

# MADE IN THE USA: RACE, TRADE, AND PRISON LABOR

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## ABSTRACT

*Justified on redemptive and rehabilitative grounds, prison industries in the United States are thriving. It is hardly surprising that as federal and state prison industries have grown, so have prison industries that rely on prison labor for private sector profit, and that such labor is primarily performed by minorities, particularly African Americans. In a new, Orwellian twist, the prison industry has also managed to hitch itself to the populist, anti-international trade wave that has reinvigorated economic nationalism. Add “Buy American” and “Made in the USA” to the purported benefits of prison labor for yet another layer of rhetorical flourish.*

*This Article provides a general overview of the prison labor industrial complex and examines the relationship between big business and prison labor in both state and federal systems. It also provides necessary historical background, particularly the racial dimensions at the root of state and private exploitation of prison labor, arguing that race and incarceration in the United States cannot be separated. The Article further explores the structural complexity intrinsic in prison labor because it embodies both economic and rehabilitative objectives and thus does not fit neatly into the conventional categories of market or non-market work, creating conceptual difficulties in both analysis and proposed solutions. As a result, prison workers are not deemed employees and, therefore, are not eligible for the minimum wage afforded other workers. The last part of the Article examines the wildly inconsistent case law that addresses the application of the Federal Labor Standards Act (“FLSA”) and argues that the profit-making, economic character of prison work makes it a market activity that entitles prison workers to the minimum wage mandate of the FLSA.*

I. INTRODUCTION.....	2
II. RACE, PENAL LABOR, AND PROFIT.....	7
III. PRISON LABOR AND BIG BUSINESS.....	13

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A. FPI, UNICOR, and the Modern Era of Prison Labor .....	14
B. Insourcing and Repatriation.....	16
C. Profits Prioritized over Rehabilitation .....	20
1. Profit-Driven Motive .....	20
2. Lost Rehabilitative Purpose .....	29
IV. PENAL LABOR AND THE DICHOTOMY BETWEEN MARKET AND NON-MARKET WORK .....	34
V. TOWARDS A PRAGMATIC PROPOSAL.....	39
A. Employment under the FLSA .....	40
VI. CONCLUSION .....	57

## I.

## INTRODUCTION

In “Orange is the New Black,” a popular web television series set in a women’s prison, the incarcerated women are put to work sewing underwear for a lingerie company for \$1 an hour after the prison is taken over by a private company set on increasing profits.<sup>1</sup> The women are later shocked to discover the lingerie they sewed is listed in the company’s catalog as selling for \$90—a jarring difference between price and wages.<sup>2</sup> While this depiction is from a fictional television episode, it has its foundation in reality and portrays a commonplace partnership between public and private prison systems and the private sector.<sup>3</sup> For example, in the early 90’s, Third Generation, a garment manufacturer, contracted with South Carolina Correctional Industries for sewing work, generating \$1.5 million worth of product that was later bought by Victoria Secret and other retail companies.<sup>4</sup> In more recent years, prison labor has produced a wide range of products for large retailers like Starbucks<sup>5</sup> and Whole Foods,<sup>6</sup> and are increasingly used in the service industry to staff call center positions.<sup>7</sup>

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1. Emily Yahr, *Yes, Prisoners Used to Sew Lingerie for Victoria’s Secret—Just Like in ‘Orange is the New Black’ Season 3*, WASH. POST (June 17, 2015), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3/?utm\\_term=.d476f97fa418](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3/?utm_term=.d476f97fa418) [https://perma.cc/BWG4-XACP].

2. *Id.*

3. *Prison Labour is a Billion Dollar Industry, with Uncertain Terms for Inmates*, THE ECONOMIST (May 16, 2017), <https://www.economist.com/news/united-states/21718897-idaho-prisoners-roast-potatoes-kentucky-they-sell-cattle-prison-labour> [https://perma.cc/5ACL-LKK5] [hereinafter *Prison Labour is a Billion Dollar Industry*].

4. Yahr, *supra* note 1.

5. Caroline Winter, *Lingerie and Bullwhips: A Peek at the Fruits of American Prison Labor*, MOTHER JONES, July/Aug. 2008, at 55. (Starbucks subcontractor Signature Packaging Solutions hired Washington prisoners to package holiday coffees, a setup a Starbucks representative described as “entirely consistent with our mission statement.”).

Justified on redemptive and rehabilitative grounds, prison industries are thriving in the United States. However, prison labor for little or no pay to produce goods and services for the government or private entities is not a new phenomenon and has grown with the prison population. The United States has the world's highest incarceration rate,<sup>8</sup> incarcerating individuals at “globally unprecedented rates” since the 1970's, and which, in recent years, is estimated at five times greater than most other countries.<sup>9</sup> It has thereby amassed a large captive workforce of men and women that can be put to work for little or no pay. Although accounting for 5% of the world's population, the United States accounts for 25% of the world's total prison population.<sup>10</sup> To put these numbers in perspective: the U.S. has locked up more people than China, which has five times the population,<sup>11</sup> and thirty-two U.S. states incarcerate at a rate higher than Turkmenistan, the country with the second highest incarceration rate, and ironically, a country the U.S. State Department criticized for its authoritarian government and human rights abuses.<sup>12</sup> Typically, countries with high incarceration rates have suffered from large-scale internal upheaval or political instability—a pattern that does not apply to the United States.<sup>13</sup>

The United States incarceration rate can be partly attributed to a number of laws and policies<sup>14</sup> that have been discriminatorily applied. Indeed, the scale of

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6. Allison Aubrey, *Whole Foods Says It Will Stop Selling Foods Made with Prison Labor*, NPR (Sept. 30, 2015, 7:53 PM), <http://www.npr.org/sections/thesalt/2015/09/30/444797169/whole-foods-says-it-will-stop-selling-foods-made-by-prisoners> [<https://perma.cc/T464-RQ9J>].

7. *Outsourcing? Try 'Insourcing,'* WIRED (Feb. 25, 2004), <https://www.wired.com/2004/02/outourcing-try-insourcing/> [<https://perma.cc/Ry8D-6UZB>].

8. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) [<https://perma.cc/SQD7-NWMD>]; see also PETER WAGNER & ALISON WALSH, *STATES OF INCARCERATION: THE GLOBAL CONTEXT 2016* (2016), <https://www.prisonpolicy.org/global/2016.html> [<https://perma.cc/8CE3-YLZK>].

9. WAGNER & WALSH, *supra* note 8.

10. Michelle Ye He Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.2a03cc5dc43b](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.2a03cc5dc43b) [<https://perma.cc/HVM3-THX3>].

11. Vicki Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RESEARCH (Aug. 28, 2016), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289> [<https://perma.cc/6C8Q-2KJW>].

A parallel system of immigration detention facilities holds another approximately 400,000 men, women, and children each year who have entered the U.S. without inspection. *Immigration Detention 101, The Issues*, IMMIGRATION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> [<https://perma.cc/KVE6-X5BP>].

12. WAGNER & WALSH, *supra* note 8 (“[T]he District of Columbia—where the U.S. State Department is based—has an incarceration rate more than twice of Turkmenistan.”); see generally TURKMENISTAN 2015 HUMAN RIGHTS REPORT, U.S. DEP'T OF STATE (2015), <https://www.state.gov/documents/organization/253191.pdf> [<https://perma.cc/77XK-5K2L>].

13. *Id.*

14. The incarceration rate increased five times between 1970 and 2008, a statistic that can be attributed to the U.S. justice system's imprisonment of “people for things that should not be crimes

incarceration in the United States is made more troubling by the overrepresentation of persons of color in the prison system, raising serious concerns about systemic racial bias in laws and incarceration practices. According to data from the Bureau of Justice Statistics, 35% of state prisoners are white while 59% are Black or Hispanic; in comparison, 62% of the overall national population is white and 30% are Black or Hispanic.<sup>15</sup> In many states, African-Americans are five times more likely to be incarcerated than white people, with the rate rising to ten times in five states,<sup>16</sup> and the rate of incarceration for Hispanics is 1.4 times that of white people.<sup>17</sup> In twelve states, more than 50% of the prison population is African American.<sup>18</sup> As federal and state prison populations have grown, so have prison industries that rely on penal labor for private sector profit, labor overwhelmingly performed by minorities.

Moral hazards abound when profit and punishment go hand in hand.<sup>19</sup> The failures of the prison system, intertwined as they are with the disturbing history of race and incarceration, are masked in layers of euphemism. The use of penal labor, at low or even no wages, to produce goods and services for private profit, is often defended by the claim that the work provides moral, psychological, and economic benefits to people in prison and to communities.<sup>20</sup> Working in prisons is assumed to cure idleness, teach specific skills, and provide the incarcerated person with a work ethic.<sup>21</sup> The experience of working is considered a redemptive end in itself, regardless of the working conditions or whether they are paid a fair wage.

In addition to rehabilitation and preparation for life after prison, bringing jobs back to the United States from overseas provides a further justification for

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(drug possession, prostitution, unintentionally violating incomprehensible regulations) and imposition of breathtakingly harsh penalties for minor offenses.” *America’s Prisons Are Failing. Here’s How to Make Them Work*, THE ECONOMIST (May 27, 2017), <http://www.economist.com/news/leaders/21722642-lot-known-about-how-reform-prisoners-far-too-little-done-americas-prisons-are> [https://perma.cc/A6BP-M2LD]. Tough on crime laws, such as the notorious “three strikes” rules and mandatory minimum sentencing rules, perpetuate the injustice whereby even “petty thieves have been jailed for life.” *Id.*

15. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [https://perma.cc/BZB9-ZUZA].

16. *Id.* at 4, 6.

17. *Id.* at 4.

18. *Id.*

19. See Beth Schwartzapfel, *Freedom: Modern-Day Slavery in America’s Prison Workforce*, PAC. STANDARD (Apr. 12, 2018), <https://psmag.com/social-justice/taking-freedom-modern-day-slavery> [https://perma.cc/25KR-U588] (“[T]he direct link between corporate profit and prison labor—and, by extension, the potential for profit-driven exploitation—has made it a target for criticism.”).

20. *Id.*

21. *Programs in Correctional Institutions*, NAT’L CORR. INDUS. ASS’N (May 2, 2001), <http://www.nationalcia.org/wp-content/uploads/annotated-bibliography.pdf> [https://perma.cc/M36Z-CCR4].

the exploitation of prison labor and the proliferation of prison industries. In an Orwellian move, the prison industry in the United States has hitched itself to the populist wave that has reinvigorated economic nationalism.<sup>22</sup> Public sentiment against outsourcing has offered prison labor programs unique opportunities for expansion under the rubric of providing a competitive alternative to low-cost foreign workers. Since the loss of American jobs is typically blamed on the use of low-wage workers in poor countries,<sup>23</sup> many companies have responded to calls to stop the outsourcing of American jobs by contracting with U.S. prisons to hire prisoners. In so doing, companies keep production costs low, access a range of tax benefits, and promote their products as “Made in the USA”—the contention being that “Made in the USA” also covers goods produced by the U.S. prison population.<sup>24</sup>

Recasting prison industries as the patriotic return of American manufacturing jobs from overseas may be one of the most troubling euphemisms deployed by proponents of prison labor. Utilizing incarcerated people that work for low or no pay, instead of low-wage foreign workers that labor in unsafe working conditions, is a cynical channeling of the rising awareness of the domestic American worker’s plight in the age of globalization.<sup>25</sup> Some who approach this issue, less from an overtly protectionist stance and more from a workers’ rights standpoint, also believe that repatriating jobs back to the United States means less exploitation of low-wage workers in poor countries. In some ways, the “Made in America” label serves as a proxy for an implicit guarantee of product quality and compliance with basic environmental and labor standards—such as the payment of federally mandated minimum wages and compliance with workplace safety regulations—but which are purportedly lowered when production is outsourced to developing countries. None of these assumptions hold true when prison labor substitutes for free-world jobs. Many of the rosy assumptions about products labelled “Made in the USA” disappear when that actually means “Made in U.S. Prisons,” but most consumers do not see the label and connect it to penal labor.<sup>26</sup>

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22. Rick Helfenbein, *The Darker Side of ‘Made in the USA,’* HILL (Sept. 5, 2016), <https://thehill.com/blogs/pundits-blog/labor/294524-the-darker-side-of-made-in-usa> [<https://perma.cc/9ATV-CCS7>].

23. Kimberly Amadeo, *How Outsourcing Jobs Affects the U.S. Economy*, BALANCE (Dec. 1, 2018), <https://www.thebalance.com/how-outsourcing-jobs-affects-the-u-s-economy-3306279> [<https://perma.cc/Z9QJ-CD94>].

24. Helfenbein, *supra* note 22. See also *infra* Section III.B.

25. Angela Hanks, *How to End Prison Labor Exploitation and Invest in Incarcerated People*, FORBES (Aug. 23, 2018), <https://www.forbes.com/sites/angelahanks/2018/08/23/from-exploitation-to-investment-how-to-end-low-wage-prison-labor/#38b986045018> [<https://perma.cc/8YTS-LFS7>].

26. In fact, the “Made in the USA” label itself has been manipulated by prison labor programs. In 1997, two incarcerated men working for Third Generation sewing lingerie for Victoria’s Secret and JCPenney in a California prison were punished and placed in solitary confinement for telling the media they were ordered to replace “Made in Honduras” labels with “Made in the USA” labels.” Caroline Winter, *What Do Prisoners Make for Victoria’s Secret? From Starbucks to Microsoft: A Sampling of What US Inmates Make, and For Whom*, MOTHER JONES (July–Aug. 2008),

The expansion in the use of prison labor opens the United States up to criticism in the global arena. The United States has vigorously denounced the use of prison labor in other countries<sup>27</sup>—even as domestic companies interested in reshoring production have increasingly turned to prison labor programs,<sup>28</sup>—and U.S. laws ban imports of goods made by prisoners.<sup>29</sup> For example, the United States continues to condemn China for its vast prison labor system, its exports of prison labor products,<sup>30</sup> and its imprisonment of political dissidents pursuant to the Chinese policy of “reeducation through labor.”<sup>31</sup> Various U.S. government reports have advocated for U.S. action against China via the World Trade Organization, and for the Congressional creation of a private cause of action against businesses suspected of importing prison labor goods in contravention of U.S. laws.<sup>32</sup>

Yet, despite these criticisms, U.S. prison industries operate similar enterprises.<sup>33</sup> The specter of systemic racial bias evident in the racial disparity in U.S. incarceration rates, combined with the requirement that all prisoners work, render U.S. prison labor programs morally suspect in ways not so remote from China’s use of political dissidents in reeducation camps. The comparison with China can be extended further to the practice of exporting products made with prison labor. In the United States, prison-made products and services are increasingly sold not only to state agencies, but also on the open market and then exported abroad.<sup>34</sup> Inmates in Florida have made products that are sold to countries such as Trinidad, Nicaragua, and the Dominican Republic.<sup>35</sup> While U.S. laws ban im-

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<http://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret/> [<https://perma.cc/NB8K-XBC2>].

27. See T.N. Srinivasan, *Comment*, in GLOBALIZATION, TECHNOLOGICAL CHANGE, AND LABOR MARKETS 278–80 (Stanley W. Black ed., 2012). See also Sophia Yan, *U.S. Steps Up Pressure on China Over Prison Labor*, CNN (June 6, 2016), <http://money.cnn.com/2016/06/06/news/economy/china-prison-labor-exports/> [<https://perma.cc/NM53-K6XP>].

28. *Outsourcing? Try ‘Insourcing,’ supra* note 7.

