</sup> Also in the late 1980s, the Massachusetts state legislature removed some \$1.2 million in profits from State prison industries over a two-year timespan in an attempt to help balance the State budget.<sup>263</sup> State private-sector prison industries have also had a measure of financial success. Of thirty-three such ventures surveyed in the late 1980s, all but two had at least recovered their full costs.<sup>264</sup>

Employing prisoners in institutional-support capacities and in public-works construction and maintenance saves States millions of dollars annually. Georgia has reportedly saved \$2 million per year by employing prisoners in its food production.<sup>265</sup> Delaware once saved between \$62,000 and \$66,000 *per bed* by employing inmates in the construction of a 200-bed medium-security prison.<sup>266</sup> Finally, South Carolina has reportedly saved about \$7 million since 1988 by paying prisoners \$0.50 per hour to build a dozen prisons.<sup>267</sup>

## 2. Administrative Objectives

By all accounts, American prison-labor has been a success from the standpoint of prison stability. For example, current U.S. Bureau of Prisons Director Kathleen Hawk recently told Congress that FPI "is the most effective correctional management program to relieve inmate idleness and ensure the orderly operation of federal prisons."<sup>268</sup> Similarly, a correctional-employees' union official has called prison-labor "a tremendous management tool . . . . There's no question about it . . . . [T]he ability to have residents of the facility work takes pressure off the inmates of the facility, . . . off the [prison] administration and the correctional officers."<sup>269</sup>

Both anecdotal evidence and controlled studies strongly suggest the administrative benefits of prison-labor.<sup>270</sup> One major

262. *Id.*

263. *Id.*

264. AUERBACH, *supra* note 62, at 22.

265. Scott Ticer, *The Search for Ways to Break Out of the Prison Crisis*, BUS. WK., May 8, 1989, at 81.

266. *Using Inmates to Build Prisons Said to Ease Costs, Teach Skills*, CRIM. JUST. NEWSL., Sept. 15, 1987, at 3, 4.

267. Charles Mahtesian, *South Carolina Looks to Its Inmates for the Labor to Build Prisons*, STAR TRIB., June 20, 1993, at 15A.

268. White, *supra* note 204.

269. Bates, *supra* note 108, at 2039.

270. *See, e.g.*, Diane M. Haller, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 496 (1986); Grieser, *supra* note 258, at 22; *see generally* AUERBACH, *supra* note 62.

U.S. Bureau of Prisons study has shown that inmates who have prison jobs are less likely to violate prison rules than those who do not.<sup>271</sup> Moreover, the study has shown that when inmates with jobs did violate rules, their infractions tended to be less serious than those of inmates without jobs.<sup>272</sup>

Comments from prison administrators and inmates indicate that prisoners enjoy having the opportunity to earn pocket money,<sup>273</sup> keep their minds occupied, and perhaps learn new skills. For example, one FPI employee serving a sentence for bank robbery told a reporter that "[w]ithout this [job], I'd be nuts. You don't get too much self-esteem in a place like this . . . . At least in here, I can do something useful—and not only for myself."<sup>274</sup> Inmates employed in private-sector State prison industries earn market wages and sometimes save thousands of dollars in anticipation of their release.<sup>275</sup>

### 3. *Rehabilitative Objectives*

The extent to which prison-labor actually succeeds in teaching U.S. prisoners useful skills is somewhat uncertain. Clearly, the types of skills that a prisoner learns on the job will depend directly on the type of job that a prisoner is given to perform. Prisoners employed, for example, in Delaware's prison-construction program learn such diverse skills as concrete casting, carpentry, plumbing, and electrical work.<sup>276</sup> By contrast, the 40 to 50%

271. LaFraniere, *supra* note 107.

272. *Id.*

273. "Pocket money" is a relative term. In 1990, a bizarre essay appeared in a major U.S. newspaper. Written by an anonymous federal prison inmate, it explained that many South American peasants act as "mules," walking cocaine across the U.S.-Mexican border for \$500 per kilogram, content in the knowledge that even if they are caught by the U.S. border patrol and imprisoned in federal penitentiaries, they will ultimately land FPI factory jobs that pay more than they could earn in their impoverished hometowns. "There's nothing to lose," one Columbian inmate was reported to have said. "If they get away with it, they make good money. If they get caught and come to American prison, they still make good money." A mestizo prisoner who was caught smuggling cocaine after only two trips now reportedly sends money from his \$1.15/hr. FPI job home to his family in Peru every month. He told the essayist, "At first, I could only send them 50 or a hundred dollars, but I make raises and now I send \$200 a month and still have some left for my needs. My family have moved to a much nicer place with electricity, and my wife has already bought a pickup . . . . [C]oming to prison here has been a blessing for me and my family." *Bars Are No Prison For These Contented Cons*, S.F. CHRON., Dec. 30, 1990, at Sunday Punch 2.

