

INMATE LABOR COMPENSATION ISSUES

by

Neal Miller

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This paper will review the issue of compensation for inmate labor from the perspective of the inmate as a productive worker. In this context inmate labor is neither punishment, nor training. Rather, inmate labor is done primarily for purposes such as producing goods and services for institutional consumption or for sale or trade to outside buyers.

Viewed this way, the primary policy question that "controls" the inmate compensation issue is what purpose(s) is/are intended to be served by having inmates work? Once that is determined, compensation for that work should presumably occur where the purposes of the work itself will be furthered by compensation, or those purposes potentially frustrated by the absence of compensation.

### Background of Issue

The practice of prisoners working as an element of a criminal penalty can be traced back to Roman, and even Biblical times. Justifications for such practices range from forced labor as punishment to simple economics: reducing society's cost of keeping inmates. With the development of the prison for incarcerating convicted criminals, prisoner labor also took on the role of aiding the inmates rehabilitation. Thus, both the New York (Auburn) and the Quaker prison systems established in the early 1800's focused on inmate work as a key element of their regimes. Due to the fiscal superiority of the New York system, it became the dominant correctional theory in the United States, while soon leading to a change in emphasis from inmate rehabilitation to the inmates' labor paying for the costs of prison operation.

The legal theory underlying the use of forced inmate labor derived from the Statute of Laborers (1349) which implied a quasi-feudal notion of state ownership of the labor of the English populace, since the law required unlanded men or women to work for any landed employer when their lord had no work for them. For this beginning came the Elizabethan poor laws which not only continued the requirement of forced labor, but also provided for the building of houses of correction to hold vagrants for whom private employment could not be found (cf. for a modern descendent, Maine Rev. Stat. Title 34 §504).

The adoption of the 13th Amendment to the Constitution seems to ratify the practice of forced labor from inmates, since its ban of slavery excludes inmate labor. Note, however, that the language of the Amendment speaks only of inmate labor as punishment--a limitation which although enforced by Supreme Court decisions in the 19th century has not been discussed by modern lower court decisions. For well into the 20th century, the notion of paying inmates for their work was occasionally advocated, but only rarely implemented.

At present, however, in 45 states and the federal government, corrections has abandoned any attempt to "force" inmates to do productive labor notwithstanding the state ownership theory. Rather, in these states, work incentive schemes provide inmates with small monetary and other rewards for work. The state ownership principle, however, is invoked to label these payments as gratuities (not subject to income tax). In some states gratuities are paid to inmates in both productive and institutional maintenance work. And, in a few states, gratuities are also paid to inmates in educational or training programs, which would otherwise conflict with the inmates desire to "earn" the limited funds provided them for work.

Indeed, so prevalent have these inmate wage incentive schemes become that the American Correctional Association, Commission on Accreditation in its Standards for Adult Correctional Institutions includes among its essential standards, a provision that inmates be paid for work performed (§4390), and that there be a written incentive plan for providing work incentives to inmates (§4391, important). The Federal Standards for Prisons and Jails issued by the U.S. Department of Justice in 1980 adopt both the ACA standards (§14.06). The Commission is now testing newly developed standards relating specifically to prison industries. These standards contain provision for both wage incentive payments and for the related issue of compensating workers for injuries (§4608.01). Standard 4647.01 would make it essential that the inmate wages be based on the level of skill employed, and the quantity and quality of work.

These developments in the United States reflect the general international consensus that inmates should be remunerated for their work, United Nations Minimum Standards for the Treatment of Offenders, Standard 76. As of 1974, 50 of 58 nations responding to a survey on the extent of their adoption of this standard reported the existence of a wage scheme for inmates. Indeed, it appears that the international community has been far ahead of the U.S. on the issue of inmate compensation. A report from the International Labor Office of the League of Nations in 1932 noted only one industrial nation at that time not having any provision for inmate incentive wages (England having in 1922 replaced wages with a good time credits incentive system, returned to a monetary incentive plan in the mid-1930s).

#### Recent Changes in Inmate Labor Practices and Laws

Whatever changes in practices may have occurred, the notion of "state ownership" of the labor of prison inmates has maintained its theoretical

currency even today. In practice, however, the advent of first, the rehabilitation theory of corrections and, more recently, "reintegration" of the offender principles have served to undercut the rationale behind state ownership. Moreover, court decisions providing for inmate "rights" to due process reinforce the need for greater policy concern about the relationship between inmate labor issues and general correctional goals.

