The Voluntaryist

Vol. 2, No. 2, WHOLE #8 *"If one takes care of the means, the end will take care of itself."* JULY 1984

HANGING NOT PUNISHMENT ENOUGH: THE STORY BEHIND PRISON SLAVERY

Editor's Introduction: This newsletter has been delayed for many reasons and we can only offer our apologies. This issue reflects the scholarly perspective Carl has brought to bear on his 40 day prison experience. We are pleased to be able to offer this voluntaryist view of prison slavery.

The anarchist insight into the nature of the State is premised upon the certainty that all States *(i.e.,* government employees) commit invasive acts. Voluntaryists condemn the initiation of force, whether by private individuals or public officials acting under the mantle of their "office." They advocate an all voluntary society, one where all the affairs of people, both public and private, are carried out peacefully and in voluntary cooperation with others. Voluntaryists are opposed to the State because no State has ever or will ever exist as a voluntary institution. Every State presumes to initiate violence against those who refuse to pay taxes or wish to secede from its jurisdiction. From this point of view, the State becomes the primary and dominant criminal organization in society, even though many people accept its "rule" as legitimate. Notwithstanding this legitimacy, government employees—in the name of the State—do commit invasive acts when they imprison peaceful people and steal private property from resisters who do not recognize their authority.

The purpose of this paper is to describe the history of prison slavery and to demonstrate how the image of penal servitude integrates itself into and reinforces the voluntaryist view of the State. Whether one views the origin of the State as grounded in "conquest" or "consent," historically most governments have treated their imprisoned opponents (those who have been "fortunate" enough not to have been murdered immediately) as slaves and forced laborers. This is exactly what one would expect of any organization which is criminal to the core. The "conquest theory" of the origin of the State conveys the image of a warrior class imposing its will on the populace of an alien land. Slavery and involuntary servitude follow as a consequence of conquest. Under the "consent theory" of the State, all are presumed to "voluntarily" accept State authority. Those who question the State's legitimacy are immediately killed or imprisoned as "lawbreakers," so that consent to State rule always appears "nearly" unanimous.

Even in ancient times, before the breakdown of the Roman Empire, the State had always tried to assert its authority against the criminal. In Rome, convicts were sentenced to "opus publicum," which meant laboring in public works, like sewer cleaning, road repair, and working in the State mines and quarries. Such work, especially the latter, represented "a kind of punitive imprisonment in the form of hard labor for the state." During the Middle Ages, penal servitude was not often resorted to because medieval society "lacked the funds and facilities for long-term imprisonment." Flogging, banishment, bodily mutilation, and the payment of fines to the feudal kings often occurred. As State power grew, major crimes became punishable by death, rather than incarceration. The main point of interest is that the State, hardly well developed during this era, had to deal quickly and harshly with offenders and could not afford to take advantage of their labor.

Penal labor reappeared in western Europe at the end of the Middle Ages and coincided with the "emergence of the national state and an increase in its wealth and power. Along with the extension of royal jurisdiction and the greater degree of centralization characteristic of state-building in the early sixteenth century, there developed an idea that the State could utilize the labor power of prisoners for its own interests." The demand for penal labor was closely related to the military needs of the emerging states, particularly in countries like Spain. Here the demand for galley rowers became urgent as naval warfare in the Mediterranean commenced. During the reign of Ferdinand and Isabella, "penal servitude was introduced as an alternative form of corporal punishment more useful to the State than other existing afflictive penalties." The 16th, 17th, and 18th Centuries found the labor of convicts useful in other ways, too. Prisoners maintained military fortifications, soldiered, and labored in public works and in workhouses or houses of correction. Often they were leased out to private employers. Clearly, the penal system and its handling of prisoners for the beneficial use of the State became part and parcel of every major European State's emerging mercantilist policy. In fact, it would be easy to conclude that the administration of criminal law proved to be a very fruitful source of income to the State. As we have seen, the prospect of increasing State revenues through the administration of criminal justice at the expense of the criminal and his victim was one of the principal incentives in the transformation of private justice from a mere arbitration between parties to a significant part of the "public" criminal law. "One might even contend that as our State prisons developed, the new form of punitive imprisonment was practically nothing but a modernized version of the Roman "opus publicum,"

A very glaring inconsistency arose within the movement for the abolition of slavery, as it grew out of the Enlightenment theories of natural law and "the rights of man." On the one hand, private individuals were to be prohibited from owning and trading slaves, while on the other "public slaves," that is, convicted felons, were to be treated to forced labor at the hands of the State. Reformers did not seem to perceive the problem of having the State abolish "private" slavery by legislative fiat and at the same time have the State remain owner of literally thousands of convict slaves. The only "legal" form of slavery after "abolition" was prison slavery. The justification for such a policy was embodied in legislation like that of the 13th Amendment to the U.S. Constitution:

> 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).

The government, itself, reserved the right to inflict forced labor on all those convicted of crimes against its laws (the king's peace of the Middle Ages). As one would expect of a criminal gang, not

The Voluntaryist

Subscription Information

Published bi-monthly by The Voluntaryists, P.O. Box 5836, Baltimore, Maryland 21208. Subscriptions are $10 per year, $18 for two years. Overseas subscriptions, please add $5 for extra postage (per year). Back issues $2 per copy.