29. 19 U.S.C. § 1307 (2012). Under Section 307 of the Smoot-Hawley Tariff Act of 1930, any products “mined, produced, or manufactured wholly or in part by convict labor or/and forced labor” may not be imported into the United States. *Id.*

30. Yan, *supra* note 27; see also Paul Blustein, *Prison Labor: Can U.S. Point Finger at China? American Inmates Manufacture Products, But Trade Debate Centers on Beijing’s Policies*, WASH. POST (June 3, 1997), [https://www.washingtonpost.com/archive/business/1997/06/03/prison-labor-can-us-point-finger-at-china-american-inmates-manufacture-products-but-trade-debate-centers-on-beijings-policies/bf3e1769-c00a-48d7-aeaa-3bf4a77fb452/?utm\\_term=.3c43ab1e65a3](https://www.washingtonpost.com/archive/business/1997/06/03/prison-labor-can-us-point-finger-at-china-american-inmates-manufacture-products-but-trade-debate-centers-on-beijings-policies/bf3e1769-c00a-48d7-aeaa-3bf4a77fb452/?utm_term=.3c43ab1e65a3) [<https://perma.cc/Y4D5-9VKB>].

31. *Id.*

32. U.S.-CHINA ECON. & SEC. REVIEW COMM’N, 2008 REPORT TO CONGRESS 16, 17–18 (2008). Such restrictions on imports of goods made by prison labor are not prohibited by World Trade Organization rules which allow such actions if certain specified conditions are met. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. XX(e).

33. Srinivasan, *supra* note 27, at 278–80.

34. Blustein, *supra* note 30.

35. *Id.*

ports of prison labor goods, there is no parallel statutory provision prohibiting U.S. exports of prison labor goods manufactured in the United States.<sup>36</sup>

As this Article will demonstrate, forced prison labor in the United States brings up a convergence of disquieting and difficult conceptual and legal issues. Part II of this Article provides historical background, focusing on the racial dimensions at the root of state and private exploitation of prison labor, and demonstrating that race and incarceration in the United States cannot be separated. Part III provides a general overview of the prison labor industrial complex and examines the relationship between big business and prison labor in state and federal systems. Part IV explores the structural complexity intrinsic in prison labor as it does not fit neatly into the conventional categories of market or non-market work, creating conceptual difficulties in both analysis and proposed solutions. Part V examines the wildly inconsistent case law that addresses the application of the Federal Labor Standards Act (“FLSA”), arguing that the profit-making, economic character of prison work makes it a market activity that entitles prison workers to the minimum wage mandate of the FLSA. Finally, this Article also makes recommendations designed to reconceptualize how prison and prison industries should be understood. My recommendations rest on the basic but transformative premise that employment of incarcerated people should be no different from employment of free workers. Legally recognizing prison workers’ right to the minimum wage will accomplish a significant immediate change and will bring prison labor into heightened scrutiny, enabling a national conversation for broader reform.

## II.

### RACE, PENAL LABOR, AND PROFIT

Rhetoric about rehabilitation must confront the systemic racial bias in the current justice system and the legacy of slavery that undergirds the history of mass incarceration. As mentioned, the U.S. population of incarcerated persons consists disproportionately of non-white individuals. Today, “there are more African American men in jail, prison, on parole or on probation than were enslaved in 1850.”<sup>37</sup> The development of prison labor as an integral component of incarceration is closely related to the history of slavery. While prohibiting slavery and involuntary servitude, the Thirteenth Amendment to the U.S. Constitution leaves open the possibility of slavery and involuntary servitude for anyone convicted of a crime: “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.”<sup>38</sup>

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36. U.S.-CHINA ECON. & SEC. REVIEW COMM’N, *supra* note 32, at 323.

37. *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/issues/incarceration/> [<https://perma.cc/8QTR-GS6N>].

38. U.S. CONST. AMEND. XIII, § 1 (emphasis added).

In the post-Civil War era, plantation owners in the South, faced with a free labor market instead of their customary slave labor pool, sought different ways “to command a reliable, predictable labor force.”<sup>39</sup> Southern lawmakers passed the so-called “Black Codes,” seemingly race-neutral statutes that nevertheless made former slaves exceedingly susceptible to arbitrary arrest and imprisonment.<sup>40</sup> Vagrancy laws are a prime example of how the Black Codes functioned to control former slaves.<sup>41</sup> Defining a vagrant as “any person who is wandering or strolling about in idleness, who is able to work, and has no property,”<sup>42</sup> vagrancy laws criminalized unemployment.<sup>43</sup> Unemployed Black people who traveled in the ordinary course of life, such as to visit relatives, faced the possibility of arrest as a vagrant and being put to work on local convict farms or public works projects.<sup>44</sup>

As slaves were freed from plantations, they came under the purview of local governments for the first time.<sup>45</sup> Southern penal institutions were used, from policing and arrests to trials and convictions, to preserve the antebellum racial order and white supremacy.<sup>46</sup> Southern cities that never had a strong police presence moved to establish police forces,<sup>47</sup> using Confederate veterans as policemen to patrol the city and protect white citizens.<sup>48</sup> Black people were excluded from juries and experienced the criminal justice system primarily as criminal defendants convicted in higher proportion than white people.<sup>49</sup> During the sentencing stage, Black people were also disproportionately sentenced to incar-

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39. ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 4 (1996).

40. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 151 (1984); see also *Black Code, United States History*, THE ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/67722/black-code> [https://perma.cc/QM5X-8XLC].

41. *Id.* (“There were vagrancy laws that declared a black person to be vagrant if unemployed and without permanent residence; a person so defined could be arrested, fined, and bound out for a term of labour if unable to pay the fine.”).

42. Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 *HOW. L.J.* 349, 354 (1988).

43. *Id.*; see also Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 *U. CHI. L. REV.* 1161, 1168 (1984).

44. Roback, *supra* note 43, at 1168–69.

45. AYERS, *supra* note 40, at 141–42.

46. *Id.* at 183.

47. *Id.* at 175–76.

48. *Id.* at 173.

49. *Id.* at 175–76, 179. W.E.B. Du Bois noted that this racially discriminatory system of justice meant the system was dysfunctional because white people were rarely held accountable and Black people were subjected to disproportionate accountability. *Id.* at 183.



ceration:<sup>50</sup> in 1874, out of 455 prisoners in North Carolina, 384 were Black and in 1878, out of 952 prisoners, 846 were Black.<sup>51</sup>

The post-Civil War transformation of the South coincided with the rise of the penitentiary model for criminal punishment. Viewed as a more humane alternative to traditional punishments, the penitentiary model emphasized the reformation of the criminal through the discipline of the penal system, which included work.<sup>52</sup> Idleness was seen as the principal contributor to crime, and consequently labor came to be viewed as a necessary activity for reforming convicts—the “ultimate element in the reshaping of bodily disposition.”<sup>53</sup>

Several models of the penitentiary emerged. The North used the so-called state-account or public-account systems,<sup>54</sup> whereby the state took responsibility for the custody and care of those in prison and oversaw the production of prisoner-made goods, which were then sold on the open market.<sup>55</sup> However, this model turned out to be unprofitable due to inferior product quality, an inadequate market, and rising costs.<sup>56</sup> Prisons then turned to the contract system, in which the state sold prison labor to private firms.<sup>57</sup> Privatization of prison production quickly became a dominant form of organizing prison labor in the North.<sup>58</sup> While the reformation of incarcerated persons remained a nominal objective, profit maximization soon overrode prior concerns about moral reform and the ennobling dimensions of labor.<sup>59</sup>

The South developed prison labor camps and the convict leasing system as a replacement for slave labor. By 1880, more than 10,000 Black prisoners worked in mines, fields, and work camps in the South.<sup>60</sup> Large prison labor camps, filled primarily with Black men, proliferated in locations which had once been slave plantations.<sup>61</sup> Other prisons implemented convict-leasing programs, in which the

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50. *Id.* at 169–70.

51. SCOTT CHRISTIANSON, *WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA* 172 (1998).

52. DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 82 (2011).

53. MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835*, at 187, 169 (1996).

54. *See* Henry Calvin Mohler, *Convict Labor Policies*, 15 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 530, 548 (1925) (providing an overview of the public account system).

55. *Id.*; GLEN A. GILDEMEISTER, *PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840-1890*, at 8–9 (1987).

56. Mohler, *supra* note 54, at 557.

57. *Id.* at 549–50.

58. GILDEMEISTER, *supra* note 55, at 33.

59. Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 *Stan. L. Rev.* 339, 352–53 (1998).

60. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 90 (2008).

61. Whitney Bennis, *American Slavery, Reinvented*, *ATLANTIC* (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [https://perma.cc/WFF4-VZ8C].

state received a fee for leasing the incarcerated as hired hands.<sup>62</sup> Convict leasing turned out to be even cheaper than slavery because, unlike slave owners, farm owners were not responsible for dealing with the health of their workers.<sup>63</sup> Both prison labor camps and convict leasing involved private control of prison production, but the convict lease system largely removed the state from responsibility of inmate custody and care, placing complete control in private hands.<sup>64</sup> This resulted in the creation of what was considered one of the most inhumane systems of forced labor in the United States during the Reconstruction Era and well into the twentieth century.<sup>65</sup>

Convict lessee labor met the evolving needs of the South's economy after the war,<sup>66</sup> resulting in enormous profits not only for former plantation owners, but also for emerging industrialists such as those operating phosphate mines and turpentine plants in Florida and railroads across the South.<sup>67</sup> By 1885, 138 prisons and penal institutions had leased over 53,000 inmates who produced goods valued at \$28.8 million in that year alone.<sup>68</sup> Commentators and historians have noted a correlation between an increase in the number of convictions, the supply of convicts, and the particular demands of industry, describing "some local criminal courts [as] little more than 'conveyor belts' supplying convicts to industries in need of workers."<sup>69</sup>

The 1890s saw a gradual shift away from the convict lease system and toward state-run prison farms<sup>70</sup> due to union concerns on the economic effect of prison labor on the wages of free laborers, and attacks by humanitarian groups over the brutal conditions.<sup>71</sup> News exposés on the brutal conditions at lease convict camps, including the punishment of inmates by hanging them up by their thumbs, created an increased public awareness of and opposition to the use of this system.<sup>72</sup> The convict lease system was eventually replaced by the state-use system, wherein control shifted from private to state hands.<sup>73</sup> In the state-use system, inmates worked on chain gangs and state farms<sup>74</sup> under conditions no

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62. *Id.*

63. *Id.*

64. Mohler, *supra* note 54, at 551–52; Roback, *supra* note 43, at 1170.

65. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 650–51 (1982) ("The cruelty of many convict-lease arrangements amounted to a virtual disregard for life.").

66. AYERS, *supra* note 40, at 191.

67. *Id.* at 192–93.

68. CHRISTIANSON, *supra* note 51, at 187.

69. Garvey, *supra* note 59, at 357.

70. AYERS, *supra* note 40, at 221.

71. *Id.* at 211; Ira Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 607–08 (1989).

72. CHRISTIANSON, *supra* note 51, at 183.

73. Garvey, *supra* note 59, at 364–65.

74. *Id.* (citations omitted).

less brutal than the convict lease system.<sup>75</sup> The chain gang, in particular, was notorious for its brutal and dehumanizing conditions.<sup>76</sup> However, once the number of white prisoners increased, and they were also made to work on chain gangs, the “increased visibility of white prisoners began to erode the public faith in the benefits and justice of criminal labor.”<sup>77</sup>

In the face of these growing doubts about prison labor, the rhetoric of prisoner rehabilitation was bolstered by the fact that prison contract labor also generated substantial revenues for the state.<sup>78</sup> The contract system combined the dual benefits of high profits for the state with just retribution for the imprisoned—the security concerns were negligible.<sup>79</sup> Inmates from New York’s Sing Sing prison, for example, worked the quarries and supplied the state with stones for its many stately buildings while also providing the state with additional revenue.<sup>80</sup>

Opposition to prison labor remained largely confined to the state level. Individual states restricted the internal sale of prison-made goods, but efforts to prevent the flow of such goods from one state into another were stymied by court rulings based on the dormant Commerce Clause.<sup>81</sup> While opponents were able to restrict the sale of prison labor and prison-made goods within individual states, the dormant Commerce Clause protected the free flow of prison-made goods from one state into another.<sup>82</sup>

As the strength of organized labor grew, so did opposition to the leasing and contracting of prison labor,<sup>83</sup> especially once it became clear that “the bidding for inmate labor under the contract system failed to elevate the price of prison labor to the level of free-market wages.”<sup>84</sup> Manufacturers in industries that had to compete with prison labor were also opposed to the system, forming the National Anti-Convict Contract Association, and even joined forces with free labor, despite an adversarial history with it, to combat convict labor.<sup>85</sup> Historically, organized labor has opposed “private profiteering from prison labor.”<sup>86</sup> The AFL-

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75. AYERS, *supra* note 40, at 222.

76. Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 451–52 (1997).

77. LICHTENSTEIN, *supra* note 39, at 190.

78. Garvey, *supra* note 59, at 359–60.

79. *Id.* at 359 (citations omitted).

80. *Id.* at 360.

81. *Id.* at 366.

82. *People v. Hawkins*, 51 N.E. 257, 262 (N.Y. 1898) (holding that a New York law imposing a labeling requirement on prison-made goods violated state substantive due process and the federal Commerce Clause); Barry Cushman, *Ambiguities of Free Labor Revisited*, in *MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON* 116, 121–24 (Daniel J. Hulsebosch & R. B. Bernstein eds., 2013).

83. Garvey, *supra* note 59, at 358.

84. *Id.*

85. *Id.* at 359.

86. James Kilgore, *Mass Incarceration and Working Class Interests: Which Side Are the Unions On?*, 37 LAB. STUD. J. 356, 363 (2013).

CIO has similarly adamantly opposed “the widespread use of prison labor throughout the public and private sectors in the United States in unfair competition with free labor.”<sup>87</sup>

The Great Depression intensified organized labor’s opposition, leading to the passage in 1929 of the Hawes-Cooper Act.<sup>88</sup> The act allowed states “to remove the interstate commerce nature of prison-made goods and to prohibit the sale of such goods in their state, even if the goods were produced in another state.”<sup>89</sup> Furthermore, the Ashurst-Sumners Act, enacted in 1935, made it a federal crime to knowingly transport prison-made goods in interstate or foreign commerce and into a state that prohibited their sale.<sup>90</sup> Subsequently amended in 1940, the act would then make it a crime to transport or sell prison-made goods in interstate commerce regardless of state law.<sup>91</sup> As a result, the use of prison labor by private entities was no longer permitted, and for the next forty years, only the state-use system would be permitted.<sup>92</sup> Complaints about chain gangs usurping jobs from free labor<sup>93</sup> also led the federal government to prohibit the use of convict labor for public works projects supported by federal money.<sup>94</sup>

Today, the emphasis on law and order, including the so-called war on drugs, has resulted in an astonishing increase in the number of incarcerated people.<sup>95</sup> The disproportionate effect on Black men has been described as a new Jim Crow—a perpetuation of the post-Civil War era attempts to use the criminal justice system to recapture former slaves as convicts.<sup>96</sup> The racial disparities in sentencing and incarceration rates further point to systemic bias. For instance, studies have shown that although “white students use cocaine at seven times the rate of black students, use crack cocaine at eight times the rate of black students, and use heroin at seven times the rate of black students,” enhanced drug laws none-

87. *Id.*

88. Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084 (codified as amended at 49 U.S.C. § 11507 (1994)).

89. *Hawes-Cooper Act*, ST. JAMES ENCYCLOPEDIA OF LABOR HISTORY WORLDWIDE: MAJOR EVENTS IN LABOR HISTORY AND THEIR IMPACT, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hawes-cooper-act> [<https://perma.cc/PTD5-VJ6M>]. Therefore, goods produced in prison and transported into or sold in another state other than for governmental use are subject to the laws of that state. The Act empowers states that do not allow the sale of goods made in their own state prisons to prohibit such sale of goods imported from out-of-state prison enterprises. *Id.*

90. Act of July 24, 1935, ch. 412, 49 Stat. 494 (codified as amended at 18 U.S.C. §§ 1761–1762 (1994)).

91. 18 U.S.C. § 1761(a).