274. Isikoff, *supra* note 205.

275. Biddle, *supra* note 122.

276. *Using Inmates to Build Prisons Said to Ease Costs, Teach Skills*, *supra* note 266, at 4.

of federal prisoners employed in institutional-support capacities<sup>277</sup> presumably learn few, if any, vocational skills.

Prisoners who have had a meaningful job experience while behind bars believe that they will be able to use this experience to their benefit once released from prison. As an inmate employed in an FPI printing plant told a journalist, "I've got a marketable skill. I've got something to look forward to when I get out of here."<sup>278</sup> And a California State prisoner employed behind bars by a private data-processing firm recently told a different reporter that his new computer skills had earned him several job offers for after his imminent parole. "I've been doing drugs all my life," he said, "and this time I feel like I don't want to use drugs when I get out of here. It's taught me a lot of responsibility about how to work."<sup>279</sup> Indeed, the jobs most popular with prisoners are the jobs that promise to teach them useful skills. For example, both FPI<sup>280</sup> and the Delaware prison-construction program<sup>281</sup> have long waiting lists.

Most experts agree that giving prisoners the opportunity to engage in prison-labor ultimately reduces recidivism. A U.S. Bureau of Prisons survey showed that released federal convicts who worked while in prison are more likely to have a job than those who did not work, are able to earn approximately \$40 more per month than those who did not work, are as able to hold a job as the general population, and are 50% more likely to avoid returning to prison than released convicts who did not work.<sup>282</sup>

These federal figures are supported by those from earlier studies showing that State prisoners in Iowa and New York who participated in prison-industry programs were less likely to commit crimes after being released than were inmates in the general prison population of those two States.<sup>283</sup> Moreover, anecdotal evidence confirms that employment of prisoners within private-sector prison industries has reduced recidivism among released State convicts across the U.S.<sup>284</sup> For example, of the first twenty-eight prisoners employed by TWA to be released from a California Youth Authority minimum-security prison, only two later re-

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277. Farkas, *supra* note 50, at 18.

278. Isikoff, *supra* note 205.

279. Catherine Bowman, *Inmate Work Plan Grows at San Quentin Prison*, S.F. CHRON., Aug. 12, 1992, at A17.

280. Isikoff, *supra* note 205 at A1.

281. *Using Inmates to Build Prisons Said to Ease Costs*, *supra* note 266, at 4.

282. Hanchette, *supra* note 102.

283. Grieser, *supra* note 258, at 22.

284. *See, e.g.*, AUERBACH, *supra* note 62.

turned to prison.<sup>285</sup> This figure contrasts sharply with the 60% recidivism rate for youthful offenders in California generally.<sup>286</sup>

Nonetheless, some penologists maintain that prison employment has no appreciable effect on recidivism. Studies have reportedly 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."<sup>287</sup> Money spent on rehabilitating prisoners during incarceration, through vocational education and industrial employment, is thus seen by such experts as "ill spent."<sup>288</sup>

### C. COMPARATIVE ANALYSIS

In general, it appears that prison-labor in both the P.R.C. and the U.S. has been an impressive success in terms of finances, prison administration, and inmate rehabilitation. Both nations are clearly pleased with their overall experiences with prison-labor and seemingly have no intention of scaling back their prison-labor programs. However, the incomplete nature of the data from both the P.R.C. and the U.S. admittedly leaves any conclusive statement about the success of prison-labor in either country open to some dispute.

Regarding the financial success of prison-labor, it is worth noting that profits which a prison earns by selling prisoner-made goods to other governmental units are somewhat troubling conceptually. In a certain sense, the government as both seller and purchaser is merely transferring money from its right hip pocket to its left. However, to the extent that P.R.C. and U.S. prisons sell goods to non-governmental units this dilemma is avoided. In the U.S., only goods produced by private-sector American prison-industries can legally be sold to private individuals on the open market. Accordingly, assuming there is no significant export of U.S. prisoner-made goods, the opportunity for American prison-labor to generate "real" profits is slight. Chinese prisoner-made goods, by contrast, are sold legally on the open market at home and, at least to a small extent, illegally on the open market in foreign countries such as the U.S. Their "real" profit potential is thus much greater. Nonetheless, there is no hard evidence that profits are currently generated from Chinese prison-labor beyond what is needed to run the prisons themselves. Moreover, even if such profits were incidentally generated as part of the P.R.C.'s efforts to rehabilitate its prisoners, this would

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285. Ticer, *supra* note 265, at 81.