Editor: ***Wendy McElroy***
Contributing Editors: ***Carl Watner and George H. Smith***

only did it exempt itself from "laws" which everyone else was subjected to, but it tended to exploit to the hilt all those it was capable of imprisoning. That is why prison slavery evolved so substantially as private slavery declined. While the State was faced with an increasing number of prisoners, new penological theories were developing during the late 18th and early 19th Centuries which helped justify prison slavery by the State. Prisoners should not only be forced to support themselves, but they should earn a profit for the State and at the same time "rehabilitate" themselves.

With these introductory comments in mind, it should be meaningful to begin a detailed examination of the history and theory of penal slavery in order to understand how they buttress the voluntaryist contention that the State always has been a parasitic and invasive institution. Although the jurisprudential and penological literature has never discussed prison slavery from an anarchist point of view, the facts speak for themselves. This study is unique in that it sets the context for a voluntaryist interpretation of prison slavery.

As we have seen, the idea of exploiting the labor power of prisoners already existed in the "opus publicum" of antiquity. Convicts were used in public works. Public overseers realized their economic value by working them as efficiently as possible. During the Middle Ages, the value of convict labor was overlooked, when medieval legislators began imitating the punishments meted out to slaves by their owners. However, from the late Middle Ages onward, "public authorities realized that the traditional punishments (such as flogging and bodily mutilation) deprived the state or the town of available manpower. Instead of killing, maiming, whipping, or banishing criminals, they could be put to work for the profit of the government." This led directly to forced labor and prison slavery. The traditional medieval methods of punishment began to undergo "a gradual but profound change during the end of the sixteenth century." These changes, which included galley slavery, deportation, and penal servitude, were not the result of humanitarian concern for the prisoner, but rather of "certain economic developments which revealed the potential value of a mass of human material completely at the disposal of the" State. Galley slavery, for example, did not die out until the need for rowers was replaced by the development of the sailing ship.

The evolution of the treatment of criminals eventually resulted in the formation of houses of correction in England and other parts of Europe. "The essence of the house of correction was that it combined the principles of the poorhouse, workhouse, and penal institution. Its main aim was to make the labor power of unwilling people socially useful. By being forced to work within the institution, the prisoners would form industrious habits and would receive vocational training at the same time." When released they would add to the supply of trained laborers demanded by emerging mercantilist industries.

There is little question that one of the primary motivations behind the formation of houses of correction was the profit motive. In Holland, one of their advocates "argued for replacing the death penalty by confinement on the ground that execution may be cheap from a short-term view, but that it is unproductive and therefore expensive from a long-term view, whereas the new form of punishment forces those who had injured the state to work for its profit." The houses of correction were factories, with low overhead costs due to their source of free labor. It is probable that they were paying concerns and that was clearly the intentions of their promoters. In these workhouses, the labor of convicts was either utilized directly by the authorities that ran the institution or else the occupants were hired out to a private employer. As houses of correction spread over the continent during the 18th Century, they came to be State factories "serving the mercantilist policies of rulers more concerned with the balance of trade than with the reformation of criminals." They simply became the foremost device of the times for making prison labor profitable to the state.

"The early form of the modern prison was thus bound up with the manufacturing house of correction," but a combination of circumstances led to a change in its importance. In certain areas of production, penal labor could no longer as effectively compete with free labor. Furthermore, developing penological theories of punishment radically altered the outlook and practices of prison authorities. When the "radical innovations" stimulated by Cesare Beccaria's famous tract *Of Crimes And Punishments,* published in 1764, began to be inaugurated, the house of correction lost its prominence and part of its purpose. Prison labor became a double-edged sword, which could be used as a form of punishment and torture to the convict, as well as possible means of revenue to the State. "Imprisonment became the chief punishment throughout the western world at the very moment when the economic foundation of the house of correction was destroyed by industrial changes."

The criminal law of 18th Century Europe was, "in general, repressive, uncertain, and barbaric." Although many other humanitarian reformers had urged the reformation of this harsh system, it was left to "Beccaria to make the most succinct and effective plea for the reform of the criminal law." For our purposes here, it is sufficient to identify Beccaria as one of the fathers of modern prison slavery. Since he was primarily concerned with the deterrent value of punishment, Beccaria deprecated the death penalty and emphasized the need for certainty, proportionality and promptness in the punishment of criminal offenders. Under Beccaria's theory, capital punishment was not a long-term deterrent to crime, since "it is the anticipation of continued suffering and terror that is more efficient as a method of deterrence." The perpetual loss of one's liberty is more of a deterrent than death.

Beccaria's ideas had a significant impact on penologists and on the evolution of the modern prison. His passion for enslavement of the transgressor rather than execution led directly over the course of two centuries to UNICOR, the industrial arm of the Federal Bureau of Prisons. His ideas were shared by others. For example, the author of the article on theft in Diderot's *Encyclopedia* noted the benefits of profitably employing convicts rather than resorting to the death penalty:

> Thieves who do not kill, do not deserve death, because there is no calculable relation between the objects stolen—perhaps of a very small value—and the life which it is proposed to destroy. Employ the convicts in useful labor: to deprive them of their liberty will be sufficient punishment for their offense, and will provide sufficient guarantee of public order, and will profit the state. You will in this way avoid the reproach of injustice and inhumanity.