92. Tracy F. H. Chang & Douglas E. Thompkins, *Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry*, 27 LAB. STUD. J. 45, 55 (2002).

93. LICHTENSTEIN, *supra* note 39, at 190.

94. *Id.* at 190–91.

95. Pamela Engel, *How the War on Drugs Changed America’s Prison Population*, BUS. INSIDER (Apr. 23, 2014), <https://www.businessinsider.com/how-the-war-on-drugs-changed-americas-prison-population-2014-4> [<https://perma.cc/Z4CS-NYQN>].

96. MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012).

theless resulted in a disproportionate increase in the number of African Americans thrown into prison.<sup>97</sup>

In 2016, coinciding with the forty-fifth anniversary of the Attica prison uprising, one of the largest prison strikes in U.S. history took place in protestation of low wages.<sup>98</sup> The Incarcerated Workers Organizing Committee, a project of the Industrial Workers of the World union, drew up plans for a national strike “against prison slavery” to draw attention to the conditions in America’s jails and penitentiaries. The strikers in South Carolina formulated a list of demands, including real wages for private-industry jobs, adequate mental-health care, educational programs, and a reduction in life sentences.<sup>99</sup>

As this history demonstrates, prison labor in the present cannot be detached from the United States’ legacy of slavery, segregation, and racial discrimination. The U.S.’ use of prison labor for private industry is tainted by the racial history of a criminal justice system that disproportionately incarcerates non-white individuals and forces them to work for little to no pay.

### III.

#### PRISON LABOR AND BIG BUSINESS

In addition to its racial dimension, prison labor must be examined through an economic lens. Prison labor programs offer companies the competitive edge they need to repatriate or keep jobs in the U.S., because they can guarantee companies a cheap and dependable workforce. The high and ever-increasing number of incarcerated individuals provides a source of low-cost labor that yields savings equivalent to those made through production in countries with low-wages, such as Mexico, countries in the Caribbean Basin, and countries in the Pacific Rim.<sup>100</sup> However, the penal context makes the prisoners’ work legally and economically ambiguous. Although prison-made goods and services create an undeniable impact on the national economy, incarcerated people are not considered “workers” and, as a result, their labor is invisible as employment.

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97. Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 704, 706–08 (2010), <https://criminaljusticecaucus.files.wordpress.com/2012/03/why-mass-incarceration-matters-article-by-dr-thompson.pdf> [<https://perma.cc/J8NY-TRN2>].

98. E. Tammy Kim, *A National Strike Against “Prison Slavery,”* NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/news/news-desk/a-national-strike-against-prison-slavery> [<https://perma.cc/CZ7B-9MP9>].

99. *Id.*

100. Heather Ann Thompson, *The Prison Industrial Complex: A Growth Industry in a Shrinking Economy*, 21 NEW LAB. F. 39, 41 (2012).

*A. FPI, UNICOR, and the Modern Era of Prison Labor*

The modern era of prison labor for private industry began in 1934, with the creation of the Federal Prison Industries (“FPI”), also known as UNICOR.<sup>101</sup> At a time when private businesses no longer had access to prison industries,<sup>102</sup> FPI was established as a wholly owned U.S. government corporation—a federal monopoly to manage prison labor programs for inmates within the Federal Bureau of Prisons.<sup>103</sup> The aim was to “create work programs necessary for prison safety and inmate rehabilitation while avoiding the alienation of labor and business.”<sup>104</sup> To satisfy this dual objective, products made by people in prison were sold exclusively to the federal government, so that prison industries would not compete in the open market with private sector companies. FPI, as well as the individual state prison industries, was created to operate programs that would teach people in prison skills to help them reenter society upon release.<sup>105</sup> To establish the program, President Franklin Delano Roosevelt overcame opposition from the American Federation of Labor on the dual claims that FPI would rehabilitate prisoners and lessen the burden on taxpayers.<sup>106</sup> As the Federal Prison Director explained, “If we send men to prison, and don’t let them work, the taxpayer must foot the entire bill.”<sup>107</sup>

By the 1940s, FPI had become a significant contributor to the war effort during World War II,<sup>108</sup> but after the war’s end, orders from the military drastically dwindled, forcing it to rely on civilian agency orders until military orders increased with the start of the Korean War. For the sake of stability, FPI engaged in a process of renovation and modernization, focusing on vocational training and rehabilitation and expanding beyond the military niche to include seven specialty divisions: 1) data processing; 2) electronics; 3) graphics; 4) metals; 5) shoe and brush; 6) textiles; and 7) woods and plastics.<sup>109</sup> To further diversify and ex-

101. 18 U.S.C. § 4122 (1994).

102. John Dewar Gleissner, *How to Create American Manufacturing Jobs*, 9 TENN. J.L. & POL’Y 166, 170 (2013).

103. 18 U.S.C. § 4122.

104. UNICOR, FACTORIES WITH FENCES: 75 YEARS OF CHANGING LIVES 6-7, [https://www.unicor.gov/publications/corporate/CATMC1101\\_C.pdf](https://www.unicor.gov/publications/corporate/CATMC1101_C.pdf) [https://perma.cc/R9PM-HLUU] [hereinafter FACTORIES WITH FENCES] (explaining that Federal Prison Industries consist of four types of work assigned to inmates, consisting of institutional, farming, public service and prison industries).

105. *Id.*

106. Beth Schwartzapfel, *Modern-Day Slavery in America’s Prison Workforce: Why Can’t We Accept the Idea that Prisoners Have Labor Rights?*, PRISON LEGAL NEWS (Sept. 19, 2014), <https://www.prisonlegalnews.org/news/2014/sep/19/modern-day-slavery-americas-prison-workforce/> [https://perma.cc/CLU8-7J87].

107. *Id.*

108. FACTORIES WITH FENCES, *supra* note 104, at 19–20. At the outset of World War II, it ran twenty-five shops and factories, becoming a major producer of more than seventy categories of products, with 95% of its products sold to the military. *Id.*

109. *Id.* at 21–23.

pand its reach into industries outside of its non-military niche, FPI initiated a new marketing strategy in 1977, through the creation of a new identity and brand called UNICOR. Through UNICOR, FPI added new product lines, state-of-the-art production techniques, and new factories throughout the 1980s and 1990s.<sup>110</sup>

UNICOR operates under a statutory requirement that “federal agencies purchase from UNICOR if it could provide the desired products on time and at competitive prices.”<sup>111</sup> UNICOR contends that such a mandatory sourcing requirement is necessary, because the prison industry is intrinsically marred by built-in disadvantages, such as its labor-intensive environment, unskilled labor force, and security costs. Additionally, UNICOR argues that it deserves special support in its mission to prepare people in prison for employment after release.<sup>112</sup> In the 1970s, as the U.S. prison population soared, businesses lobbied to relax the regulations on the use of prison labor for private business. This move was pushed by groups such as the American Legislative Exchange Council (“ALEC”) through the Prison Industries Act and the Prison Industries Enhancement Certification Program (“PIE” or “PIECP”).<sup>113</sup> PIE was created in 1979 by Congress:

...to encourage states and units of local government to establish employment opportunities for offenders that approximate private-sector work opportunities. The program is designed to place inmates in a realistic work environment, pay them the prevailing local wage for similar work, and enable them to acquire marketable skills to increase their potential for successful rehabilitation and meaningful employment on release.<sup>114</sup>

Through PIE certification, certified departments of correction are exempt from the normal restrictions on the sale of prison-made goods in interstate commerce; such certified departments of correction are also permitted to sell prison-made goods to the Federal Government “in amounts exceeding the \$10,000 maximum normally imposed on such transactions.”<sup>115</sup>

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110. *Id.* at 23–25.

111. *Id.* at 26.

112. *Id.*

113. Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION (Aug. 1, 2011), <https://www.thenation.com/article/hidden-history-alec-and-prison-labor/> [<https://perma.cc/7WNP-PUAE>]. Notably, ALEC supported policies that contributed immensely to the explosion of the U.S. prison population, such as tough sentencing laws that mandate minimum terms for non-violent drug offenders and “three strike” laws. *Id.* ALEC has also offered “innovative” solutions to the prison population explosion by proposing more construction of private prisons; as some have noted, “ALEC has proven expertly capable of devising endless ways to help private corporations benefit from the country’s massive prison population.” *Id.*

114. *Prison Industry Enhancement Certification Program*, NAT’L CORR. INDUS. ASS’N, <http://www.nationalcia.org/piecp-2> [<https://perma.cc/Z8JZ-WVFA>] [hereinafter NCIA, *Prison Industry Enhancement Certification Program*].

115. *Id.*

Since 2006, UNICOR has been intensifying its push for diversification by opening new prison factories in West Virginia, Kentucky, Pennsylvania, South Carolina, California, and Florida.<sup>116</sup> It has also adopted a new production and management method called Six Sigma (LSS) “as its standard methodology for process improvement.”<sup>117</sup> UNICOR established a new Corporate Improvement Branch in 2009 to apply LSS methods and to make UNICOR more profitable by bringing production to commercial and competitive levels through the improvement of delivery turnarounds and reducing inventories.<sup>118</sup> Finally, new business groups have been developed, including the clothing and textiles group, the electronics business group, the recycling business group, and the services business group, among others.<sup>119</sup>

Yet while the profitability and competitive edge of UNICOR has been enhanced by these updates, the company has done little to address its core mission of rehabilitation. The assumption seems to be that what is good for UNICOR will also be good for the incarcerated population. Nevertheless, UNICOR’s advertising materials consistently tout the program’s many benefits. It claims that people in prison participating in UNICOR programs are 24% less susceptible to recidivism, that 14% are more likely to find employment after release, and that UNICOR not just provides job skills but also teaches work ethic to inmates.<sup>120</sup> None of these claims have been verified by long-term studies.<sup>121</sup>

### *B. Insourcing and Repatriation*

In a relatively new twist, UNICOR and other prison industries are now espousing the reshoring, insourcing, and “Made in the USA” benefits of their prison programs. UNICOR offers its “flexible labor force to help meet companies’ surge production needs,”<sup>122</sup> as well as warehouses, facilities, and factories to

116. FACTORIES WITH FENCES, *supra* note 104, at 29.

117. *Id.* at 30.

118. *Id.*

119. *Id.* at 34–35.

120. *Id.* at 32.

121. See generally SHILPA AVASARE, RECONSIDERING PRISON INDUSTRY PROGRAMS IN AMERICA AND THEIR VALUE TO PRISONER REENTRY (2011), [http://www.law.northwestern.edu/legalclinic/prison/documents/Reconsidering\\_Prison\\_Industries.pdf](http://www.law.northwestern.edu/legalclinic/prison/documents/Reconsidering_Prison_Industries.pdf)

[<https://perma.cc/36KV-BRM2>]. See also Derek Gilna, *Businesses, Members of Congress, Not Happy with UNICOR*, PRISON LEGAL NEWS (Mar. 15, 2014), <https://www.prisonlegalnews.org/news/2014/mar/15/businesses-members-of-congress-not-happy-with-unicor/> [<https://perma.cc/M6TD-WJGS>] (“Although the BOP has cited statistics claiming that UNICOR workers have lower recidivism rates, such data has been questioned. In 2013, the Congressional Research Service noted that ‘questions about the methodology used in most evaluations of correctional industries means that there is no definitive conclusion about the ability of correctional industries to reduce recidivism.’”).

122. UNICOR, *Workforce Development with UNICOR*, TRADEOLOGY (Nov. 3, 2016), <https://blog.trade.gov/2016/11/03/workforce-development-with-unicor/> [<https://perma.cc/J9DJ-J4WG>].



companies that otherwise lack sufficient space. UNICOR is empowered with repatriation or reshoring authority to manufacture or assemble products for companies that certify such products are, or would otherwise be, produced outside the United States if not for prison labor.<sup>123</sup> In advertising its capabilities to U.S. companies, UNICOR emphasizes its comparative advantage, which lies precisely in its “readily available workforce in low cost manufacturing facilities to more competitively produce your products or provide your services.”<sup>124</sup> UNICOR boasts that its production facilities and inmate workers should be lauded for three reasons: “U.S. Locations; U.S. Labor Force; U.S. Manufacturing.”<sup>125</sup>

The economic impact of prison labor on the U.S. domestic economy is especially visible in this insourcing movement. UNICOR has authorization to pursue commercial business opportunities and preempt potential job loss if it determines that those jobs would be moved offshore.<sup>126</sup> UNICOR announced that its objective is to repatriate jobs that have been outsourced from the United States and bring them home to “infuse the UNICOR program with new inmate jobs without undue negative impact on the American worker.”<sup>127</sup> In addition, participating companies that repatriate offshore manufacturing back to the United States by establishing a production relationship with UNICOR could receive a 9% income tax deduction under the Domestic Production Activities Deduction.<sup>128</sup>

UNICOR’s repatriation efforts center around its prognosis that U.S. companies that return to the United States would benefit from the “‘Made in the USA’ Marketing Advantage.”<sup>129</sup> UNICOR’s appeal to companies to return to the United States for production and prison labor is based on the following claims: that manufacturing and services through UNICOR guarantees “[c]ompliance with U.S. best practices, environmental mandates, industrial performance standards, OSHA requirements and the tightest of military specifications.”<sup>130</sup> Moreover, because production and services are in the United States, added benefits for participating companies include: the “[a]bility to mobilize, collaborate and convene without the worry of transoceanic flights, significant time zone differences and communications challenges; [m]anufacturing and surge capacity to meet the

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123. *Id.*

124. *Contract Manufacturing Opportunities*, UNICOR, <https://www.unicor.gov/PieProgram.aspx> [<https://perma.cc/QR78-Z8WV>].

125. UNICOR, *DISCOVER UNICOR*, [https://www.unicor.gov/publications/corporate/CATC4202\\_C.pdf](https://www.unicor.gov/publications/corporate/CATC4202_C.pdf) [<https://perma.cc/ARH9-B9MK>].

126. UNICOR, *THE BEST KEPT SECRET IN CONTACT CENTERS 1*, <https://www.unicor.gov/publications/services/CATMS361.pdf> [<https://perma.cc/36AW-JC4T>].

127. *Factories with Fences*, *supra* note 104, at 30.

128. *Could Your Company Be Eligible for a Federal Income Tax Deduction and Tax Credit?*, UNICOR, <https://www.unicor.gov/publications/fpi/TaxCredit.pdf> [<https://perma.cc/P82Z-T34Y>].

129. *See* UNICOR, *BRINGING JOBS HOME: INVESTING IN AMERICA 3*, [https://www.unicor.gov/publications/corporate/CATC6300\\_C.pdf](https://www.unicor.gov/publications/corporate/CATC6300_C.pdf) [<https://perma.cc/QDF6-R2H9>] (“Our infrastructure offers . . . ‘Made in the USA’ marketing advantage.”).

