

Prison Labor Through the Lens of International Trade

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Lan Cao, *Made in America: Race, Trade, and Prison Labor*, available at [SSRN](#).

Twenty years ago this September, over 3500 activists gathered in my home town of Berkeley, California, for a conference entitled "[Critical Resistance: Beyond the Prison Industrial Complex](#)." Their purpose was to reject outright the project of criminal justice reform and to call instead for the complete abolition of prisons, jails, and other human cages.

Central to the argument for prison abolition is the notion that we law teachers mislead our students when we teach our students that the purpose of prisons and jails is to effect retribution, rehabilitation, incapacitation, and deterrence. Abolitionists argue (as do many contemporary academics) that incarceration is terrible at preventing and punishing criminality. Rather, prison responds to deeper political and economic needs. From a political perspective, the carceral system serves the purpose of social control: it expresses racism and helps produce "race;" it helps manage "surplus" populations made economically marginal by globalization and automation of production; and it establishes a new template for governance in the wake of the perceived failures of the 1960s welfare state.

Abolitionists often argue that prison serves an economic function as well. For example, Critical Resistance member [Angela Davis](#) says of the 1980s mass incarceration boom,

[A]s the U.S. prison system expanded, so did corporate involvement in construction, provision of goods and services, and use of prison labor. Because of the extent to which prison building and operation began to attract vast amounts of capital - from the construction industry to food and health care provision - in a way that recalled the emergence of the military industrial complex, we began to refer to a "prison industrial complex."

Many contemporary scholars have offered evidence and argument to support abolitionists' political theory of the carceral state—Michelle Alexander, Loïc Wacquant, Jonathan Simon, Marie Gottschalk, and others come to mind. But the assertion that a vast "prison industrial complex" (hereafter PIC) profits from incarceration is much less well supported by the evidence. Prisons and jails look much more like zones of "dead capital," in Ruth Wilson Gilmore's phrase: prisoners languish rather than work, new facilities fail to produce promised community jobs, and private prisons remain a relatively small part of the carceral system (although attorney general [Jeff Sessions has recently given them a thumbs-up](#) to expand). In *Made in America: Race, Trade, and Prison Labor*, however, [Lan Cao](#) provides some intriguing support for the economic part of the abolitionist case.

Cao, an international trade scholar, argues that our era of trade wars and "Make America Great Again" opens the door for the greater use of prison labor as a means of "insourcing:" "Using prisoners as their workforce, companies can keep production costs low, access a range of tax benefits, and promote their products as 'Made in the USA.' Since the loss of American jobs is typically blamed on low-wage workers in poor countries, many companies have responded to the calls to stop outsourcing American jobs through contracting with U.S. prisons to hire prisoners." Prison laborers lack the legal rights of employees. Like the labor of undocumented people, then, inmate labor is cheaper because it is less

free—making “insourcing” increasingly attractive.

Cao argues that as undocumented workers already do, prisoners are well-placed to serve as a nearly invisible base of a global production system. The federal government-owned corporation that hires prisoners out under the innocuous-sounding trade name UNICOR waves the “Made in the USA” flag when touting its services, as do state prison industries that do the same. State and federal governments offer legal and financial incentives to companies that are willing to replace foreign labor forces with a domestic one. The resulting products travel the world. Cao notes that although importing goods made with prison labor violates the Smoot-Hawley Tariff Act of 1930, exporting them is perfectly legal. Thus, the California Prison Industry Authority “has actively searched for export markets in Europe and Asia for denim jeans made in its prisons,” and jeans made with Oregon prisoners’ labels were blithely marked in Japan and Italy as “Prison Blues, made on the inside to be worn on the outside.”

Finally, like undocumented workers, prison inmates are disproportionately nonwhite. Racism adds social disregard to political powerlessness, continuing a tradition from slavery to the present. Cao concludes, “Prisoners are members of a shadow workforce which overlaps with the free-world U.S. economy. Prison labor has a significant economic dimension through direct and indirect impacts on the economy. In addition to generating vast revenues for corporations, prison labor incentivizes the growth of the mass incarceration system, bloats the prison and criminal justice workforce, and exploits economically vulnerable populations in myriad ways.”

In addition to supporting the abolitionist claim that the carceral system is economically profitable, Cao’s article offers a way to restrict those profits through law. Prison labor, as Cao points out, falls into an anomalous crack in our governance structure: those who benefit from it take the position that inmates are enjoying “rehabilitation,” not performing as workers. This allows the public-private assemblages that exploit their labor to avoid environmental and occupational safety and health obligations. Cao argues, however, that the Fair Labor Standards Act applies to prison labor. If inmates can win the right to a minimum wage, thus substantially raising the cost of their labor, this will both benefit working inmates immediately and open the door to a broader public debate about the functions of the carceral system.

What are the implications of this article for those of us who teach and write in criminal law and procedure? Cao’s article underscores the need for a law and political economy approach to criminal justice scholarship, and the benefits of incorporating international trade law into this approach. As the “cimmigration” literature has demonstrated, the carceral system cannot be fully understood within the traditional confines of criminal law and criminal procedure. We as teachers and scholars contribute to the invisibility of these systems of marginalization and exploitation when we look only at the rights of offenders and inmates vis-a-vis the domestic criminal justice state. Attention to international trade regulation—and the shift from state to market governance popularly called “neoliberalism”—may help us understand the full significance of the flow of bodies through American jails, prisons, and detention centers.

Finally, although more empirical work is necessary to determine the size, scope, and trajectory of production reliant on American prison labor, Cao’s article reminds us of the value of bringing abolitionist arguments into the classroom. We who teach criminal law and criminal procedure typically assume the necessity of the criminal justice system, perhaps stopping briefly to discuss the conventional justifications for punishment and then getting down to the business of how offenders are brought into the system and what their rights within it are. But, what if we stopped to ask whether the system should exist at all? Lan Cao’s article encourages us to ask, with our students, what are prisons really for?

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