Thomas Jefferson, who helped develop American prison practices, was influenced by Beccaria's essay. Jefferson's *Commonplace Book* contains some 26 excerpts from Beccaria, all copied in the original Italian. Jefferson studied law and by the end of 1778, he had already completed his "Bill for Proportioning Crimes and Punishments in Cases heretofore Capital." In his autobiography, Jefferson noted that this proposed legislation was not passed by the Virginia Legislature, even though "Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and ineffiency of the punishment of crimes by death; and hard labor on roads, canals, and other public works, had been suggested as a proper substitute."

The ideas of people like Beccaria and Jefferson paved the way for the development of prison slavery in the United States. Prison industries and even the institution of prison itself was undoubtedly the product of penological developments of the last two centuries, which these men helped start. The actual impetus for prison labor in the United States began with Quaker innovations in Pennsylvania, dating from the formation of the Philadelphia Society for Alleviating the Miseries of Public Prisons in 1787. The Society persuaded the legislature to set aside the Walnut Street Jail, built earlier in the 1770's, to administer their penological theories of "solitary confinement to hard labor." In what has been referred to as "the cradle of the penitentiary," Quakers helped establish the two fundamental principles of forced labor and humane treatment. A cellular structure, much like today's prisons, was incorporated into the jail at Walnut Street. The major offenders were kept in solitary confinement and after a length of time they earned the "privilege" of working in their cells and reading. "The inmates worked at carpentry, joinery, weaving, shoemaking, tailoring, and the making of nails—all of them industries that later became the stock industries in American prisons."

Overcrowding led to the disruption of the work program at the Walnut Street Jail by 1801, and stimulated the development of rival prison systems. By 1825, the existence of prisons in other states on the East coast led to what was known as the Auburn plan, after the New York State prison at Auburn, which was in partial operation by 1821. Ultimately, the Auburn plan embraced solitary night-cells and "strict discipline, coupled with a closely supervised work program in congregate shops" during the day. Instead of inmates working in their individual cells, as at Philadelphia, the plan at Auburn enabled the prison administrators to adopt more factory-like operations and more effectively utilize their prisoners' labor. Prior to the Civil War, most of the prisons operated under the Auburn plan were at least self-supporting, if not financially profitable to the state. The success of prisons operated along these lines, inevitably, led to protests. Free laborers objected to the "cheap" competition provided by prison labor and favoritism and corruption were rumored to abound among those who administered these "profit-making" institutions.

During the early 1840's, the time in which these issues were being agitated, the question of recompense for prison labor was never once raised. This was a time of chattel slavery and "there was a total lack of interest on the part of prison reformers and the public in any regular wage-scale compensation of prisoners." It was generally believed that punishment must not include any "remuneration for the suffering endured." "Since the prisoner had not been willing to work honestly for a living with the inducement of wages on the outside, he should work involuntarily within the prison for 'no' wages. Otherwise, there was the same incentive to work inside the prison as on the outside, and the deterrent effect of the prison would be lost. The convict was sent to prison 'at hard labor.'"

> The prisoner's time was forfeit to the State. His labor was a part of that forfeit. He was the slave of the State. He had forfeited citizenship. He was an outcast.

In England, this particular line of reasoning resulted in "a notable trend away from productive labor and an adoption of punitive labor." Treadwheels, where convicts simply walked on the paddle wheel, and crank devices, where convicts were required to crank out a certain number of revolutions every 8 hours, were widely employed. This was hard, unproductive labor at its worst.

Prison industry in America has developed along commercial lines, since its inception in the late 1700's. Several different systems of prison labor have been used here during the last two centuries. The "contract" system is one of the oldest. Under this form, a private businessman or firm contracts with the state for the use of a certain number of convicts. The contractor sets up shop in the prison, providing his machinery and raw material to manufacture some commodity. "The state feeds, shelters, guards, and otherwise takes care of the prisoners for the contractor, who sells the products made by the convicts in the open market wherever he can." The "piece-price" form of the contract system allows the state to retain control over both the discipline and labor of the convict. The contractor, after having furnished materials to be worked upon, pays an agreed upon price for the labor bestowed on each piece produced.

The "state account" or "public account" system is similar to the contract system except that in this form, the state essentially replaces the contractor. The state goes into business for itself: providing the labor, raw materials and necessary machinery for production itself. Goods are marketed wherever they can be sold. Under the "state use" system, the state produces the goods but is limited to using or selling them in certain legislatively defined ways. Both federal and individual state legislation has been passed during the last 60 years to control the use and sale of prisoner made goods and to prevent their competition with commodities made by free labor. The "state use" system began during the Civil War in 1862 in the District of Columbia. "In response to appeals from the journeymen and master cordwainers, Congress directed that the warden of the District Prison produce shoes exclusively for the army and navy, to be paid for by the latter at the customary rates." The "public works or public ways" system works convicts in construction or repair work in the prisons themselves, and also on other public jobs, like road and public building maintenance. The well-known road gangs of the South exemplify the operation of the public works system.

Most notorious of all the systems of working prison labor is the "lease system." "Under it a convict is rented or hired out entirely in the custody of a private businessman or company. The prisoner virtually belongs to the contractor, who has complete authority to guard, feed, discipline and exploit him as it sees fit." The lease system originated in the South. After the war, prisons and prisoners in the South were in a perilous condition. The origin and abuses of the lease system can be traced back to this time.