130. *Id.*

most challenging demands and cyclical markets; [and the] [h]ighest standards of business practices to promote a culture of trust and collaboration.”<sup>131</sup>

Thus, the prison labor industry is actively coaxing U.S. companies into repatriating their overseas production back to the United States.<sup>132</sup> When Kevin Mannix, former Oregon State Representative, lobbied Nike to move production from Indonesia to his state, he reasoned “there won’t be any transportation costs; we’re offering you competitive prison labor (here).”<sup>133</sup> Indeed, rather than outsourcing production to poor countries, many U.S. companies have resorted to “insourcing” in response to such lures from prison labor programs.<sup>134</sup> Thus “insourcing,” as applied to prison labor, has allowed manufacturers to forcibly employ 2.4 incarcerated people in the United States.<sup>135</sup> If a product you’re holding says ‘American Made,’ it is very likely that it was made in an American prison.”<sup>136</sup>

UNICOR’s marketing strategies have proven highly effective. UNICOR has successfully induced telemarketing companies to return call center jobs to the United States by establishing call centers in prisons, with seven centers employing a total of 1,700 inmate agents nationwide.<sup>137</sup> As UNICOR puts it:

Outsourcing offshore presents many challenges—language barriers, exchange rates, time differences and transoceanic flights just to visit the contact center. When you outsource with UNICOR, your contact centers are located in the United States, so those issues disappear. Your company will enjoy all of the benefits of a domestic operation with the cost savings of going offshore.<sup>138</sup>

From a telemarketing business’s perspective, there are benefits to hiring incarcerated people, one of which is reliability. As one company CEO remarked about the benefits of UNICOR, “Absenteeism is the bane of the contact center world. UNICOR has effectively eliminated this issue from the equation.”<sup>139</sup> Other businesses that contracted with UNICOR elaborated on the rationale, “We

131. *Id.*

132. Pelaez, *supra* note 11 (“Thanks to prison labor, the United States is once again an attractive location for investment in work that was designed for Third World markets.”).

133. *Id.*

134. Ricky Riley, *13 Mainstream Corporations Benefiting from the Prison Industrial Complex*, ATLANTA BLACK STAR (Oct. 10, 2014), <https://atlantablackstar.com/2014/10/10/12-mainstream-corporations-benefiting-from-the-prison-industrial-complex/> [<https://perma.cc/MAH3-8LUZ>].

135. Kelley Davidson, *Made in the USA: Household Names Make a Killing Off of the Prison-Industrial Complex*, INCARCERATED NATION, <http://incarceratednation.org/inc/prison-industrial-complex/made-in-the-usa/> [<https://perma.cc/ET54-HFN9>].

136. *Id.*

137. THE BEST KEPT SECRET IN CONTACT CENTERS, *supra* note 126, at 2.

138. *Id.* at 4.

139. *Id.* at 2.

would receive services from an onshore agent—a U.S. citizen—but at offshore prices. It’s a win-win for everyone involved.”<sup>140</sup>

At least 2,000 inmates across the United States work in call centers, with that number rising as more companies seek cheap labor while avoiding the wrath of politicians and unions.<sup>141</sup> Many companies utilizing these call centers have admitted “they would have sent the centers overseas if they hadn’t given the business to the prisons.”<sup>142</sup> The federal government has called this “‘the best-kept secret in outsourcing’—providing inmates to staff call centers and other services in both the private and public sectors.”<sup>143</sup> FPI explicitly advertised its prison labor call centers as “[d]omestic outsourcing at offshore prices.”<sup>144</sup>

Call centers in about a dozen states, including Oregon, Arizona, California, and Iowa, have also used inmates in state and federal prisons, “underscoring a push to employ inmates in telemarketing jobs that might otherwise go to low-wage countries such as India and the Philippines.”<sup>145</sup> The Oregon Department of Motor Vehicles used a women’s prison as a call center.<sup>146</sup> When New Yorkers call their Department of Motor Vehicles, their calls might be answered by inmates at the Greene Correctional Institution in Coxsackie, near Albany, or at Bedford Hills Correctional Facility for Women, near White Plains.<sup>147</sup> American Airlines and Avis have used prisoners to take reservations.<sup>148</sup> Even telephone marketing has been provided by firms that partner with prisons; for example, Televerde, a Phoenix-based firm, provides marketing services for major companies like Hitachi and Microsoft by hiring inmates in Arizona.<sup>149</sup> Although most centers have inmates handling calls for orders they made themselves, and most deal with government agencies that buy prison-made goods, there are some prisons that have created call centers to service private companies wishing to out-

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140. *Id.* at 5.

141. Jon Swartz, *Inmates vs. Outsourcing*, USA TODAY (July 6, 2004), [http://usatoday30.usatoday.com/money/economy/employment/2004-07-06-call-center\\_x.htm](http://usatoday30.usatoday.com/money/economy/employment/2004-07-06-call-center_x.htm) [<https://perma.cc/5C9S-WTTD>].

142. Laura Sullivan, *Prison Call Centers Put Squeeze on Service Sector*, NPR (Feb. 23, 2005), <http://www.npr.org/templates/story/story.php?storyId=4505278> [<https://perma.cc/HQ63-VYB3>].

143. *Inside the Secret Industry of Inmate-Staffed Call Centers*, NBC NEWS (Jan. 12, 2012), [https://usnews.newsvine.com/\\_news/2012/01/12/10140493-inside-the-secret-industry-of-inmate-staffed-call-centers?lite](https://usnews.newsvine.com/_news/2012/01/12/10140493-inside-the-secret-industry-of-inmate-staffed-call-centers?lite) [<https://perma.cc/93RR-JN3U>].

144. *Inbound/Outbound Call Center Solutions*, UNICOR, <https://www.unicor.gov/Category.aspx?idCategory=1429> [<https://perma.cc/QTP3-XQUF>].

145. Swartz, *supra* note 141.

146. *Id.*

147. *Inside the Secret Industry of Inmate-Staffed Call Centers*, *supra* note 143.

148. Bob Sloan, *Identifying Businesses that Profit from Prison Labor*, POPULAR RESISTENCE.ORG (May 19, 2015), <https://popularresistance.org/identifying-businesses-that-profit-from-prison-labor/> [<https://perma.cc/6A68-4U9T>] [hereinafter Sloan, *Identifying Businesses that Profit from Prison Labor*].

149. *Inside the Secret Industry of Inmate-Staffed Call Centers*, *supra* note 143.

source their own call centers.<sup>150</sup> For example, female prisoners were hired to enter used-vehicle data for CCC Information Services Group, an insurance claims processing company in Chicago.<sup>151</sup> FPI saw this venture as a win-win situation precisely because the data entry work had been previously outsourced to the Philippines, meaning that, the shift to prison labor did not cost any American jobs.<sup>152</sup>

### C. Profits Prioritized Over Rehabilitation

#### 1. Profit-Driven Motive

While prison labor programs are usually promoted as enhancing prisoner rehabilitation and employment after reentry into society, such rationales obscure the rampant profiteering that undergirds the expansion of mass incarceration. The direct cost of incarceration in the criminal justice system is more than \$80 billion annually, or \$260 per capita.<sup>153</sup> However, this cost is increasingly offset by the revenues generated by prison labor and prison-related business.<sup>154</sup> There are an estimated six hundred thousand to one million prisoners working full-time in jails and prisons throughout the United States.<sup>155</sup> FPI, operating under the brand name UNICOR,<sup>156</sup> is now supplemented by many equivalent state programs.<sup>157</sup> In 2016, FPI earned \$500 million in sales, manufacturing a vast range of products, including those for the Department of Defense and the Department of State.<sup>158</sup> Combined with similar state prison labor programs, the market for prison labor is worth over one billion dollars.<sup>159</sup>

Additionally, the high numbers of incarcerated individuals have resulted in a boom of prison vendor companies and a flourishing for-profit bail industry. Pris-

150. Sullivan, *supra* note 142.

151. Rodney Ho, *Inside Jobs: Mr. Schwalb Is Putting His Inmates to Work for the Private Sector*, WALL STREET J., July 22, 1999, at A1.

152. *Id.*

153. MELISSA B. KEARNEY & BENJAMIN H. HARRIS, THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 13 (2014), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v8\\_THP\\_10CrimeFacts.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf) [<https://perma.cc/APC8-NF9V>].

154. *U.S. Prisoners' Strike Is Reminder How Commonplace Inmate Labor Is—and that It May Run Afoul of the Law*, CONVERSATION (Aug. 30, 2018), <https://theconversation.com/us-prisoners-strike-is-reminder-how-commonplace-inmate-labor-is-and-that-it-may-run-afoul-of-the-law-101948> [<https://perma.cc/D9K3-4LBM>].

155. Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAN. L. REV. 857, 868 (2008) [hereinafter Zatz, *Working at the Boundaries of Markets*].

156. FACTORIES WITH FENCES, *supra* note 104, at 24.

157. Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (Dec. 9, 2015), <https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration> [<https://perma.cc/S5Q2-RGT5>].

158. *Prison Labour is a Billion Dollar Industry*, *supra* note 3.

159. *Id.*

on vendor companies provide exorbitantly priced goods and services to prisons, including basic food items like cereal and canned soup sold for five times its free world retail price, prison phone services that can cost \$15 for a short call, and substandard prison health care.<sup>160</sup> While prison vendors earned \$2.9 billion in annual revenues, the for-profit bail industry garnered \$1.4 billion in non-refundable fees.<sup>161</sup> The potential for generating such high revenues from prison industries creates perverse incentives that feed the high incarceration rate in the United States.

The systematization of incarcerated labor provides profits across the board for federal, state, and private prisons as well as for private corporations, because the workers are paid little to nothing for their work. While incarcerated workers in state prisons earn an average of \$0.93 to \$4.73 per hour, federal prisons pay from nothing to \$4.73 per day, and private prisons pay from \$0.16 to \$0.50 per hour.<sup>162</sup> According to the Bureau of Justice Statistics census of prison population, in 2005, 88% of U.S. prisons had implemented work programs.<sup>163</sup> The vast majority of people in prison work in jobs that support prison maintenance, such as performing janitorial duties, washing dishes, doing laundry, and delivering mail.<sup>164</sup> A smaller number work in correctional industries where they make goods and provide services for outside customers; employees in these programs are paid slightly higher wages.<sup>165</sup>

Thanks to a plethora of state and federal incentives, private for-profit companies employing prison labor can be more economically competitive than corporations that do not use prisoners. For example, Florida's state prison industries program is managed by Prison Rehabilitative Industries and Diversified Enterprises ("PRIDE"), a private, non-profit corporation. Florida granted PRIDE multiple liability protections, including sovereign immunity, exemption from unemployment compensation and workers' compensation, and freedom from oversight by any state agency.<sup>166</sup> Additionally, the state law provision entitling Florida to 50% of PRIDE's profits has not been in effect for many years since PRIDE opts to use the proceeds for capital improvements and expansion.<sup>167</sup>

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160. Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market> [https://perma.cc/5KMT-3SZH].

161. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [https://perma.cc/4ZFE-FVGB].

162. Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. C.R. & ECON. DEV. 679, 681–82 (2015).

163. Shemkus, *supra* note 157.

164. *Id.*

165. *Id.*

166. David M. Reutter, *Florida's Private Prison Industry Corporation Under Siege*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 141, 141–42 (Tara Herivel & Paul Wright eds., 2007).

167. *Id.* at 141, 143.

While PRIDE generated nearly \$80 million in revenue in 2007,<sup>168</sup> the number of inmates trained by PRIDE remains relatively small at just 3,400 inmates per year.<sup>169</sup> PRIDE's growing portfolio includes apparel, printing services, prescription lenses, and office furniture, among other items.<sup>170</sup>

In some states, such as California, pressure from organized labor since as early as the 1800s led to state laws prohibiting prison-made goods from being sold on the open market in the United States.<sup>171</sup> However, there is little concern for competition with labor outside the United States, and hence, selling U.S. prison-made goods outside the United States is not prohibited. Indeed, the California Prison Industry Authority ("CALPIA") has been testing export markets for denim jeans in Asia and Europe for a year.<sup>172</sup> In some cases, U.S. exporters even marketed the jeans as prison-made in order to increase their appeal to certain consumers. Oregon's multimillion-dollar export of blue jeans to Japan and Italy were advertised with the catchy slogan "Prison Blues, made on the inside to be worn on the outside."<sup>173</sup> California and Oregon have exported prison-made garments to Italy, Japan, Malaysia, and other countries in Asia.<sup>174</sup> Additionally, in California, where CALPIA has established a diverse portfolio of inmate-produced products and services, nearly 30% of the state's forest firefighters are inmates working alongside professional firefighters, saving the state about \$80 million in firefighting costs.<sup>175</sup>

More than thirty states have laws allowing the use of prison labor by private enterprises.<sup>176</sup> California's prison industry generated around \$232 million in sales mostly from its textile and construction divisions in 2017, and about \$10 million from meat-cutting.<sup>177</sup> In Idaho, prison labor is used to roast potatoes, and

168. *History of PRIDE*, PRIDE ENTERPRISES, <https://www.pride-enterprises.org/content.aspx?page=HistoryOfPride> [<https://perma.cc/NSZ6-X58A>].

169. PRIDE ENTERPRISES, PRIDE ENTERPRISES 2016 ANNUAL REPORT 13, [https://www.pride-enterprises.org/Themes/PrideDefault/MediaContent/About/2016%20Annual%20Report/2016\\_Annual\\_Report.pdf](https://www.pride-enterprises.org/Themes/PrideDefault/MediaContent/About/2016%20Annual%20Report/2016_Annual_Report.pdf) [<https://perma.cc/7XXY-AM98>].

170. *Id.*

171. Dan Morain, *Inmate Jobs Harder to Find as Prison Population Soars*, L.A. TIMES (Oct. 17, 1994), [http://articles.latimes.com/1994-10-17/news/mn-51368\\_1\\_prison-population](http://articles.latimes.com/1994-10-17/news/mn-51368_1_prison-population) [<https://perma.cc/DHJ4-6B65>].

172. *Id.*

173. *Id.*

174. Reese Erlich, *U.S., As Well As China, Exports Prison Goods*, CHRISTIAN SCI. MONITOR (Feb. 9, 1994), <http://www.csmonitor.com/1994/0209/09081.html> [<https://perma.cc/PDU6-UNM7>].

175. Julia Lurie, *30 Percent of California's Forest Firefighters are Prisoners*, MOTHER JONES (Aug. 14, 2015) <http://www.motherjones.com/environment/2015/08/40-percent-californias-fires-are-fought-prison-inmates/> [<https://perma.cc/7S46-XQYP>].

176. Gordon Lafer, *Captive Labor, America's Prisoner's As Corporate Workforce*, AM. PROSPECT (Sept. 1, 1999), [http://www.democraticunderground.com/discuss/duboard.php?az=view\\_all&address=389x762097](http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=389x762097) [<https://perma.cc/7AWR-CGT3>].

177. *Prison Labour is a Billion Dollar Industry*, *supra* note 3.

in Kentucky, it sold about a million dollars' worth of cattle.<sup>178</sup> As it currently stands, the list of U.S. corporations that have used prison labor is a startling who's who of popular U.S. brands. For years, Whole Foods had been selling tilapia and cheese sourced and distributed by two private companies that partnered with Colorado Correctional Industries, paying inmates between 74 cents and \$4 per day.<sup>179</sup> Notably, companies can also get up to 40% of the money paid to prisoners back in taxpayer-funded refunds,<sup>180</sup> and under the Work Opportunity Tax Credit ("WOTC"), employers receive a \$2400 tax credit for each work-release inmate they employ, ostensibly as a reward for hiring prisoners.<sup>181</sup> In some states, individuals in prison are not even paid for their work, instead receiving time off from their sentences.<sup>182</sup>

Furthermore, retailers like Kmart and JCPenney have also turned to prison labor, using Tennessee prisons to make jeans,<sup>183</sup> and Eddie Bauer purchased prison-made toys, such as wooden rocking horses.<sup>184</sup> Starbucks has used inmates for cost-cutting purposes, subcontracting with Signature Packaging Solutions to package holiday coffees.<sup>185</sup> To reduce costs in food service operations, McDonald's buys uniforms and plastic utensils from companies that use inmate labor.<sup>186</sup> Both McDonald's and Wendy's use inmates to make frozen food and to process meat for patties.<sup>187</sup> More than 150 inmates in a Virginia federal prison are used to make car parts for Delco Remy International, which had relied on foreign labor prior to insourcing via prison labor.<sup>188</sup>

People in prison are used not only in manufacturing work but also in "de-manufacturing" work, that is, work involved in the disposal of products returned by customers or deemed "buy-backs, over-stocks, shelf-pulls, scratch-and-dent, and excess inventories."<sup>189</sup> Walmart disposes of these products by selling them

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178. *Id.*

179. Susanna Kim, *Whole Foods Suppliers Defend Using Prison Labor*, ABC NEWS (Oct. 5, 2015), <http://abcnews.go.com/Business/foods-suppliers-defend-prison-labor/story?id=34258597> [<https://perma.cc/2W5Y-MRME>].