Among the major inmate labor practice changes that have occurred in recent years are:

- Provision for workers compensation (about 20 states)
- Payment of wages beyond the gratuity level so that federal and state income taxes are collected (e.g., Iowa, Minn.)
- Conditioning wages to worker skill and productivity (24 states)
- Explicit statutory recognition of inmate as state worker (i.e., Illinois)
- Authorization for private employers to use inmate employees who are paid prevailing usages (12 states)
- Increased stress on post-release employment opportunities of inmates, including the provision of direct employment assistance (e.g., Conn.), elimination of state and service and licensing restrictions (25 states), and limitations on private employer discrimination against former felons (5 states) and even fiscal incentives to employers hiring ex-felons (e.g., federal Targeted Jobs Tax Credit; state analogies).
- Development of other reintegration programs focusing on bridging the gap between the institution and work in the community, such as work furlough and work release, as well as procedural innovations such as mutual agreement parole, for coordinating institutional training with other release programs.

#### Policy Perspective

Because of the centrality of inmate labor to correctional activities, it may be hypothesized that examination of the inmate labor practices will reveal how developed the state's general correctional policies are. For

example, where inmate labor policies are not far from those of the nineteenth century, one would expect little advancement from 19th century practices in other areas of prison life.

Probably the key element of any modern inmate labor policy is the development of an inmate incentive scheme. Such a scheme serves three immediate functions:

- Provides inmates with a self-interest in maintaining prison order and productive work;
- Reduces the need for overly rigid discipline enforcement by prison staff (thereby reducing the likelihood of the staff resorting to overly primitive or brutal acts in inmate control);
- Focuses the need for professionally responsible staff insofar as a cost accounting mechanism is established to measure the costs and production value of inmate work.

Another long-term consequence of the "normalization" of prison discipline is the enhancement it provides for programs serving inmate rehabilitation and reintegration. The expectation being that effective programming can ultimately reduce the likelihood of criminal recidivism.

A review of current practices in the states shows a variety of incentives being provided for both inmate work and inmate behavior generally. These include monetary payments, better housing, and good time credits, etc. However, the common use of program placement itself as an incentive for good behavior suggests that work performance requires incentives different from that of behavior generally.

The two ordinary incentives for inmate work are monetary payments and sentence reduction through earned good time. Little work has been done to date to compare these two incentives. What research there is, however, suggests that inmates are more likely to favor good time incentives, the less "safe" the prison setting. For, the more brutal the prison setting,

the more important it becomes to escape. Where physical security of the inmate is not overly threatened, then inmates are more likely to prefer monetary incentives. Having even limited moneys permits the inmate a means of making prison life more bearable.

There is also some reason for believing that the availability of these two incentive choices interact. Where no monetary incentives are available, the level of prison brutality may go up as physical intimidation becomes the sole means for inmates to obtain their needs. Hence, the value of good time increases. In sum, monetary incentives have the potential of reducing inmate violence by substituting a monetary economy for an economy of intimidation.

In an effort to test the hypotheses above, that inmate wage policies can "predict" prison conditions generally, data was gathered on the type of wage system used in 49 states (Vermont state prison is closed) and on court decisions on prison conditions. Chart I, below, shows the extent to which inmate wage scales (rows 1 to 4) are correlated with general correctional policies--as measured by court findings of unconstitutional overcrowding conditions (Columns 1-4). The wages row is scaled according to its parallelism with free world wage scales. Row 1 lists these states that provide sufficient wages for the inmates to pay income taxes. This is followed by states whose pay scheme include productivity incentives or is differentiated by skill level. Next are states where the same gratuities are paid to inmates or where inmate behavior is the basis for the gratuities. Last are those states where inmates receive no wages for work.

[insert Chart I here]

The court rulings column is scaled according to the degree to which the prison system as a whole is under court order. Column A lists those states where no court ruling exists. Column B includes states where court





challenges exist and the litigation is of substantial duration. Column C lists states where only one facility is under court order. Column D includes states where two or more facilities are under court order. Column E lists those states where the entire prison system is under court order (including states that have only one prison).