The Civil War also produced an unprecedented demand for prison labor and during the war prison industries flourished. There was a great demand for cheap clothing, shoes, and boots, which was opportune work for convicts. In Georgia, for example, the state penitentiary at Milledgeville was being used as a gun manufactory. It was thought that Sherman's army would burn the place down and "if the convicts were in the walls when General Sherman reached there they would be either turned loose for indiscriminate plunder or enlisted in the Federal army." To avoid this, and make use of the prisoners, the Governor of Georgia, around Christmas time 1864, determined to offer each convict a pardon, on the condition that he would aid in the removal of state property from Milledgeville and then enlist in the Confederate army. "Only four of the 126 refused the offer," excluding the few men in for life for murder, who were not included in the pardon. Although some of the convicts eventually deserted, a large majority of them performed faithfully during the retreat from Milledgeville and were discharged honorably for their service.

The lease system is said to have actually originated in Georgia, where the state penitentiary had been burned. Since there was no prospect of obtaining state funds for a new prison, the only option was to lease the convicts out. This decision was first made by General Ruger of the Federal Army. "This new system of leasing convicts had come into being because of the poverty of the state after the war. Unable to support the criminals, the State was hiring them out to those needing large labor crews in the building of railroads, in turpentine forests, and lumber camps." Many southerners "thought this was far worse than slavery had ever been." Convict leasing was called "convict murdering."

> Buying men like they was mules. Treatin(g) them worse then mules ever was treated. Beating them, starving them, killing them. And who cares? The State don't care. It's got the lease money. The folks that git the convicts, they don't care. All they want is to feed them cheap and get all the work they can out of them.

In her novel, *Gone With The Wind,* Margaret Mitchell recounted all the horrors and abuses of the lease system. Her descriptions illustrated the fact that slavery was slavery, whether it was black chattel slavery or prison slavery. The abuse was in the system which permitted the ownership of sor[illegible]n by others, not in the particular master who owned them. [illegible]chell did not explain was how prison slavery was possible, [illegible]ough chattel slavery had been abolished.

As indicated, the 13th Amendment made prison slavery constitutionally permissible: "Neither slavery nor involuntary servitude *except as a punishment for crime* . . . shall exist within the United States . . ." The legislative history of the prison slavery proviso in the 13th Amendment harks directly back to Thomas Jefferson and his mentor, Cesare Beccaria. "Beccaria's theories became American law, to a considerable degree through Thomas Jefferson's influence on American criminal justice," and this came about in the following way.

The Articles of Confederation, while indirectly embracing slavery as did the federal Constitution of 1787, contained no proviso which would have explicitly permitted prison slavery. However, Jefferson's authorship of the first Northwest Ordinance of 1784 is our lead to understanding the existence of the slavery proviso in the 13th Amendment. This ordinance was written by a committee chaired by Jefferson and was designed to prohibit slavery in the new territories west of the Alleghanies. Jefferson's belief in Beccaria's theories led to a proposed "exception proviso" in the original bill. Jefferson was largely credited with writing Article 5, which read:

> That after the year 1800 of the Christian era there shall be neither slavery nor involuntary servitude in any of the said States, otherwise than in the punishment of crimes whereof the party shall have been duly convicted to have been personally guilty.

This section of the bill was defeated and dropped from the final version of the ordinance. "Several attempts were made to readmit the article, including one by Rufus King in 1785, but nothing came of such efforts until 1787, when a new ordinance was drafted to provide more efficient territorial government."

The new Northwest Ordinance of 1787 was written while Jefferson was in France. It was prepared by Nathan Dane and Rufus King, both of Massachusetts, and Richard Henry Lee and Thomas Pickering. Article 6 of the 1787 ordinance was modeled after the earlier Article 5 and read as follows:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted. Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Since many of the delegates that participated in writing the Ordinance of 1787 had also been delegates to the Constitutional Convention they were familiar with the efforts to give a legal basis to slavery. Pickering, out of all of them, objected most strenuously to the legalization of any form of slavery. His 1783 "Proposition for Settling a New State" contained a requirement for the "total exclusion of slavery from the State" with no proviso exception for those who had been duly convicted of crime.

Prison slavery was never an issue for the pre-Civil War abolitionists. Those free states which were formed after 1787 often adopted the language of Article 6 of the Northwest Ordinance as their model. In 1802, Ohio became the first free state to include prison slavery in its Constitution. Although the decades before the Civil War were filled with abolitionist agitation, there was no perception of the incongruity of abolishing chattel slavery while retaining prison slavery. Thomas Clarkson, one of the foremost British abolitionists, for example, saw nothing iniquitous about the use of convicts to clear rivers, repair the roads, or work in the mines. Lincoln's Emancipation Proclamation did not address the issue of prison slavery and furthermore only freed the slaves in the states in rebellion. It did not pretend to affect slavery in the northern states, where prison slavery was constitutionalized by law.

The first national discussion of the validity of the prison slavery proviso occurred in 1864 in the Senate of the United States, when debate was held over the wording of the 13th Amendment. Senator Charles Sumner of Massachusetts, although not a radical abolitionist himself, was the only senator to speak out against the prison slavery proviso. Sumner, earlier in his career during the 1840's, had been involved with the Boston Prison Discipline Society and perhaps his opposition to forced labor stemmed back to his experiences then. On January 11, 1864, Senator Henderson from Missouri had proposed (S.B. 16) an amendment to the Constitution, which would have partially abolished slavery:

> Slavery, or involuntary servitude, except as a punishment for crime, shall not exist in the United States.