180. Simon McCormack, *Prison Labor Booms As Unemployment As Unemployment Remains High; Companies Reap Benefits*, HUFFINGTON POST (Dec. 10, 2012), [http://www.huffingtonpost.com/2012/12/10/prison-labor\\_n\\_2272036.html](http://www.huffingtonpost.com/2012/12/10/prison-labor_n_2272036.html) [<https://perma.cc/5XVR-JLPS>]; Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), <https://www.thenation.com/article/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/> [<https://perma.cc/7GR8-Y5YW>].

181. Riley, *supra* note 134.

182. Elk & Sloan, *supra* note 113.

183. Riley, *supra* note 134.

184. Sloan, *Identifying Businesses that Profit from Prison Labor*, *supra* note 148.

185. Riley, *supra* note 134.

186. Sloan, *Identifying Businesses that Profit from Prison Labor*, *supra* note 148.

187. Riley, *supra* note 134.

188. Swartz, *supra* note 141.

189. Al Norman, *Demufacturing Wal-Mart: Profiting from Prison Labor*, HUFFINGTON POST (Feb. 2, 2013), [http://www.huffingtonpost.com/al-norman/walmart-prison-labor\\_b\\_2224743.html](http://www.huffingtonpost.com/al-norman/walmart-prison-labor_b_2224743.html) [<https://perma.cc/8PU8-D2ZV>].

to liquidators or salvage companies, such as Jacobs Trading Company, which rely on prison labor to remove Walmart serial numbers, logs, bar codes, and other identifying marks from these cast-off products before resale.<sup>190</sup> Jacobs Trading Company's purchases from Wal-Mart are "demanufactured" by female prisoners in Oklahoma and Nevada who scrub all identifying labels from the products and repackage them for shipping nationwide for resale.<sup>191</sup> A female prisoner in 2000 working 40 hours a week demanufacturing heavy items such as compressors, ceiling fans, and yard lights, would likely only keep half of what she earned, netting just \$2.67 an hour.<sup>192</sup>

With the passage of harsh anti-immigration laws, there has also been an expanded use of incarcerated people as farmworkers:<sup>193</sup> "[a]s states increasingly crack down on hiring undocumented workers, western farmers are looking at inmates to harvest their fields."<sup>194</sup> State laws are increasingly passed seeking to fine employers for knowingly employing undocumented workers, as a result, more farms have turned to prison labor<sup>195</sup> "to fill the voids created by these laws."<sup>196</sup> For instance, Colorado has instituted a program in which female inmates harvest crops.<sup>197</sup> The Colorado Department of Corrections entered into a partnership with large farms near Pueblo, Colorado, to allow female inmates to work in the fields, earning 60 cents a day.<sup>198</sup> And according to the owner of one of the largest watermelon farms in the West, the steady supply of inmates kept his business in operation despite the shrinking pool of farm migrant workers; even so, 400 acres of watermelons rotted because he was unable to find enough harvesters.<sup>199</sup> Arizona Correctional Industries, a state labor program with contracts with government and private companies, provided Arizona inmates to nine private agricultural companies, including a hydroponics greenhouse tomato factory and a chile cannery.<sup>200</sup>

Faced with the declining numbers of migrant laborers who cross the border from Mexico in search of seasonal agricultural work, companies have lobbied for legislation allowing the use of incarcerated people to fill the shortage in the agri-

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190. *Id.*

191. *Id.*

192. *Id.*

193. Allison Battey, *Facing Illegal Immigrant Crackdown, Farms Look to Inmate Labor*, ABC NEWS (July 25, 2007), <http://abcnews.go.com/TheLaw/story?id=3409570&page=1> [<https://perma.cc/Y4TA-FFLW>].

194. Nicole Hill, *US Farmers Using Prison Labor*, CHRISTIAN SCI. MONITOR (Aug. 22, 2007), <https://www.csmonitor.com/2007/0822/p14s02-wmgn.html> [<https://perma.cc/7D8T-UPSL>].

195. *Id.*

196. Sloan, *Identifying Businesses that Profit from Prison Labor*, *supra* note 148.

197. Hill, *supra* note 194.

198. Sloan, *Identifying Businesses that Profit from Prison Labor*, *supra* note 148.

199. Hill, *supra* note 194.

200. *Id.*



cultural workforce.<sup>201</sup> In 2014, Idaho passed a bill allowing private farms to employ state prisoners to cover the farmworker shortage.<sup>202</sup> The Idaho Correctional Industries claims that their Agriculture Work Program provides private employers with a “stable and reliable work force when non-inmate workers are unavailable.”<sup>203</sup> Arizona, Alabama, Florida, Georgia, and Washington also have prison work programs that aim to assist farmers, but have been met with limited success.<sup>204</sup>

The nonprofit, Farmworker Justice, opposes the move of states to replace undocumented laborers with prisoners as an alternative to comprehensive immigration reform.<sup>205</sup> The United Farm Workers has also raised concerns about the long-term damage that may be caused to food safety and quality by the increasing use of untrained incarcerated men and women instead of traditional farmworkers.<sup>206</sup> According to George Borjas, a Harvard economist, decades of unregulated immigration of farmworkers has depressed agricultural wages, which explains why most American workers do not apply for farm jobs even when wages are significantly higher than the state minimum wage.<sup>207</sup> Nonetheless, agricultural employers unable to secure enough workers even after raising wages can then turn to a low-cost alternative through prison labor programs. In Idaho, legislators hope to expand the use of prison labor in the agricultural industry in the future.<sup>208</sup>

Companies that use prison labor have a clear advantage against their competitors, and the practices described above have garnered condemnation.<sup>209</sup>

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201. Rebecca McCray, *A Disturbing Trend in Agriculture: Prisoner-Picked Vegetables*, TAKEPART (Apr. 14, 2014), <http://www.takepart.com/article/2014/04/14/prison-ag-labor> [<https://perma.cc/7HLM-VWAL>].

202. *Id.*

203. Idaho Corr. Indus., *Agricultural Program*, CI.IDAHO.GOV, <https://ci.idaho.gov/product/agricultural-program/> [<https://perma.cc/BDZ8-WTRT>].

204. Derrick Cain, *Lacking Workers, Idaho Set to Allow Prisoners to Work Private Farms*, AGRIPULSE (Sept. 19, 2014), <https://www.agri-pulse.com/articles/4408-lacking-workers-idaho-set-to-allow-prisoners-to-work-private-farms> [<https://perma.cc/F4SY-7S7Y>].

205. *Id.*

206. Dave Wilkins, *Capitol Press: Prisoner Proposal Stirs Labor Debate—Some Call It Logical, Others Say It’s Crazy*, UNITED FARM WORKERS (Apr. 27, 2007), <https://ufw.org/Capitol-Press-Prisoner-proposal-stirs-labor-debate-Some-call-it-logical-others-say-it-s-crazy/> [<https://perma.cc/XZL6-4DX4>].

207. Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don’t Want the Job*, L.A. TIMES (Mar. 17, 2017), <http://www.latimes.com/projects/la-fi-farms-immigration/> [<https://perma.cc/79MK-8JEH>].

208. Chuck Abbott, *To Meet Farm-Labor Shortages, Idaho Puts Inmates on the Job*, SUCCESSFUL FARMING (Oct. 19, 2017), <https://www.agriculture.com/news/to-meet-farm-labor-shortages-idaho-puts-inmates-on-the-job> [<https://perma.cc/UG2H-ZDVA>].

209. In 2004, a Lewisburg, Pennsylvania prison facility won a recycling contract from the Pennsylvania Department of Environmental Protection with a winning bid that was but one-quarter the bid of private sector competitors, some of whom had to lay off their staff after losing the business to the state’s prison industry. See Elizabeth Grossman, *Toxic Recycling*, NATION (Nov. 3, 2005), <https://www.thenation.com/article/toxic-recycling/> [<https://perma.cc/9DBE-WAHQ>]. When

However, penal labor remains attractive to for-profit industries for a number of reasons. For one, prisons offer a dependable and low-cost workforce. Contributing to their low cost is the fact that people in prison do not receive most of the benefits that free workers must receive. For example, it is unclear whether prisoners have been compensated for workplace injuries, including amputations caused by machinery.<sup>210</sup> In particular, California inmates serving life without parole would never receive compensation for workplace injuries since the state prohibits inmates from receiving workers' compensation until release.<sup>211</sup> Corporations do not need to be concerned about labor unions since inmates do not have the right to unionize.<sup>212</sup> Companies can also hire state inmates on a contract basis and be exempt from prevailing wage requirements and workers compensation as long as prisoners are paid a minimum of \$2 per hour, with 30% of their wages going to prison room and board, and the remaining amount going to court-mandated restitution for victims, child support, if any, and a savings account.<sup>213</sup>

Furthermore, corporations stand to make even heftier profits when the key requirements of PIECP are circumvented or companies are granted additional benefits.<sup>214</sup> For those who administer PIECP, the program is a success, with 37 state and 4 county-based certified correctional industry programs with management authority over at least 175 business alliances with the private sector.<sup>215</sup> UNICOR heavily markets its PIECP initiative by emphasizing the flexibility inherent in using prison labor in a strictly monitored environment.

Statutory safeguards are supposed to protect both local industries from unfair competition and prisoners from unfettered exploitation. For a state or local prison system to receive PIECP certification, certain conditions must be met.<sup>216</sup> The prison system seeking certification must provide assurances that employed

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Tennier Industries, a military clothing manufacturer operating in a depressed area of Tennessee lost a \$45 million contract to UNICOR, the company was forced to lay off 100 workers. *See* Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html> [https://perma.cc/7Z3E-7E22]. It is no wonder that the U.S. Chamber of Commerce opposed the introduction of call centers in prison, advancing concerns about the prison system's "unfettered expansion into the commercial marketplace." Sullivan, *supra* note 142.

210. Spencer Woodman, *California Blames Incarcerated Workers for Unsafe Conditions and Amputations*, INTERCEPT (Dec. 28, 2016), <https://theintercept.com/2016/12/28/california-blames-incarcerated-workers-for-unsafe-conditions-and-amputations/> [https://perma.cc/3X85-W5TL].

211. *Id.*

212. *See* Jones v. North Carolina, 433 U.S. 119 (1977).

213. Hill, *supra* note 194.

214. NCIA, *Prison Industry Enhancement Certification Program*, *supra* note 114.

215. Bureau of Just. Assistance, U.S. Dep't of Justice, *Prison Industry Enhancement Certification Program*, BJA, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=73](https://www.bja.gov/ProgramDetails.aspx?Program_ID=73) [https://perma.cc/EGU5-SZF6].

216. NAT'L CRIM. JUST. REFERENCE SERV. U.S. DEP'T OF JUSTICE, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1-2 (March 2004), <https://www.ncjrs.gov/pdffiles1/bja/203483.pdf> [https://perma.cc/MUD8-9VKS].

workers will not be displaced and that their contracts will not be impaired.<sup>217</sup> PIECP also requires that inmates be paid “at a rate not less than that paid for work of a similar nature in the locality in which the work is performed.”<sup>218</sup> Additionally, organized labor and local private industry must be consulted, and PIE industries must comply with the requirements of the National Environmental Policy Act (“NEPA”).<sup>219</sup>

These statutory safeguards, however, are often relaxed or ignored entirely. Under heavy lobbying by ALEC, the Prison Industries Act could be read to create a critical loophole that suggests the safeguards do not apply as long as prisoner-made goods are not shipped across state lines.<sup>220</sup> Third-party companies can defeat statutory safeguards by setting up a local address in a state that makes prison goods in violation of the safeguards, and then purchasing those products for local sales or surreptitiously shipping them across state borders.<sup>221</sup> Such a loose reading of the Act is likely possible because oversight was effectively transferred from the Department of Justice to the National Correctional Industries Association (“NCIA”), a private trade group.<sup>222</sup>

Private companies that partner with PIECP prison industries skirt the rules in order to bypass statutory requirements that stand in the way of greater profit.<sup>223</sup> Initially, the U.S. Department of Justice’s Bureau of Justice Assistance (BJA) was in charge of ensuring compliance with program criteria; however, in 1995, the BJA outsourced oversight and management to NCIA, which receives government grants to perform its assigned tasks.<sup>224</sup> Critics contend that this decision has contributed to abuses in the program since most of the NCIA’s members are embedded in the prison industry, and as a result, “the NCIA includes the very PIECP participants that it is charged with monitoring; in effect, it is overseeing itself.”<sup>225</sup> In addition, the NCIA’s compliance review period went from annual to biennial, with only about 30% of companies reviewed during each review cycle, work mostly done via “desk assessment” and involving only a cursory review of previously filed papers.<sup>226</sup> The mandate that labor unions be consulted prior to the establishment of a prison industry program has also been

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217. *Id.* at 3.

218. *Id.*

219. *Id.*

220. Elk & Sloan, *supra* note 113.

221. *Id.*

222. *Id.*

223. Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should Be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010), at 1, <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/> [<https://perma.cc/A92D-XGWA>] [hereinafter Sloan, *The Prison Industries Enhancement Certification Program*].

224. *Id.*

225. *Id.*

226. *Id.*

ignored. Prison industries have simply advertised in local papers or notified the local Chamber of Commerce of their intent to establish such programs, without first consulting with union groups as required.<sup>227</sup> Finally, PIECP's requirement that businesses partnering with a prison industry continue to maintain free market operations to ensure prison workers do not completely replace private sector workers, who are supposed to retain the same level of benefits and wages they had beforehand, has been violated by companies without consequence.<sup>228</sup>

A major culprit is PRIDE, the privately held non-profit corporation that operates Florida's more than forty prison work programs.<sup>229</sup> PRIDE ships its products, ranging from eyewear to office furniture, from its main distribution center in Florida to businesses across the United States.<sup>230</sup> One rule PRIDE has been caught in violations of is the requirement that prisoners be paid "prevailing wages."<sup>231</sup> An example of one such violation involves the demarcation of training periods to circumvent the requirement that prisoners be paid prevailing wages. During the so-called "training period," participating prisoners are paid only minimum wage,<sup>232</sup> and consists of a lengthy, intensive 480-hour training course that takes the trainee to level 1 status.<sup>233</sup> Wage increase is incremental and occurs after the prisoner advances through three more levels.<sup>234</sup> It takes about two years for a prisoner to become eligible to be paid the "prevailing wage."<sup>235</sup> However, prisoners often never arrive to the point where they might become eligible. A prisoner is susceptible to being moved to another position at any time during the four-tier training program, in which case the training starts over, entitling them only to minimum wage. This practice allows prisoner wages to remain depressed, despite statutory mandates.<sup>236</sup>

Moreover, other companies have exploited a loophole in the PIECP statute that allows for an exemption from the "prevailing wage" requirement if the work is deemed a "service" rather than a "job." By so designating the work, Martori Farms, which was a leading supplier of produce for Walmart, paid female prisoners \$2 an hour for farm work in the Arizona desert without adequate water or sunscreen.<sup>237</sup> That hourly wage did not include the 60 to 90 minute commute to

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227. *Id.*

228. *Id.*

229. Elk & Sloan, *supra* note 113.

230. *Id.*

231. Sloan, *supra* note 223.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Schwartzapfel, *supra* note 106.

and from the prison and the field.<sup>238</sup> Female inmates from Arizona's Perryville prison complex start their day around 2:30 a.m. and work eight hours in the field in the blazing sun.<sup>239</sup> These inmates complained that the work unit ran out of drinking water several times a day, and out of sunscreen multiple times per week.<sup>240</sup> Although the inmates were allowed two 15-minute breaks and 30 minutes for lunch, supervisors often gave less time and sometimes did not allow the women to stop work to receive medical care.<sup>241</sup> An exhausted or ill worker who took an unauthorized break may have received a disciplinary citation which counted against her "good behavior" time.<sup>242</sup>

## 2. *Lost Rehabilitative Purpose*

Mass incarceration has been exploited for profit on the rationale that prison labor is rehabilitative for prisoners and prepares them for gainful employment upon release. Since post-prison employment is considered a buffer against recidivism, "[t]he chief justification for prison labour is that it both defeats idleness and gives inmates marketable skills. Whether it actually does so is unclear."<sup>243</sup> But as Professor Heather Thompson, Pulitzer Prize winner for history in 2017, stated, "The vast majority of prison labour is not even cloaked in the idea of rehabilitation."<sup>244</sup>

Terms such as rehabilitation and reform hide the ugly facts and history entwined in the history of incarceration and prison labor in the United States. As commentators have noted, "America's prison-labour industry is wrapped in euphemism. Federal Prison Industries does business under the more palatable name of UNICOR, and government-run prison production schemes are called "correctional industries."<sup>245</sup> Some slogans promoting prison industries are better than others: for example, in its reports UNICOR calls its facilities "factories with fences,"<sup>246</sup> but at the very least, this slogan aptly captures the idea that prison labor is the exploitation of incarcerated men and women for profit. More often, prison labor is masked by rhetoric about the numerous benefits such labor brings to the prison population.<sup>247</sup> The public's investment in the idea of rehabilitation through forced labor allows for the egregious exploitation of individuals in the justice system. One particularly troubling example of this came to light when it

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238. Victoria Law, *Martori Farms: Abusive Conditions at a Key Wal-Mart Supplier*, TRUTHOUT (June 24, 2011), <http://www.truth-out.org/news/item/1808:martori-farms-abusive-conditions-at-a-key-walmart-supplier> [<https://perma.cc/PKQ9-53BN>].