Because the data used here are category ordered, not interval valued, the Gamma statistic is used to determine the strength of the relationship between inmate wage policies and correctional deficiencies as seen in court litigation. Gamma was found to be 56.4. This is analogous to the variation described by the square of a correlation coefficient (a statistic more familiar to most people)  $\eta^2$  where  $\eta = .75$ . Thus, the use of the Gamma statistic indicates that as theorized, the same factors that lead to progressive inmate wage policies also lead to more generally progressive correctional policies as indicated by the absence of court found unconstitutional prison conditions. This does not necessarily mean that there is any direct cause-effect relationship between the two factors such that implementing inmate wages will be sufficient to relieve prison problems. However, it may be hypothesized from the data that progressive inmate wage schemes can be a key element of resolving existing prison problems.

#### Incentive Scheme Implementation Issues

Accepting the utility of adopting wage incentive schemes for inmate work to the general atmosphere of the correctional system, what incentive scheme is to be most desired? A corrolary question is what problems may be expected in implementing such a scheme in a correctional system that has hitherto provided no wage incentives. Finally, what are the expected costs?

1. Wage scheme elements that must be considered include:

- Should inmates be paid based on skill and productivity or should all workers be paid the same? Where inmate work has nonpunitive goals such as producing goods and services, work familiarization or skills training, a differential wage scale is preferred as best emulating the real world conditions that serve these nonpunitive goals.
- Should productivity incentives be based on individual or group performance? Where the work to be performed is dependent upon work done by other workers, e.g., laundry, production line, etc., group performance bonus systems prevent any production imbalance being generated by individual bonuses. Moreover, group bonuses better emulate real world conditions where piece work production is not common.
- What guidelines should control the settling of production bonuses? The production standards should be set by individuals who are familiar with both the relevant free world industry activity and with the special problems created by the correctional environment. Whatever standard is established, it must be realistic in being both achievable, yet calling for more than the effort now being put forth. It must be a simple system that the inmates can readily understand, and one easily administered (simple to calculate). In most cases, performance bonuses should be calculated as a percentage of the worker's base pay scale, rather than any equal sharing of a bonus pool. A written performance evaluation should be provided to each inmate worker on a periodic basis, where productivity incentives are used.

- What other incentives might be provided to supplement the basic wage incentives plan? Provision can be made, as it is in a number of states such as California, for paid vacation time and paid sick leave. The rationale for this benefit is to both emulate free world conditions and to gain the productivity effects that such benefits accrue. Similarly, longevity-on-job wage increases can be expected to reduce labor turnover where it is now caused by inmate choice. Nonmonetary benefits that are often seen include better housing arrangements and good time credits. The latter, however, would seem to be inconsistent with the determinate sentencing laws in many states, or at least this is so where a productivity standard is the basis for the granting of good time.

2. Among the problems that might result from the implementation of an inmate wage scheme, the most important is that of the inability of present staff to administer a productivity-oriented inmate work program. New staff with business management credentials may need to be hired to direct the inmate labor activities in place of existing staff who may be primarily corrections trained.

Similarly, the need to coordinate inmate work programs with other correctional programs may require administrative staff with different skills than are now needed. Training and education programs especially may need to be coordinated so that they do not either conflict with work assignments, nor fail to prepare inmates for work assignments.

The experience of the states participating in the LEAA Free Venture prison industries program indicates that these staff and coordination problems are not insignificant. For the present, however, consultant assistance is available to states seeking to institute "business like" industries

operations from the American Institute of Criminal Justice in Philadelphia, Penna. and the Institute for Economic and Policy Studies in Alexandria, Va.

3. The most difficult issue relevant to inmate wage systems is its cost. For, no simple formula exists to estimate either wage costs or the productivity benefits that wage incentives may create.

One major impediment to developing such estimates is the lack of uniformity among the states in determining which work should be compensated. Obviously, work that produces goods and services for sale to buyers outside the corrections system is the minimum that should be compensated. In some states, however, inmates who perform agricultural work or institutional maintenance are also compensated--although not always at the same wage level. And, a few states and the federal prison system also pay inmates who attend training or education programs and achieve satisfactory performance there so that the availability of paid work does not discourage attendance at these needed services.

Direct costs, however derived, should have deducted from it any state taxes paid by the inmates, as is done in Minnesota, for example. If legislation exists for inmates with funds to pay room and board contributions (e.g., Michigan) this too should be deducted from direct costs. Other potential cost reducers are lowering of family welfare support payments due to inmates sending moneys home and inmate contributions to a state victims compensation fund.