Nearly a month later, Sumner countered with his own proposal (S.B.24) which would have abolished all forms of slavery under the guise of establishing equality for all persons before the law:

> Everywhere within the limits of the United States, and of each state or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave.

The Senate Judiciary Committee, chaired by Lyman Trumbull, considered both bills, but Sumner, the senator best known for his antislavery views, oddly enough had almost nothing to do with the framing or passage of the constitutional amendment ending slavery. Sumner had not been consulted by Trumbull, when on February 10, 1864, the Judiciary Committee announced "acceptance of Henderson's resolution as the basis for the Thirteenth Amendment." In the Senate debates over the wording of the amendment, Sumner proposed that his resolution be accepted as a substitute.

Although the Senate refused to accept any of Sumner's suggestions, he was given a more than adequate opportunity to have his say and explain his objections to the language eventually adopted. The interesting point is that Sumner specifically objected to the prison slavery proviso, which was transferred from the Northwest Ordinance of 1787.

In the course of his lengthy remarks, Sumner pointed out that even under the best of circumstances he would object "to the

Jeffersonian ordinance, even if it were presented in its original text." Sumner also noted that the reference to both "slavery" and "involuntary servitude" seemed to imply that there was some distinction between these two forms of servitude. In 1857, Iowa had amended her state constitution "to prohibit slavery and permit involuntary servitude as punishment for crime." If there was no intended difference between "slavery" and "involuntary servitude" then the inclusion of the latter was simply "surplusage," as Sumner termed it. It could only introduce doubt and confusion.

Sumner was the only Senator cognizant of the import of these issues and despite his efforts the Senate adopted the Judiciary Committee's proposed text the same day (April 8, 1864) that he made the above remarks. The bill was submitted to the House of Representatives and "the long debates in the House over the Senate's proposed amendment did not mention the offensive exception" which permitted prison slavery. The House passed the Thirteenth Amendment on January 31, 1865 and it was eventually ratified by the required number of states and certified officially on December 18, 1865, as part of the United States Constitution. In its final, completed version, it read as follows:

> Section 1. Neither slavery nor involuntary servitude, except as punishment for crimes whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> Section 2. Congress shall have the power to enforce this article by appropriate legislation.

"The Senate's refusal to act on Sumner's appeal to delete the exception" legalizing enslavement of convicts was an act that still victimizes the American system of criminal justice. "Slavery remained the destiny of those imprisoned for crime." Courts in the United States have consistently upheld the prison slavery proviso of the 13th Amendment, although some judicial decisions during the last few decades have begun to recognize the existence of what they term "prisoners' rights."

One of the earliest reported cases viewing the criminal as "a slave of the state" was Ruffin *v* Commonwealth of Virginia, decided during the November Term, 1871 in Richmond. Woody Ruffin was a convicted felon, who had been hired out by the State of Virginia to work on the Chesapeake and Ohio Railroad in 1870. He was indicted for the murder of Lewis Swats and the Court held that the principles of the Virginia State Bill of Rights only pertained to freemen and not to convicts. A convicted felon has only such rights as granted him by state legislation. According to the court

> A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him. He is for the time being the slave of the State.

There is an unbroken string of court cases, both state and federal, which trace themselves back to the prison slavery proviso of the 13th Amendment and the language of Ruffin *v* Commonwealth. A brief mention of the more prominent of these cases will simply reinforce the view that prison slavery is an accepted and legitimate part of American criminal jurisprudence. As we shall see when we come to our discussion of prisoners who are pre-trial detainees or serving time for civil contempt of court, the law has always recognized that those who are confined in jails and prisons —but not convicted of any crime—may not be forced to labor for the government. This exemption from forced labor while in confinement stems from the wording of the 13th Amendment as well as several centuries of common law usage.

Thirteen years after Ruffin *v* Commonwealth, the Supreme Court of the United States noted that "imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the provision of the Ordinance of 1787, and of the Thirteen Amendment of the Constitution, by which all other slavery was abolished." Despite the Court's affirmation that forced labor was a form of involuntary servitude, the legal definition of both "slavery" and "involuntary servitude," as expressed in the 13th Amendment have plagued both the legal profession and prisoners.

In a 1916 decision, the Supreme Court ruled on the validity of conscripted labor for state highway repairs in Florida. Butler took exception to the state laws which required every able-bodied male between the ages of 21 and 45 to provide 6 days labor on the highways of his county. One of his arguments was that this conscripted labor was a form of involuntary servitude that was prohibited by the 13th Amendment. Justice Reynolds in the majority decision noted that the language of the 13th Amendment was rooted in the Northwest Ordinance of 1787.

One of the issues involved in a similar 1920 Kentucky case concerned the payment of wages to convicts. In determining that convicts had no contractual right to any wages that the state saw fit to pay them, the Kentucky court observed that the labor of convicts has always been the property of the state. It is performed involuntarily and under duress as punishment for having committed a crime. "The labor of the convicts cannot be the property of the state and of the convict at the same time. . . . Any concession . . .to the convict with respect to his involuntary labor or the fruits thereof is necessarily a dispensation of legislative grace, and not a recognition of a property right in the convict to his labor."