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Prison Labour is a Billion Dollar Industry*, *supra* note 3.

244. *Id.*

245. *Id.*

246. *Id.*; see also FACTORIES WITH FENCES, *supra* note 104.

247. Shemkus, *supra* note 157.

became known that judges across the country were ordering drug offenders into substance abuse rehab programs that were actually prison labor camps for private companies, such as meat processing factories that sold slaughtered chicken to big-name brands.<sup>248</sup> The men were paid nothing since the organization kept their wages to supposedly fund the program.<sup>249</sup>

Further indication that rehabilitation is, at best, a secondary side effect of prison labor programs emerges from the use of funds set aside for inmate wages for expanding prison industries' infrastructure. In participating states, prisoners are paid "prevailing wages" to perform typical factory-type work, such as "packaging products, assembling clothing, and building circuit boards. Deductions of up to 80% can be made from the prisoner's wages to cover the cost of prisoner maintenance, victim compensation, and savings for the prisoner.<sup>250</sup> However, the Prison Industries Act absorbed these deductions from inmate wages and directed the funds towards expanding prison industries by stipulating that the money should be used to "construct work facilities, recruit corporations to participate as private sector industries programs, and pay costs of the authority and department in implementing [these programs]."<sup>251</sup>

Studies have shown that "[p]risoners who gain professional skills while locked up, and those who earn a decent wage for their work, are far less likely to end up back behind bars."<sup>252</sup> Yet, that is hardly the reality in prisons. The vast majority of prisoners are made to work in low-skill maintenance jobs, such as laundering, serving food, and filing papers.<sup>253</sup> In Texas, some prisoners work in "'field force' jobs designed to be particularly demeaning."<sup>254</sup> As Judith Greene of the nonprofit organization Justice Strategies remarked, "Thousands of prisoners toil in the hot sun every day and make nothing...[p]rison guards on horseback, ten-gallon hats, prisoners in their uniforms. It looks like what it is: plantation labor all over again."<sup>255</sup>

Although compensation varies depending on the state and the facility, the median wage is 20 cents in state prisons and 31 cents in federal prisons.<sup>256</sup> At those pay rates, prisoners accumulate very little to help them assimilate to civil-

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248. Amy Julia Harris & Shoshana Walter, *All Work, No Pay: They Thought They Were Going to Rehab. They Ended Up in Chicken Plants*, REVEAL (Oct. 4, 2017), <https://www.revealnews.org/article/they-thought-they-were-going-to-rehab-they-ended-up-in-chicken-plants/> [https://perma.cc/TR8U-DAGP].

249. *Id.*

250. Schwartzapfel, *supra* note 106.

251. Elk & Sloan, *supra* note 113.

252. Schwartzapfel, *supra* note 106.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* In Alabama, Arkansas, Florida, Georgia, and Texas, prisoners are not paid at all for regular prison jobs. See Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [https://perma.cc/A565-QVV7].

ian life upon release, both financially and with marketable skills. Since wages are so low, people in prison are usually unable to build up savings for their post-prison life, and unsafe work conditions endanger their health beyond their length of incarceration.<sup>257</sup> Because prison workers are not legally employees, none of the protections employees might receive apply to them; they are not entitled to disability or worker's compensation, social security withholding, or sick or overtime pay.<sup>258</sup>

The combination further undermines the rehabilitative potential of prison work. According to CALPIA, prison workers have suffered more than 600 injuries in combination since 2012.<sup>259</sup> These injuries range from "amputations, crushed fingers, and eye injuries to carpal tunnel syndrome and other routine injuries and accidents."<sup>260</sup> The argument for rehabilitation becomes especially suspect when prisoners are employed in such hazardous work at minimal pay. Firefighting, for instance, is one of the most hazardous jobs in the prison labor system. In California, which is highly susceptible to annual wildfires, minimum security prisoners who pass a fitness test can train to fight fires in outdoor conservation camps.<sup>261</sup> The pay is under \$3 a day while in the training camps, and up to \$1 an hour while fighting fires.<sup>262</sup> In contrast, the starting annual pay for civilian firefighters is \$40,000.<sup>263</sup> Inmate firefighters are in the front lines of fires, helping to clear brush, extinguish hot spots, and protect structures. While full-time firefighters must apprentice for three years, inmate firefighters may receive less than three weeks of training.<sup>264</sup> Not surprisingly, several prisoners fighting fire have been severely injured or even killed.<sup>265</sup> During the fall 2017 wildfires, approximately 1700 inmate firefighters were deployed to the front lines around the state.<sup>266</sup> By using prisoners as firefighters, California saves its taxpayers approximately \$100 million annually.<sup>267</sup> A number of other fire-prone

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257. *Id.*

258. Whitney Bennis, "Free" Labor: The Law of Prison Labor, ONLABOR (May 28, 2015), <https://onlabor.org/free-labor-the-law-of-prison-labor/> [<https://perma.cc/XJC9-CSVP>].

259. Derek Gilna, *California Prison Officials Shift Responsibility for Work Injuries to Prisoners*, PRISON LEGAL NEWS (Aug. 30, 2017), <https://www.prisonlegalnews.org/news/2017/aug/30/california-prison-officials-shift-responsibility-work-injuries-prisoners/> [<https://perma.cc/Z4P9-DX8S>].

260. *Id.*

261. Jaime Lowe, *In the Line of Fire*, N.Y. TIMES MAG., Sept. 3, 2017, at 42–43.

262. *Id.* at 43.

263. *Id.* at 44.

264. *Id.* at 42.

265. *Id.* at 42–43.

266. Matt Wotus & Monte Plott, *California Inmates Help Battle Raging Wildfires*, CNN (Oct. 18, 2017), <http://www.cnn.com/2017/10/13/us/california-fires-inmate-firefighters/index.html> [<https://perma.cc/FL43-BGUW>].

267. Lowe, *supra* note 261, at 44.

states, such as Arizona, Nevada, Wyoming, and Georgia, have also turned to prisoners to fight fires.<sup>268</sup>

Prison industries have also turned to the dangerous electronic recycling business, which involves processing heavy metals and other toxic substances. Processing electronic waste, also known as e-waste, for recycling has become a booming area due to the large amount of obsolete computers and electronic technology that state and local governments typically prohibit the dumping of in landfills. Formerly, the e-waste was transported overseas to the developing world, where workers earn pittance in unsafe working conditions that are dangerous for the environment and worker health.<sup>269</sup> Similar health and safety hazards were reported when prison industries entered the e-waste recycling business.<sup>270</sup> Toxic e-waste from discarded televisions, computers, and cell phones, have been taken to facilities such as the federal prison facility in Texarkana, Texas for disassembly and recycling.<sup>271</sup> Discarded electronic devices containing dangerous substances such as lead, cadmium, and barium need to be taken apart, their components separated and taken apart, and “reprocessed as feedstock for new products”<sup>272</sup> These component parts “are tightly packed, largely unlabeled and of variable design, making that separation process both expensive and labor intensive.”<sup>273</sup>

As of 2009, UNICOR’s facilities employed around 1000 prisoners at seven prisons to process the recycling of 39 million pounds of highly toxic electronic waste. An investigation by the Office of the Inspector General (“OIG”) and other federal agencies, prompted by complaints of prisoners becoming ill from the work, found that prisoners had been exposed to toxic metals, such as lead and cadmium.<sup>274</sup> The report charged that UNICOR ignored advice from the Bureau of Prisons regarding the hazards of toxic recycling, resulting in numerous violations of health, safety, and environmental protocols.<sup>275</sup> UNICOR recycling facilities operated for many years without adequate safety measures, such as monitor-

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268. *Id.*

269. David Biello, *Trashed Tech Dumped Overseas: Does the U.S. Care?*, SCI. AM. (Sept. 19, 2008), <https://www.scientificamerican.com/article/trashed-tech-dumped-overseas/> [<https://perma.cc/4XTA-354B>].

270. Leslie Kaufman, *Toxic Metals Tied to Prison Work*, N.Y. TIMES (Oct. 26, 2010), [http://www.nytimes.com/2010/10/27/science/earth/27waste.html?\\_r=1&ref=science](http://www.nytimes.com/2010/10/27/science/earth/27waste.html?_r=1&ref=science) [<https://perma.cc/6GWL-TXTC>].

271. Matt Clarke, *Arkansas Sends Toxic Tech Trash to UNICOR Recycling Program*, PRISON LEGAL NEWS (July 15, 2009), <https://www.prisonlegalnews.org/news/2009/jul/15/arkansas-sends-toxic-tech-trash-to-unicor-recycling-program/> [<https://perma.cc/889S-RLHG>].

272. Grossman, *supra* note 209.

273. *Id.*

274. *Id.*

275. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL PRISON INDUSTRIES’ ELECTRONIC WASTE RECYCLING PROGRAM, at xi (2010), <https://oig.justice.gov/reports/BOP/o1010.pdf> [<https://perma.cc/UGZ6-6S7E>].



ing for air quality, instituting ventilation and dust controls, and providing prisoners with protective gear.<sup>276</sup>

Theoretically, the Occupational Safety and Health Act applies to prisoners. The act allows prisoners “working in conditions similar to those outside prisons” to file a complaint with the Occupational Safety and Health Administration (“OSHA”) if their workplace is unsafe.<sup>277</sup> While prison work conditions frequently violate OSHA health and safety rules, the agency lacks true enforcement capacity because it is required to provide advance notification to prisons before a visit.<sup>278</sup> The Government Accountability Office produced a report in 2010 that documented how a federal prison system deliberately hid dangerous practices and toxic work conditions from OSHA at its supposedly green electronics-waste recycling center.<sup>279</sup>

While prison labor programs purport to prepare individuals for post-prison life by giving them the skills to counter recidivism, the correctional system engages in a range of practices that burden the recently released and practically guarantee they will be back in prison. Faced with operating budget deficits, states are increasingly imprisoning people merely for their inability to pay fines and court fees; yet perversely, the cost of incarcerating people for failure to pay legal debts often costs the government more than their unpaid debt.<sup>280</sup> An in-depth report shows that even after prisoners have served their time and have been released, “[t]hey . . . remain tethered to the criminal justice system—sometimes decades after they complete their sentences—and live under constant threat of being sent back to jail or prison, solely because they cannot pay what has become an unmanageable legal debt.”<sup>281</sup> Unsurprisingly, this practice has a disproportionate impact on racial minorities.<sup>282</sup> As noted by the ACLU, “The rise of these debtors’ prisons also has a disproportionate impact on people of color, who are overrepresented in the criminal justice system.”<sup>283</sup>

In short, the prison labor system, has become a punitive, as well as money-making, enterprise deeply entrenched and systematically involved in producing profit for private-sector companies under many guises, including the guise of

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276. Myron Levin, *Electronics Recycling at Prisons Under Fire*, S.F. CHRON. (Oct. 6, 2010), <https://www.sfchronicle.com/news/article/Electronics-recycling-at-prisons-under-fire-3171511.php> [<https://perma.cc/S9QP-V24R>].

277. Schwartzapfel, *supra* note 106.

278. *Id.*

279. *Id.*; see also A REVIEW OF THE FEDERAL PRISON INDUSTRIES’ ELECTRONIC WASTE RECYCLING PROGRAM, *supra* note 275, at xi.

280. Press Release, ACLU, ACLU and Brennan Center Expose Resurgence of Debtors’ Prisons (Oct. 4, 2010), <https://www.aclu.org/news/aclu-and-brennan-center-reports-expose-resurgence-debtors-prisons> [<https://perma.cc/X276-653M>].

281. ACLU, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS 6 (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons?redirect=prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons> [<https://perma.cc/C3QF-Z2WD>].

282. *Id.* at 9–10.

283. Press Release, ACLU, *supra* note 280.

bringing jobs back to America. The system's link to rehabilitation is tenuous at best.

#### IV.

#### PENAL LABOR AND THE DICHOTOMY BETWEEN MARKET AND NON-MARKET WORK

The increasing use of incarcerated people by private corporations contracting with correctional authorities for low-cost labor raises questions about the economic status of prison labor. Work performed by people in prison is paid, even though at drastically lower than market rates. Additionally, prison labor impacts the domestic economy by generating vast revenues for corporations and by potentially undermining local competition. Despite this, labor performed by people in prison is not considered employment, and prison industries are exempted from the requirements of the Fair Labor Standards Act ("FLSA").<sup>284</sup> As a result, these incarcerated people do not receive the same or even similar protections as someone considered an employee under the act.

Thus, a legal framework for analyzing prison labor under employment law runs into difficulties because of the penal setting in which the work is performed, distinguishing it from traditional market-based employment. Moreover, nonmarket work is usually seen as occurring in the realm of family and caregiving duties in homes. The domestic setting is held to preclude commodification or economic exchange, because it is performed out of love and caring within intimate relationships, making it inappropriate for legal regulation.<sup>285</sup>

Despite lacking the qualities of intimacy and domesticity, penal labor is held to preclude the economic exchange that characterizes market work.<sup>286</sup> The work done by people in prison is simultaneously punishment, rehabilitation, and production. While punishment and rehabilitation can be understood as nonmarket work, production qualifies as economic activity. The combination of the nonmarket social dimensions of prison labor should not automatically disqualify the productive and economic aspects from receiving recognition. If fact-intensive requirements establishing the productive and economic dimensions of the work are satisfied, incarcerated workers should qualify as employees, with at least the right to receive minimum wage and statutory protections as mandated under the FLSA and Title VII. Instead, however, prisoners are members of a shadow workforce, where they are required to provide their individual labor to produce goods and services for prisons.

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284. *Prisoner Not Covered by Fair Labor Standards Act*, PRISON LEGAL NEWS (May 15, 2007), <https://www.prisonlegalnews.org/news/2007/may/15/prisoner-not-covered-by-fair-labor-standards-act/> [<https://perma.cc/R8QB-8VWB>].

285. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 494 (2005).

286. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 863–64.

Moreover, prison labor has a significant economic dimension through direct and indirect impacts on the economy. This impact, however, is not publicly visible because the corporate profits produced by penal labor are undergirded by a labor economy that straddles market and non-market work. Indirect economic impacts of prison labor are felt at various levels of the economy. States' use of penal labor to offset the economic burden of incarceration decreases taxpayer costs and affects the local economy in other ways. Prisons lower the costs of operations by using inmates instead of paid public-sector employees to perform many of the institutional support tasks necessary for the prison to function. The addition of for-profit production further offsets costs of incarceration by enabling prison industries to compete for business in niche markets where the low costs of prison labor are especially beneficial. Additionally, these for-profit production activities impact the domestic economy by undermining the competitiveness of private businesses that do not use prison labor.

Proponents of prison labor contend that the main reason people in prison are required to work is rehabilitative, but also argue that they do not deserve minimum wage and other statutory protections available to employees on account of the penological status of the work.<sup>287</sup> Thus, the work prisoners do exists outside of the market because it is done in a penal setting. In this view, whether inmates work for the prison or for private companies makes no difference because the principle of work as rehabilitation is satisfied in either situation. What matters is that people in prison *work*. Proponents further point out that prison work programs in companies providing goods and services are highly sought-after<sup>288</sup> and are especially beneficial for reentry into society since these work programs replicate the conditions of labor in a profit-making enterprise.<sup>289</sup>

Defining the work by the incarcerated as rehabilitative rather than remunerative allows it to be viewed as qualitatively different from the same work done by free employees. The innately rehabilitative quality of the work supposedly makes labor its own reward, regardless of whether the prisoners view it in that light. This rehabilitative goal is sufficient justification for withholding the rights and benefits afforded to free workers. However, as previously discussed, the mantle of prison labor as purely rehabilitative does not bear up to scrutiny. The economics of prison labor programs, which are focused on productivity and cost reductions, strongly suggest that rehabilitation is a secondary goal to generating revenue for the programs. The productivity of prison labor is boosted by work-

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287. Ian Urbina, *Prison Labor Fuels American War Machine*, PRISON LEGAL NEWS (Jan. 15, 2004), <https://www.prisonlegalnews.org/news/2004/jan/15/prison-labor-fuels-american-war-machine/> [<https://perma.cc/W6JJ-BTUV>].

288. Mary Lacity, Joseph Rottman & Erran Carmel, *Impact Sourcing: Employing Prison Inmates to Perform Digitally Enabled Business Services*, in SOCIALLY RESPONSIBLE OUTSOURCING: GLOBAL SOURCING WITH SOCIAL IMPACT 138, 149 (Brian Nicholson, Ron Babin & Mary Lacity eds., 2014).

289. *Id.*

place policies, such as hourly pay rates ranging from 23 cents to \$1.15, few breaks, rigorous absentee policies, minimal sick leave, and so on.<sup>290</sup> Convicted inmates are legally required to work “for nothing or for pennies at menial tasks that seem unlikely to boost their job prospects.”<sup>291</sup>

Incarcerated people are believed not to deserve similar wage and workplace protections as free workers because their labor is intended as part of their sentence. In fact, under Section 3 of OSHA, inmates are not defined as “employees.”<sup>292</sup> This classification is critical. Workers classified as employees receive protection, while those who are not, do not.<sup>293</sup> When determining whether a worker is an employee, courts look to the character of the relationship between the parties and assess, first, whether the employer has sufficient control over the working conditions and, second, whether the parties’ relationship is primarily of an economic character.<sup>294</sup> In cases where incarcerated workers have sued their prison-employers to enforce minimum wage laws or the FLSA, courts have ruled that the workers’ relationship with the prison is not economic, but social or penological.<sup>295</sup> As a result, incarcerated workers are not protected by the minimum wage provisions of the FLSA, are not covered by workers’ compensation statutes in many states, are generally deemed ineligible for unemployment compensation, and are not free to form unions.<sup>296</sup> They are believed not to need these protections because their labor provides enhanced post-conviction employment prospects.<sup>297</sup> These rationales work in tandem to support the extensive economic infrastructure profiting from prison labor.

People in prison are workers but are not considered employees, and “employers pay no health insurance, no unemployment insurance, no payroll or Social Security taxes, no workers’ compensation, no vacation time, sick leave, or overtime.”<sup>298</sup> Thus, they will not qualify for unemployment benefits post-conviction despite years of working in a prison labor program. As a UNICOR

290. Urbina, *supra* note 287, at 111.

291. *Prison Labour is a Billion Dollar Industry*, *supra* note 3.

292. OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA INSTRUCTION FAP 1.2A, FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS WITH THE BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE (1995), <https://www.osha.gov/enforcement/directives/fap-01-00-002> [<https://perma.cc/6DXS-JGDU>]. OSHA notes that, when required to perform work similar to that outside of prisons (e.g., farming, industrial work, machine operations, etc.), inmates have the right to file a report of hazardous working conditions with appropriate safety and health officials. However, these reports are largely ineffective because all OSHA site visits to prison labor facilities are announced in advance, allowing the facilities the chance to cover up any hazardous conditions. *Id.*

293. Bennis, *supra* note 258.

294. *Id.*

295. *Id.*

296. MICHAEL B. MUSHLIN, 2 RIGHTS OF PRISONERS § 8:13, 8:21, 8:24, 8:25 (5th ed. 2017), Westlaw. Prison laborers are, however, protected by civil rights laws prohibiting employment discrimination on unlawful grounds, such as race, religion, age, and sexual orientation. *Id.* § 8:8.

297. *Id.*

298. *Id.*

manager explained, prison workers are “not covered by the Fair Labor Standards Act, minimum wage laws...[and] they don’t get retirement benefits, unemployment compensation, etc.”<sup>299</sup> Benefits such as health insurance are covered by the state system. Prison workers have few rights, can be fired at will, have no right to organize or to access the press, thus constituting “the ultimate flexible and disciplined workforce.”<sup>300</sup> All able-bodied prisoners who do not pose a security risk are required to work under federal law.<sup>301</sup> Prisoners can choose between solitary confinement and other forms of punishment, or work in prison for which they would be paid as little as two cents per hour for full-time work in farms, manufacturing, or kitchens.<sup>302</sup>

Despite various statutory safeguards, prison labor impacts the labor market for free American workers by depressing wages and putting pressure on workers’ rights. A few examples discussed below illustrate how competition from prison-made products has had a deleterious effect on private sector companies. For example, in 2008, free-world jobs in Texas were lost when a Lufkin Industries’ trailer division closed due to its inability to compete with a prison industry program.<sup>303</sup> The saga began in the mid-1990s, when Lockhart Technologies (now known as the private prison corporation, GEO Group) entered into an agreement with Wackenhut prison to use prisoners to assemble electronic parts.<sup>304</sup> Wackenhut prison constructed a 25,000 square feet industrial facility and leased it to Lockhart Industries for merely one dollar per year; once its prison industry program was established, Lockhart closed its facilities in nearby Austin.<sup>305</sup> Lockhart’s owner gave a straightforward explanation about the benefits of using prison labor: “Normally when you work in the free world, you have people call in sick, they have car problems, they have family problems. We don’t have that [in prison].”<sup>306</sup> As the spokesperson for Texas AFL-CIO stated, “The incentive for companies to go into the prisons is pretty clear in some cases. They don’t have to pay all the benefits, in some cases they pay very few of the benefits, that an outside company has to pay in the regular marketplace.”<sup>307</sup>

In several states, PIECP programs have been shown to have a harmful effect on the wages of free workers and profit of private sector employers due to their ability to benefit from business conditions not available in the open market. In Florida, PRIDE’s more than 41 prison industries have outcompeted smaller pri-

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299. Srinivasan, *supra* note 27, at 279.

300. Lafer, *supra* note 176.

301. Crime Control Act of 1990, Pub. L. 101–647, 104 Stat. 4914.

302. Bennis, *supra* note 258.

303. JAMES KILGORE, UNDERSTANDING MASS INCARCERATION: A PEOPLE’S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME 193 (New Press, 2015).

304. Sloan, *The Prison Industries Enhancement Certification Program*, *supra* note 223.

305. *Id.*

306. *Id.*

307. *Id.*

vate businesses.<sup>308</sup> More than 60 such prison industries exist in California alone, with hundreds more in other states, many of which end up competing with the private sector notwithstanding statutory safeguards against such competition.<sup>309</sup> In addition, “several states are looking to replace public sector workers with prison labor...[for instance,] Wisconsin Governor Walker’s recent assault on collective bargaining opened the door to the use of prisoners in public sector jobs in Racine, where inmates are now doing landscaping, painting, and other maintenance work.”<sup>310</sup> As in states like Virginia, Ohio, New Jersey, Florida, and Georgia, and as a result of legislation proposed and supported by ALEC<sup>311</sup> union workers in Wisconsin are replaceable not just by non-union workers, but also by inmates who perform the work without being paid, in exchange for time deducted from their sentences.<sup>312</sup> One of the key provisions featured in ALEC’s proposed labor legislation enables the state to replace public workers with prisoners.<sup>313</sup>

In another instance, Talon Industries, a company based in Washington that used water jet technology, also went out of business when it had to compete with MicroJet, a competitor that partnered with Monroe Corrections Center to produce airplane parts for Boeing.<sup>314</sup> In response to a lawsuit initiated by Talon against state officials over their illegal use of prison labor, the Washington Supreme Court prohibited the use of prisoners in private sector industries.<sup>315</sup> Shortly thereafter, however, Article II of Washington State’s Constitution was amended to provide for “the working of inmates for the benefit of the state, including the working of inmates in state-run inmate labor programs. Inmate labor programs provided by statute that are operated and managed, in total or part, by any profit or nonprofit entities shall be operated so that the programs do not unfairly

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308. Elk & Sloan, *supra* note 113.

309. *Id.*

310. *Id.*

311. ALEC describes itself as “America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.” *About Alec*, ALEC, <https://www.alec.org/about/> [<https://perma.cc/W5V5-DXEK>]. Others have referred to it as “a year-round clearinghouse for business-friendly legislation.” Karen Ollson, *Ghostwriting the Law: A Little Known Corporate Lobby is Drafting Business-Friendly Bills for State Legislatures Around the Country*, MOTHER JONES (Sept.–Oct. 2002), <http://www.motherjones.com/politics/2002/09/ghostwriting-law/#> [<https://perma.cc/YA83-V7C4>].

312. David Reutter, *Prison Slave Labor Replaces Freeworld Workers in Down Economy*, PRISON LEGAL NEWS (May 15, 2012), <https://www.prisonlegalnews.org/news/2012/may/15/prison-slave-labor-replaces-freeworld-workers-in-down-economy/> [<https://perma.cc/DRT2-RHN2>]; *see also* Elk & Sloan, *supra* note 113.

313. Elk & Sloan, *supra* note 113.

314. Paul Wright, *Washington Prison Slavery Runs Competitors Out of Business*, PRISON LEGAL NEWS (Feb. 15, 2000), <https://www.prisonlegalnews.org/news/2000/feb/15/washington-prison-slavery-runs-competitors-out-of-business/> [<https://perma.cc/JC73-3WAF>].

315. Wash. Water Jet Workers Ass’n v. Yarbrough, 90 P.3d 42 (Wash. 2004).

compete with Washington businesses as determined by law.”<sup>316</sup> Supposedly, safeguards were added to make sure that prison wage would not undercut industry wage, that part of inmate wages would be used to pay for the cost of the inmate’s incarceration, and that inmates would learn marketable skills.

As these examples demonstrate, prison labor programs have expanded greatly in scope and size over the decades. The broad reach of these programs means that the economic impact of prison labor can be felt at many levels throughout the national economy. Categorizing the work of prisoners as rehabilitative or penological unduly emphasizes the social character of prison labor at the expense of its significant economic quality. The mere fact that an inmate’s work may have rehabilitative value or that it is performed in a penal context does not eliminate its status as economic activity. Once inmate labor is viewed as market activity, certain consequences should follow, including qualification for minimum wage as well as other statutory protections extended to employees.

## V.

### TOWARDS A PRAGMATIC PROPOSAL

Section 1 of the Thirteenth Amendment provides that “[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>317</sup> Hence, incarcerated people who have complaints about their work in prison or their wages, have no constitutional claims under the Thirteenth Amendment’s prohibition against slavery or involuntary servitude. As this Article has shown, people in prison have been made to work for very little remuneration under various models, under the auspices of the state or leased out to private employers. In 2016, the largest-ever prisoner strike took place in protest of low or nonexistent wages, and equated prison labor with slavery; it ultimately ended when none of the protestor’s demands were met. Given the text of the Thirteenth Amendment, a strategy with the objective of improving work conditions or increasing wages cannot be anchored in comparing prison labor to slavery.

Rather, protests against prison labor could be understood within a framework that links it to exploitation within market, profit, and employment contexts. This approach is not without its own difficulties, however. Indeed, from a conceptual standpoint, prison labor has been a conundrum for courts and scholars because it does not fit neatly into the category of market or nonmarket work. On the one hand, prison labor possesses features that are commonly associated with

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316. John E. Dannenberg, *Washington DOC Restarts Private Industry Prison Jobs Following State Constitutional Amendment*, PRISON LEGAL NEWS (Feb. 15, 2009), <https://www.prisonlegalnews.org/news/2009/feb/15/washington-doc-restarts-private-industry-prison-jobs-8232following-state-constitutional-amendment/> [https://perma.cc/Y756-UDCK] (citing Wash. Const. art. II, § 29).

317. U.S. CONST. AMEND. XIII, § 1.

market work: “compensation” and “control,” as used in legal doctrine and “short-term monetization” and “time discipline,” as used in the social science literature.<sup>318</sup> As further support for considering prison labor as a market sector activity, one could point out the fact that prison labor lacks many of the features normally associated with the nonmarket sector, like those associated with intimacy, or “work embedded in a highly particularized relationship among a small number of individuals and often characterized by the worker’s identification with or protection of the interests of those who benefit from her labor.”<sup>319</sup>

The rigid market/nonmarket dichotomy has long been critiqued by feminist scholars who ask whether nonmarket work “should be incorporated into legal regimes of worker support and protection,”<sup>320</sup> and whether caregivers and others in the family sphere should “count[] as a worker for the purposes of family, welfare, social insurance, and tax law.”<sup>321</sup> This dichotomy has been crucial for determining what kind of work legally qualifies as employment, and what kind of worker legally qualifies as an employee. Courts engage in a contorted and convoluted analysis of the FLSA<sup>322</sup> because they are unable or unwilling to venture beyond the market/nonmarket framework. In the context of prison labor, adherence to this dichotomy has led many courts to categorically reject the claim that incarcerated people who participate in the myriad prison labor programs can be deemed employees, resulting in their continuing to be paid subminimum wages. Judicial analysis of the FLSA in the prison labor context has resulted in wildly inconsistent results. In this Part, I select a few representative cases to demonstrate that although there is increasing judicial receptivity to minimum wage claims by inmate workers, the case law in this area is muddled and the distinctions made by courts to determine FLSA claims by inmates is unnecessarily formalistic, resulting in wrongful denials of coverage. As I argue in this Article, the mere fact that inmates work in a penal setting should not categorically eliminate their work from being considered employment. Under this reasoning, assuming the proposed fact-intensive requirements are met, inmates should qualify as employees, with at least the right to receive minimum wage as mandated under the FLSA.

#### A. *Employment under the FLSA*

Congress enacted the FLSA to eliminate “in industries engaged in commerce or in the production of goods for commerce, . . . labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” because such conditions

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318. Noah D. Zatz, *Prison Labor and the Paradox of Paid Nonmarket Work*, in 18 RESEARCH IN THE SOCIOLOGY OF WORK: ECONOMIC SOCIOLOGY OF WORK 369 (Nina Bandelj ed., 2009).