A final cost consideration is the indirect costs for corrections likely to accompany system changes needed to permit an inmate wage system to operate as an element of "business like" prison industries. Upgrading of staff is one example previously mentioned. Another related cost is that of developing a product cost information system. New equipment may also be needed to be purchased.

On the positive side, inmate wage incentives may be expected to increase worker productivity between 50 and 100 percent, based on past experience with the Free Venture program states. However, as with any new business, the gains from increased productivity are not likely to offset the new expenses for three to five years, at best. The economic gains from decreased violence in the prison setting, or any reductions in recidivism among releasees are impossible to fiscally quantify, even if likely to be real. Nor can one easily quantify the economic benefits that inmate wage incentive systems bring in lessening the likelihood of prison riots. For, inmate perceptions of their labors' exploitation are often, as in Oklahoma, a major element of inmate dissatisfaction.

The bottom line of the cost issue is whether prison industries can be profitable operations, even where inmates are paid wages. The experience of the federal prison system indicates that this surely is the case. Nor is there any reason to believe that this example is atypical. Inmate workers are not inherently inefficient workers. Of course, prison conditions may present some difficulties, but these are not insurmountable with competent administrators and adequate capitalization. Hence, it should be concluded that the cost of inmate wages is far less significant an issue than is the obtaining of the capital necessary to develop any new business.

#### Summary and Policy Options

Virtually all states and the federal government provide wage incentives for inmate workers. The specific wage plans used vary considerably, but the trend is towards wage incentive plans to include skill differentials and provide for productivity bonuses. A strong relationship was found between free-world-like wage incentive plans and absence of unconstitutional prison conditions (as evidenced by court decisions). It is hypothesized that this is because the existence of wage incentive schemes requires more

professional correctional staff; greater attention to the setting and attainment of specific correctional goals; and, provides inmates with an incentive for activities that replace more violent means of attaining their wants.

Several significant problems are likely to exist for states desiring to implement free world like wage incentive schemes. Cost of implementation is a major problem, particularly at the initial stages when productivity increases are not yet able to compensate for new capital investments.

The principal options for states to implement new wage incentive schemes are:

- Upgrade existing state-run industries operations;
- Utilize private industry expertise by permitting their hiring of inmate labor (not contracting);
- A combination of upgraded state-run industries with private industry through contracting arrangements and the use of private sector technical assistance or even capital investment to support the contracting arrangement.

New federal legislation, Section 827 of Public Law 96-157 provides for lifting of federal statutes restricting the sale of prison-made goods to the federal government or in interstate commerce. Seven states are to be authorized by the LEAA to permit such sales on condition that prevailing usage be paid to the inmates, that they receive the fringe benefits afforded other workers (except for unemployment compensation while incarcerated) and that organized labor be consulted. At present, perhaps a dozen states seem to have laws permitting their application, while one state, Kansas, already has received LEAA approval (see Chart II).

More recently, legislation has been introduced by Senator Robert Dole to go beyond the pilot programs authorized by PL96-157 to permit any state meeting the statutory criteria to sell beyond its borders.

CHART II

STATES PERMITTING PRIVATE INDUSTRY HIRING  
OF INMATE WORKERS

<u>State</u>	<u>Year of Legislative Action</u>
Arizona	1981
Indiana	1979
Iowa	1977
Kansas	1978
Kentucky	(A. G. opinion)
Louisiana (Restitution Industries)	1976
Minnesota	1973
Mississippi	1981
Rhode Island	1972
Tennessee (Restitution Industries)	1977
Utah	1980
Washington	1980, '81
Florida	pending in state House, passed Senate
Alaska	passed one Chamber

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Source: American Institute of Criminal Justice.

The major problem with the private industry options is its likely limited size. This raises the possibility that the inmate population will not be receptive of a program that benefits few inmates out of proportion to other inmates. This is especially likely to be true in those states not presently paying any wages to inmate workers. Hence, states may also wish to upgrade their existing state-run industries. And, the interest of a private industry to work with corrections may be politically useful in achieving the legislator's approval and funding.

Overall, improvements in prison conditions often require substantial public investment. This is especially true of improvements in inmate labor programs. However, these changes are probably needed if other changes are to be effective. Yet these changes hold the promise of ultimately leading to less public costs either as profit earners (e.g., Federal Prison Industries) or as the private sector assumes some of the initial capital costs of improvement.



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