There are a number of more recent cases dealing with the issues of involuntary servitude as this issue relates directly to prisoners.

In 1970, a circuit court decision dealt with the Arkansas State Penitentiary work farms. Prisoners claimed that their rights under the Thirteenth Amendment, among others, were being violated. With respect to the 13th Amendment claim, the court decided that "the Arkansas system of working convicts is not 'slavery.' . . .When Congress submitted the Thirteenth Amendment to the States, it must have been aware of generally accepted convict labor policies and practices, and the Court is persuaded that the Amendment's exception manifested a Congressional intent not to breach such policies and practices." The court also referred to the case of Heflin v Sanford, a World War II era decision, which upheld the distinction between "uncompensated service" and "involuntary servitude." Heflin, a conscientious objector, refused to report for work of national importance during World War II, claiming that to require him to work with little or no pay amounted to slavery or involuntary servitude. "The Court pointed out that there is a difference between 'involuntary servitude' and 'uncompensated service,' and that the Thirteenth Amendment prohibits the one, except as punishment for crime, but does not prohibit the other." Unfortunately the Court did not explain what the difference was between "uncompensated service" and "involuntary servitude."

As we have seen, the U.S. Courts have consistently upheld prison slavery and the forced penal servitude of convicts. By implication, this means that any convicts who refuse to work may be subject to additional punishment or disciplinary procedures "Refusal to work" while imprisoned constitutes a crime in its own right. Not surprisingly, both state and federal prison regulations reflect this in their disciplinary processes. For example, the

Federal Bureau of Prisons specifically refers to "refusal to work or accept a program assignment" in their discussion of "Prohibited Acts and disciplinary severity scale." Some of the possible punishments for refusal to accept a work assignment are: parole date recission, forfeiture of statutory good time, disciplinary transfer, disciplinary segregation, loss of privilege (movies, recreation time, and commissary), change in housing, extra duty or restriction to quarters.

Work stoppages and prison strikes have been one of the only means available to prisoners to protest their forced labor. Sometimes, such protests have been those simply of individuals, who for whatever reason, chose not to work; at other times such strikes have been mass movements. In the direst of straits, prison inmates have resorted to suicide in order to escape their fate. One such story, dating back to England in the mid-19th Century is worth relating. The governor of the Birmingham borough prison routinely ordered that petty offenders be confined in solitude and be kept turning a hand crank weighted at thirty pounds pressure, ten thousand times every ten hours. "Those who failed to keep the crank turning or who sought to resist were immobilized in strait-jackets, doused with buckets of water, thrown into dark cells, and fed on bread and water." One who resisted was Edward Andrews. After two months of refusing to work, during 1854, he eventually hanged himself from his cell window to escape from the punishments meted out to him for his obstinacy.

Such treatment was not out of line with 20th Century penal practices in America. James Bennett, former head of the Federal Bureau of Prisons, recounts one of his earliest visits to the Ohio State Penitentiary. He was shown "the cells reserved for prisoners who refused to work or were otherwise recalcitrant. These men were stood for hour or for days in tiny strap-iron cages, in which there was no room for them to sit down, until they agreed that washing pots and pans or shoveling coal was not such a bad fate." In an interview reprinted in 1970, Huey Newton, the Black Panther leader, explained why he refused to work while imprisoned in California, "choosing instead to suffer the punishment of solitary confinement for more than a year."

> The prison is a capitalistic enterprise. It differs very little from the system where inmates are "farmed out" to growers. In those instances the growers compensate the state. Most civilized people agree that the system is abhorrent. Yet the California method is to employ the reverse system. The convicts are not farmed out, the work is farmed in. What factors remain the same? The convicts are still exploited by the state; the work is still accomplished; the state is still compensated.

All systems of prison labor exploit the prisoner as a slave worker. At times, such as in Danbury, Conn. or the McNeil Island Federal Penitentiary, there have been massive work stoppages. The demands of inmates have ranged from better industrial training and increased wage rates to simply protests against oppressive conditions inside prison. "In the federal prison in Danbury, Connecticut, there was a total work stoppage involving 760 men for nine days. Things like that are not supposed to happen . . . . The system is too elaborate, the inmates are too weak, . . .the population too divided . . . ." But it did happen and serves as a dire reminder of slave revolts of earlier centuries.

The legal basis for treating refusal to work as a disciplinary violation harks back to the century old customary treatment of prisoners and the constitutional basis of prison slavery found in the 13th Amendment. People in the custody of the courts, for whatever reason, but who have not been convicted of crimes, cannot be forced to work during the time of their incarceration (prior to their conviction and sentencing). Most city and county jail inmates (as opposed to those in most state and federal prisons or penitentiaries) are detentioners, "not prisoners, and are, under the law, presumed to be innocent. Theoretically, at least, the detention is for the sole purpose of ensuring a defendant's appearance at trial, and is not for punishment.

Historically this distinction between those imprisoned for crimes and those held in "safekeeping" has always been maintained in this country. "Normally, there was no work prescribed or supplied for those who were thus being held in prison awaiting trial or for debt or inability to pay imposed fines." In one of the earliest studies of the Walnut Street Jail at Philadelphia, it was noted that prisoners were divided into the following categories: 1. The untried. 2. Convicts. 3. Vagrants. 4. Debtors. "The untried are not forced to work, but they are furnished with materials and implements if they desire them." Between 1818 and 1835, "a separate prison on Arch Street had been set aside for the incarceration of debtors and witnesses" in Philadelphia. This is indicative of the attempt of prison authorities to separate their "charges."

