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The Real Price of Forced Prison Labor

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The Thirteenth Amendment to the United States Constitution, adopted in 1865 at the conclusion of the Civil War, abolished slavery across the United States with one notable exception. According to the amendment, "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 subject to their jurisdiction" (emphasis added). In other words, slavery and involuntary servitude remain constitutionally acceptable forms of punishment for individuals who are convicted of crimes. This loophole has a disturbing history of being used to target Black Americans in the aftermath of the Civil War, with local authorities imprisoning thousands of formerly enslaved people on faulty charges and exploiting their labor. In upholding the legality of forced prison labor, the Virginia Supreme Court even went so far as to describe a prisoner who challenged the practice as a "slave of the State." *Ruffin v. Commonwealth* (1871).

Even more disturbing is the continued exploitation of prison labor today. The leading study on this issue, "Captive Labor: Exploitation of Incarcerated Workers," was published in 2022 by the American Civil Liberties Union (ACLU) alongside the University of Chicago Law School. The study exposed the number of vital public services that rely upon the unpaid, involuntary labor of incarcerated Americans (including the upkeep of the prisons themselves). According to the report, of the 1.2 million people in the U.S. who are currently incarcerated in state and federal prisons, approximately two-thirds are employed in the prison system. These individuals produce nearly $11 billion worth of goods and services each year, but earn just 13 to 52 cents per hour on average. Not only are prisoners denied minimum wage and the freedom to choose to work, but they are also denied basic workplace health and safety standards otherwise guaranteed by state and federal laws. Moreover, economists have found "negative externalities created by prison labor," including a correlation to lower wages and employment growth in counties that use prison labor.

This issue has become even more troubling during the pandemic, as the ACLU report reveals. Workplace health and safety standards, already a major concern during the pandemic, were found to be greatly lacking in prisons. The report details the ways in which incarcerated laborers were made to take on high-risk frontline health roles in states such as Michigan, Missouri, New York, Oregon and Texas, placing them at high risk for contracting COVID-19. At Proskauer, we have witnessed this firsthand. As an example, one of our pro bono clients was required to fill hand sanitizer bottles during the height of the pandemic in 2020. Hand sanitizer is a highly flammable product, and yet there was no safety plan in place and our client was paid under a dollar an hour for this essential work.

Fortunately, there is a growing movement to address forced prison labor. Voters in four states (Alabama, Oregon, Tennessee and Vermont) have recently taken steps to ban involuntary servitude and slavery in their state constitutions. A dozen additional states, including California, are considering similar measures. In New York, Assembly Member Harvey Epstein has sponsored an amendment to the state constitution that would ban the "slavery loophole" and mandate minimum wage pay and basic workplace health and safety standards in prisons. With no action on the federal level expected, these grassroots, state-led initiatives appear to be the best hope for reform.

Denying fair wages and safe working conditions are violations of fundamental human rights, as detailed by the ACLU report, but also constitute a greater danger to society. The real price of tolerating forced prison labor is the way it diminishes all of us and, most especially, our standing as a nation committed to justice. In the words of Eleanor Roosevelt:

"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world.… Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

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