286. *Id.*

287. Haller, *supra* note 270, at 494.

288. Potuto, *supra* note 186, at 56.

not constitute a legitimate basis for criticism unless it could conclusively be shown that rehabilitative goals have been subordinated to financial ones.

Conceptual difficulties also inhere in any comparison of P.R.C. and U.S. recidivism figures. While the P.R.C. claims very low recidivism rates, it bears mentioning that prisoners whom Chinese administrators feel have not been properly rehabilitated are, per governmental policies discussed earlier in this paper, retained within the labor camp as forced-job-placement personnel even after completion of their sentences. Never releasing its most dangerous prisoners out into the general public, the P.R.C. government seemingly confirms the obvious when it claims a lack of recidivism among its ex-convicts. However, it would be wrong to conclude that the practice of prison-labor in the P.R.C. does not reduce recidivism at all. More likely, it simply does not reduce recidivism quite so much as the P.R.C.'s official numbers indicate.

## CONCLUSION

Prison-labor in the P.R.C. has much in common with prison-labor in the U.S. The two countries' prison-labor laws and their actual practice of prison-labor are readily analogous, as are the objectives that each country has stated for its prison-labor system and the apparent success that each has met with in fulfilling these objectives. The major differences between Chinese and American prison-labor lie mostly with the P.R.C.'s lack of procedural safeguards, its improper prison conditions, and its use of political prisoners in the prison workforce. As discussed earlier in this article, however, these problems are less problems with the P.R.C.'s practice of prison-labor than they are problems with the P.R.C.'s criminal justice system generally.<sup>289</sup> Moreover, conditions in American prisons are far from idyllic, and it would certainly seem that putting political prisoners to work is preferable to keeping them in solitary confinement.

U.S. concerns that Chinese prisoner-made goods find their way into the American market seem largely to have been mooted by the 1992 Memorandum of Understanding between the U.S. and P.R.C. on this issue, in particular since the P.R.C. appears to have substantially complied with it. Any prisoner-made goods that do enter the U.S. market from the P.R.C. constitute only a small fraction of U.S.-P.R.C. trade. Moreover, the unapologetic official U.S. acknowledgment that American prisoner-made

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289. *Supra* section I.A.

goods are themselves exported seemingly takes the moral edge off of any U.S. criticism directed at the P.R.C. on this issue.

Clearly then, the ostensible reasons that U.S. human-rights groups and labor unions advance in opposition to the P.R.C.'s practice of prison-labor are largely specious. This is not to say, however, that such organizations do not have other, more legitimate reasons for contesting the continued extension of MFN status to the P.R.C. Rather, it is merely to say that Chinese prison-labor appears, on balance, to provide a variety of benefits and certainly is not so different from the American prison-labor system whose existence the human-rights and labor groups tend to conveniently forget. Accordingly, if U.S. human rights groups believe, for example, that the lack of due process in the Chinese criminal justice system is a problem that merits withdrawal of the P.R.C.'s MFN status, then they should make this argument directly rather than tangentially by way of the more media-friendly prison-labor issue. And if U.S. labor unions believe that it is important to the welfare of American workers that the number of U.S. imports from the P.R.C. be limited, they too should make this argument directly rather than pretend that P.R.C. prisoner-made goods constitute any significant portion of such imports. To do otherwise is to distort the reality of Chinese prison-labor and to minimize the benefits that prison-labor has provided both in the P.R.C. and in the U.S.

The simple fact is that Americans are not opposed to the concept of prison-labor at all, at least when it is presented in isolation from the issue of extending MFN status to the P.R.C. U.S. support for prison-labor is readily apparent among the American general public (when brought to its attention), American legislators, American penologists, American prison administrators, American correctional employees, and even American prisoners.<sup>290</sup> The annual U.S. media criticism of Chinese prison-labor, instigated largely by U.S. labor unions and human rights groups with much broader agendas, is destined to begin again this spring when President Clinton, pursuant to statute and his own executive order, will be forced to deal directly with the issue of P.R.C. export of prisoner-made goods to the U.S. as part of his determination whether to extend MFN status to the P.R.C. for yet another year. In light of the above discussion, one could well view such criticism as unfair or even hypocritical, for, in the end, it seems that "gulag" is very much in the eye of the beholder.

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290. Perhaps one State legislator explained the appeal of prison-labor best when he said, "You can make a buck and exact vengeance. What could be more American?" Thompson, *supra* note 218, at 3.