Contemporary Federal Bureau of Prison regulations reflect this attempt at segregation. At 28 CFR, Section 551.100 under its treatment of "pre-trial inmates" the Bureau notes that in addition to convicted inmates, it "houses" persons awaiting trial. "Procedures and practices required for the care, custody, and control of such inmates may differ from those established for convicted inmates." A "pre-trial inmate" is defined as "a person who is legally detained but not convicted."

> Pre-trial status includes any individual who is detained while awaiting trial, while in the process of trial, or while awaiting a verdict, or a detained person who has pleaded or been found guilty but is awaiting sentencing. For purposes of this rule, an inmate committed for civil contempt, or as a detained alien, or as a material witness is considered a pre-trial inmate.

The Bureau regulations also note that those committed for civil contempt of court are not convicted "for any offense against the laws of the United States." As we have already seen, "an inmate serving a civil contempt sentence in a Bureau institution will be treated the same as a person awaiting trial," and accordingly may not be forced to work under the directive of the 13th Amendment.

The Courts have repeatedly upheld the distinction between the convicted and unconvicted inmates. In a 1969 decision, a federal appellate court noted that "The Constitution does not authorize the treatment of a pre-trial detainee as a convict." In one of the most forthright discussions of this subject, the Iowa Supreme Court in 1916, held that "imprisonment at hard labor by the judgement or sentence of a court is involuntary servitude within the meaning of the Constitution" and that such a penalty cannot be imposed except as punishment for a crime. A party charged with contempt of court is not being prosecuted for a crime but rather with an offense against the authority of the court. Therefore the Court found that civil contemnors could not be sentenced to imprisonment at hard labor because such a sentence is constitutionally restricted to those convicted of crimes. This is why it has been consistently held that "persons who are detained in prison otherwise than on conviction of a crime . . .may not be required to perform labor, not even to defray the reasonable cost of their board." This also explains, at least indirectly, why prisons used primarily for the detention of "prisoners awaiting trial and therefore not susceptible to commercial exploitation remained in a very bad condition until well into the nineteenth century." Since detainees could not be forced to work, there was little incentive to improve their living conditions. None of the investment could be recouped through the application of their prison labor.

Although there is a fine line between civil contempt and criminal contempt, criminal contemnors may be required to labor because their convictions are of a criminal nature. "With certain exceptions, a criminal contempt is a crime, and . . .one adjudged guilty of a criminal contempt may be properly characterized as a convict." This distinction was also maintained for those imprisoned for non-payment of debt during much of the 17th, 18th, and 19th centuries in England and America. Imprisonment for debt was normally a civil proceeding and not a criminal one. In Hanoverian England, the process of imprisonment for debt was a civil one, "which could be initiated by any creditor owed a debt of forty shillings or more, in any of the more important courts handling civil suits." "The imprisoned debtor had no claim for support from anyone. He was not a pauper, he was not a criminal, he owed money until he could pay." The most famous of the debtors' prisons in England during the 17th and 18th centuries was the King's Bench prison. All of the prisoners of the King's Bench prison were, "without exception, prisoners of the court of the King's Bench; the vast majority were debtors prosecuted on the 'plea' (civil) side of the court. The remainder were products of the 'Crown' side', or had been committed for contempt of court."

The contemporary descriptions of debtors' prisons give truth to these distinctions. "By right and custom, debtors could not be chained or forced to work." They often lived with their families inside the prison and could maintain nearly unrestricted contact with the outside world. Security in the debtors' prisons was quite lax, "since the debtor enjoyed a privileged immunity from discipline." Other categories of inmates, such as a felon awaiting trial or those awaiting trials for misdemeanors, were given special privileges also. These included excemption from labor and coercive discipline as well as free run of the prison. Prison keepers in these types of prisons were only responsible for guaranteeing the custody of these classes of prisoners and for delivering them to the courts for trial; they had no authority to discipline.

The abolition of imprisonment for debt which took place in both England and the United States during the early- to mid- 19th Century eventually did away with imprisonment as a remedy for a civil suit. In the evolution of the common law, the development of civil arrest involved some highly refined distinctions. Even today, one might be placed in jail for failure to pay a sum of money, "yet this might not be what was technically called imprisonment for debt. Thus, imprisonment on failure to pay a fine was not imprisonment for debt." If the court had ordered payment of the fine, then non-payment would be construed as a contempt of court, and imprisonment would be for the contempt, not for the non-payment. Most authorities do not consider such imprisonment as imprisonment for debt but rather as a remedial type of enforcement device, much in the nature of a civil contempt proceeding. However inconsistent it may be, the State has exempted itself from public laws which have done away with imprisonment for debt.

Although the State has always maintained a hypocritical stance with regard to the criminal, there has been some effort to establish what is referred to as "prisoners' rights." Historically, the prisoner has had no rights and was simply construed as property of the State, but modern legal theory has come to recognize that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication,t aken from him by law." But even this effort has been half-hearted and futile. The situation fo the convict in prison is such that he has no property he can call his own. He cannot maintain his self-ownership rights to the fruits of his labor; he has no property rights at all while he resides in prison. Without property rights, the convict soon realizes that no other rights are possible. Whatever are referred to as "prisoners' rights" are simply grants by the State and/or prison administration to help appease the discontent of the prisoners. Between 1855 and 1955, there were more than 400 known and documented cases of prison uprisings and disturbances. Just as slave revolts and slave rebellions were expressions of discontent, so were these prison uprisings. Prisoners wished to call attention to the existence "without rights" that they suffered in prison.

The parallell between the convict prisoner and slave is even more far reaching than just comparing prison disturbances to slave revolts. Today, prisoners have no control over their "sale" or removal from one prison to another, just as slaves had no control over their movement from one plantation to another. "Cages have replaced cabins, while poor diet and enforced poverty continue. Electric doors and automatically locked passages enforce curfew. Prison watches day and night acknowledge no right to privacy, and prisoners may not convene without the approval or supervision of their keepers." Prisoners cannot assume their rightful role as parents. Prison education is inadequate and libraries and materials "skimpily supplied and those captives who teach themselves law to protect their rights through the courts are labelled 'dangerous' by prison officialdom: A thinking slave is a potentially rebellious slave."

Seldom have State officials been so blatantly supportive of one of the major themes of this paper: that possession of a vast number of prisoners is profitable to the State. As one post-Civil War governor of Kentucky acknowledged:

> Possession of the convict's person is an opportunity for the state to make money. The amount to be made is whatever can be wrung from him, without regard to moral or mortal consequences. The penitentiary which shows the largest cash balance paid into the state treasury is the best penitentiary. In the main, the notion is clearly set forth and followed that a convict . . .has almost no human right that the state is bound to be at any expense to protect.

This attitude has not disappeared today. The courts have "consistently ruled" that "prisoners have no right to wages for work performed while in prison." The State of Georgia, perhaps even today, but certainly as recently as a few years ago, still did not pay its inmates any form of compensation for work performed. The fact is that prison industry is big business in the United States and many other countries and that any movement such as a prisoners' rights movement which might weaken such big business is discouraged in whatever ways possible. "Today, Federal Prison Industries, Inc. (now renamed UNICOR) is far and away the most profitable line of business in the country. Profit on sales in 1970 were 17 percent . . . . The board of directors' annual report summarizes the success story: over a thirty-five year period, 1935 to 1970, the industries grossed $896 million, increasing their net worth by $50 million and contributing $82 million in dividends to the US Treasury . . . ." The secret of the success of all prison industries is the fact that pay rates in their manufactories range from 11 cents to about $1 per hour. The federal government, as well as nearly all state governments, violate their own minimum wage requirements.

Slave labor is simply the name of the game. No American prisoner has the rights of the free laborer, "to choose their jobs, receive just and equitable wages and organize with other workers for better wages, working conditions, employment security and benefits." Such rights are non-existent among the so-called list of prisoners' rights and "every American prison exploits convict labor." There is simply no way around this observation. Involuntary servitude which constitutes the essence of prison labor un-

doubtedly contributes to the poor working conditions, the many work-related accidents, as well as the general sense of alienation against the "system." "Slavery in any manner breeds hatred and contempt for the master and the work performed." It is a well-documented fact that prison "slaves" have been used in medical experiments and studies in this country and elsewhere. The federal, long-term control unit at Marion, Illinois "is an experimental behavior modification program designed to alter human behavior." These "modern concentration camps" definitely meet the criteria of 20th Century slaveholding.

"Prisons are run by slave labor: laundry, clothing, food, repair and maintenance, all are done by prisoners." The services provided by prisoners varies from state to state, but in nearly all the states, and including the federal prisons, the prisoners supply farm and plantation labor, build and repair roads, manufacture licence plates, furniture, road signs, and American flags, canned goods, mops, brooms, shoes, plastic products, and process poultry. In Pennsylvania all "Pencor" (Pennsylvania Corrections) products are slave-made and easily recognizable by their trade name. Prison administrators pick over the skills of their prisoners and seldom need outside contractors to perform work.

Although prison conditions have immensely improved over the centuries, the point is that the very concept of imprisonment and forced labor have not changed. We have a Humane Society for the protection of animals but we have no Humane Society that concerns itself with human prisoners. It is no part of any criminal's sentence that he should be degraded, perverted, or depersonalized. "Two centuries ago men had buckets in their cells instead of plumbing;" but regardless of how conditions change inside the prison, "no one has questioned the idea of caging" and enslaving men, "only how to perfect the cage." "The sentence of imprisonment, and not the treatment in prison, constitutes the punishment." Being in strange surroundings, around strangers: being confined to a certain building or locale: these are the earmarks of punishment. "Men come to prison as a punishment not 'for' punishment. It is doubtful whether any of the amenities granted in some modern prisons can in any measure compensate for the punishment involved in the deprivation of liberty."

Imprisonment is a violation of the body and prisoners are obviously held in prison against their will. Whatever debts they owe to their victims remain hopelessly unpaid because the State monopolizes their labor while they are incarcerated. Instead of forcing the criminal to restore the victim to his original position, the payment of a fine or actual imprisonment aims at "punishing" the criminal, while increasing the wealth of the State (or at least minimizing its expense in punishing him). By provision of the 13th Amendment, every prisoner is and remains a slave.

Carl Watner
March 1984

The Voluntaryist

P.O. Box 5836 • Baltimore, Maryland 21208