319. *Id.*

320. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 859.

321. *Id.*

322. 29 U.S.C. § 201 (2000).



“constitute[] an unfair method of competition in commerce[.]”<sup>323</sup> The minimum wage mandate of FLSA applies only to those who are deemed “employees” within the meaning of the statute; the FLSA states that an “employee” is “any individual employed by an employer.”<sup>324</sup> An employee is also “any individual employed by a State.”<sup>325</sup> An “employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.”<sup>326</sup> “To employ,” as used in the FLSA, means “to suffer or permit to work.”<sup>327</sup>

For many courts and agencies, prison labor straddles incongruously between market and nonmarket categorizations, and is usually perceived to be outside the boundaries of the market. To the extent that prison labor has any nonmarket features, that is, to the extent prison labor has a social or rehabilitative or penal feature, it has been slotted into the nonmarket box; thus, it is assumed that “inmates’ work must be noneconomic and therefore not employment.”<sup>328</sup> For example, the Bureau of Labor Statistics which collects data on the labor force, including employment and unemployment, specifically excludes “residents of penal and mental institutions.”<sup>329</sup>

Judicial opinions on this issue have been mixed and muddled. Courts have considered any number of factors, ranging from varying interpretation of controls to voluntariness, as well as economic reality to bargained-for exchange. For some courts, employment status has centered on the question of which entity has exercised control over the worker. In the 1980s, inmates alleging violations of FLSA’s minimum wage mandate by private employers operating on prison grounds faced an intransigent “control” issue. At the time, federal courts were fixated on the issue of control. Finding that control belonged to the prison and prison authorities, and not the private companies who had leased the incarcerated to do work, such courts usually held that there was no employment relationship between the inmates and the private companies.<sup>330</sup> Even as early as the 1940s, courts had cast the defendant private companies as mere customers of the prison authority with no direct relationship to the incarcerated people who work for

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323. *Id.* § 202(a).

324. *Id.* § 206(a)(1).

325. *Id.* § 203(e)(2)(C).

326. *Id.* § 203(d).

327. *Id.* § 203(q).

328. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 864.

329. *Employed Persons (Current Population Survey), Glossary, Handbook of Methods*, BUREAU OF LAB. STAT. (Apr. 17, 2003), <http://www.bls.gov/opub/hom/homch1> [<https://perma.cc/8QQM-VE5M>] (defining “Employed Persons” as including only “[p]ersons 16 and over in the civilian noninstitutional population”); *Employed Full-Time from the Current Population Survey: Union Affiliation Statistics in (000)*, DataPlanet, <https://www.data-planet.com/> [<https://perma.cc/87RF-2VK5>] (last updated 02/22/2015).

330. *See, e.g.,* *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1326–27 (9th Cir. 1991); *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir. 1983); *Sims v. Parke Davis & Co.*, 334 F. Supp 774, 786 (E.D. Mich.), *aff’d*, 453 F.2d 1259 (6th Cir. 1971).

them. In *Huntley v. Gunn Furniture Co.*, in a suit brought by the inmates against private military contractors, the court ruled unequivocally that “plaintiffs were employees of the Michigan prison industries and not of the defendant.”<sup>331</sup>

This restrictive interpretation of “control” meant that third-party contractors or subcontractors to whom inmates are leased were able to avoid their statutory obligations. With that realization, courts began to engage in a more nuanced approach by examining the facts at issue rather than categorically denying inmate claims under the presupposition that control could never lie in the private company’s hands. In *Carter v. Dutchess Community College*, the plaintiff complained that he was compensated below the federal minimum wage in violation of the FLSA.<sup>332</sup> The Second Circuit broke new ground when it rejected the district court’s finding that there was no employment relationship between the inmate and the community college that had hired him as a teaching assistant because “ultimate control” of the inmate remained with the prison.<sup>333</sup> Although the Second Circuit retained the “ultimate control” test, it held that the district court had given “undue weight to the control factor alone.”<sup>334</sup> Rather, in determining whether an employment relationship existed for purposes of the FLSA, the Second Circuit in *Carter* also referred to and reaffirmed the “economic reality” test first enunciated in *Bonnette v. Cal. Health & Welfare Agency* which classified judicial inquiries based on the following factors: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”<sup>335</sup>

From this broader framework, and taking into consideration the statute’s underlying purpose, the *Carter* decision rejected the notion that:

an entity’s control over a worker must be ‘ultimate’ in order to justify a finding of an employer-employee relationship. The statute is a remedial one, written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy. It runs counter to the breadth of the statute and to the Congressional intent to impose a qualification which permits an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party’s veto, to escape compliance with the Act.<sup>336</sup>

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331. 789 F. Supp. 110, 116 (W.D. Mich. 1948).

332. 735 F.2d 8 (2d Cir. 1984).

333. *Id.*

334. *Id.* at 12.

335. *Id.* (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

336. *Id.* at 12.

The Second Circuit explicitly rejected the proposition that the penal context of inmate labor categorically makes their work nonmarket and hence not subject to the FLSA. Doing so would result in “an absolute preclusion of FLSA coverage for prisoners”<sup>337</sup> which would be contrary to Congress’ intent because Congress did not include inmates in the list of those it explicitly exempted from FLSA coverage.

This reasoning has been adopted by other courts. There is no categorical exclusion from FLSA minimum wage mandate based on inmate status. For example, in *Watson v. Graves*,<sup>338</sup> the Fifth Circuit reversed a lower court ruling that inmates per se are not employees of private defendants under the FLSA. Under the program administered by the sheriff and the warden, plaintiffs were leased to the sheriff’s daughter and son-in-law’s construction business for \$20.00 per day. Guided by the Second Circuit in *Carter*, the Fifth Circuit examined the purposes behind the FLSA and found that the “Act was drafted not only to improve living conditions, bargaining strength vis-a-vis employers, and the general well-being of the American worker, but also to eliminate unfair competition among employers competing for business in the market and among workers looking for jobs.”<sup>339</sup> The Fifth Circuit correctly determined that inmate status alone should not remove the inmate from possible coverage under FLSA, and that “control” as well the “economic reality” underpinning the relationship are relevant: “We must also look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage.”<sup>340</sup> Applying the economic reality test to the facts at hand, the Fifth Circuit found that plaintiffs were not supervised by prison officials, but rather by the private contractor who kept them as long as they needed their labor, sometimes for more than twelve hours,<sup>341</sup> and that the private contractor “had the de facto power to hire and fire.”<sup>342</sup> Even though the court found that the sheriff, and not the private contractor, technically set the pay rate for plaintiffs, and neither the sheriff nor the private contractor kept any employment records, the economic reality test nonetheless was met under the FLSA.<sup>343</sup>

Of particular significance is the language used by the 5th Circuit to explain its decision, which focused on the subpar circumstances faced by plaintiffs as well as the economic benefits received by the private company—a situation likely replicated in other prison labor scenarios all over the United States. As the court described, the private contractor:

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337. *Id.*

338. 909 F.2d 1549, 1550 (5th Cir. 1990).

339. *Id.* at 1554.

340. *Id.*

341. *Id.* at 1554–55.

342. *Id.* at 1555.

343. *Id.*

had at his disposal a ‘captive’ pool of workers whom he had only to pay token wages. Those wages were well below the legal minimum, and, we speculate, even further below the ‘going rate’ for workers with the Inmates’ skills and abilities. Unlike his competitors, [the contractor] incurred no expense for overtime, unemployment insurance, social security, worker’s compensation insurance, or other employee benefit plans because he had no ‘employees.’ . . . Such a situation is fraught with the very problems that FLSA was drafted to prevent—grossly unfair competition among employers and employees alike.<sup>344</sup>

The fact of a “captive pool” of workers and hence the penal setting itself did not make the FLSA inapplicable. To the contrary, the court’s language suggests that those conditions and the subsequent impact on other employers were the very conditions the FLSA was meant to address.<sup>345</sup>

Nonetheless, courts, including the one in *Watson*, which held in favor of inmate labor’s classification as employment, have carved out exceptions. Generally speaking, the exceptions fit into two categories. The first category of exclusion involves private companies that hire inmates for work performed within the prison.<sup>346</sup> The court in *Watson* distinguished the facts of its case from others where FLSA coverage had been appropriately declined. Employment was not found where private firms conducted their business operations within the confines of the prison and relied on prison labor for their business.<sup>347</sup> In those cases, “analysis under the economic reality test has led the courts to conclude that the inmates were not entitled to FLSA protection because primary control over the inmates, and determination of the hours to be worked and the nature of the work to be performed rested with the prison.”<sup>348</sup> The *Watson* court cited with approval the holding and reasoning of cases in which courts have found an absence of employer-employee relationship because of a combination of the following limiting factors: (1) the outside private company had no contractual relationship with the inmate; (2) compensation was sent to the prison, not directly to the prisoners; and (3) prison authorities selected which inmates would be assigned to the private company.<sup>349</sup> We are thus back to the “control” test in which the penal

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344. *Id.*

345. “Obviously, construction contractors in the area could not compete with Jarreau’s [the contractor’s] prices because they had to pay at *least* minimum wage for even unskilled labor, not to mention all of the above listed overhead costs avoided by Jarreau. It takes little imagination to recognize that job opportunities for non-inmate workers in the area was severely distorted by the availability of twenty dollar per day workers from the parish jail.” *Id.* at 1555.

346. *Id.* at 1553.

347. *Id.* at 1555.

348. *Id.* at 1553.

349. *Alexander v. Sara, Inc.*, 721 F.2d 149 (5th Cir. 1983); *Hudgins v. Hart*, 323 F. Supp. 898 (E.D. La. 1971); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich.), *aff’d*, 453 F.2d 1259 (6th Cir. 1971).

setting is interpreted to mean control over inmates is exercised by the prison, not the private employer, and the inmate worker cannot be deemed an employee.

Here, the courts have rested their holdings on a few factors, which I will discuss below. One of which is that control could not be exerted by the private company if the work is done in a prison setting, presumably because the prison was deemed to be the sole entity in absolute control and control could not be shared between both private company and prison authorities. Additionally, the assumption is that even if private companies use prisoners to work for private profit, the fact that such work is on prison grounds makes the work somehow more penal than market. Consequently, there can be no employment relationship because the market/nonmarket dichotomy is rigidly constructed in a way that does not account for market work within a prison setting.

The second category of cases that has resulted in judicial findings of no employment relationship involves inmates performing what has been commonly referred to as prison housework. The facts and holding can be illustrated in a Seventh Circuit case *Vanskike v. Peters*, in which the court found that precisely because inmate plaintiff was made to do janitorial, kitchen, and garment work in the Illinois prison in which he was a prisoner, he was not an employee of the prison, despite the fact that control was fully vested in the prison and not diluted by any private third party.<sup>350</sup> Indeed, the court ignored factors that proved control by the prison and instead came up with other facts that it could use to justify its finding.

The *Vanskike* court minimized control, then proceeded to gut the economic reality test relied upon by other courts, because there is essentially a much more fundamental question at stake: “[c]an this prisoner plausibly be said to be ‘employed’ in the relevant sense at all?”<sup>351</sup> The court rejected the economic reality test because its factors “essentially . . . presuppose a free labor situation.”<sup>352</sup> Without holding explicitly that inmate workers are categorically excluded from the FLSA, the court has, through the backdoor, ensured, that this result is inevitable. Inmates working inside prisons for prison authorities cannot be employees because in such cases, “control . . . does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself.”<sup>353</sup> There was, in other words, “too much control to classify the relationship as one of employment.”<sup>354</sup> According to the court, there is the boundary

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350. 974 F.2d 806 (7th Cir. 1992).

351. *Id.* at 809.

352. *Id.*

353. *Id.*

354. *Id.* at 810; *see also* *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993) (“Because the inmates are involuntarily incarcerated, the [Department of Corrections] wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment. . . . Inmates may voluntarily apply for [State Use Industries] positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day. [State Use Indus-

of employment and then there is the prison and the two do not overlap.<sup>355</sup> Thus, whatever inmates receive as a result of the work assignment in a prison, such payments “are not wages in a realistic economic employer-employee relationship.”<sup>356</sup> The court reasoned that the FLSA cannot apply because under those facts, the purpose of inmate work was rehabilitative and not pecuniary.<sup>357</sup>

Even the Fifth Circuit, which had held in *Watson* that prisoners who worked outside the prison for a private firm were indeed FLSA employees,<sup>358</sup> came to the opposite conclusion in *Loving v. Johnson* when prisoners were used to do prison housework.<sup>359</sup> The court in *Loving* found that “prisoners doing prison work are not the prison’s employees under the FLSA,” citing the Seventh Circuit’s decision in *Bennett v. Frank* that suggests an intrinsic incompatibility between two irreconcilable principles—incarceration and employment:<sup>360</sup>

People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.<sup>361</sup>

In this way, the Fifth Circuit is in line with other courts that have rejected inmates’ claims for minimum wage under the FLSA when inmates work in routine prison housekeeping or maintenance work.<sup>362</sup> The court presupposes that if the inmate is engaged in work due to a prior condition of incarceration, the work is not economic, and the inmate cannot be an employee. Further, the court presupposes that if prison work is supposed to achieve a rehabilitative function, then

tries] and [inmate] do not enjoy the employer-employee relationship contemplated in the Act, but instead have a custodial relationship to which the Act’s mandates do not apply.”).

355. The economic reality “factors thus primarily shed light on just one boundary of the definition of ‘employee,’ and we are concerned with a different boundary. Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.” *Vanskike*, 974 F.2d at 810.

356. *Id.* (quoting *Harris v. Yeager*, 291 F. Supp. 1015, 1017 (D.N.J. 1968), *aff’d*, 410 F.2d 1376 (3d Cir. 1969)).

357. *Vanskike*, 974 F.2d at 809–10.

358. *Watson v. Graves*, 909 F.2d 1549, 1556 (5th Cir. 1990).

359. 455 F.3d 562, 563 (5th Cir. 2006) (per curiam).

360. 395 F.3d 409 (7th Cir. 2005).

361. *Id.* at 409–10.

362. Zatz, *Working at the Boundaries of Markets*, *supra* note 155.

it cannot have a market function either. Although the focus of this Article is on the use by private companies of inmate labor for profit, the courts' treatments of prison use of prison labor for prison housework are nonetheless relevant because it goes to the wider issue of how courts insist on formalistic dichotomies—market vs. nonmarket—rather than engage in a more nuanced analysis when the facts of a case might straddle both categories.

Faced with this dichotomy, courts have zigzagged, slotting some facts into the nonmarket universe and others into the market universe. It is often all too easy to find that the existence of any other element—rehabilitation, control by the prison system—also negates a finding of market activity, resulting in what one commentator called judicial insistence on “the exclusive market view.”<sup>363</sup> In such cases, courts refuse “to separate inmate labor from the institutional context of the prison”<sup>364</sup> which in turn leads to the conclusion that such labor is nonmarket and there can be no employment relationship at hand.

For example, in *George v. SC Data Ctr., Inc.*, the inmate plaintiff worked under the auspices of Wisconsin Prison Industries.<sup>365</sup> This case illustrates what I have called category one exclusion—an inmate working for a private company but within prison compounds and hence deemed “not an employee.” It also illustrates what happens when courts focus on the location of the job to come to an “exclusive market view.” The facts of the case show that Prison Industries and the private data company SC Data had entered into a contract.<sup>366</sup> SC Data sent customer requests for catalogs from Swiss Colony to inmates of Prison Industries who entered raw data into the computers for further processing.<sup>367</sup> Plaintiff inmate received \$1 per hour and sued both Prison Industries and SC Data.<sup>368</sup> The court found that the inmate was not an employee of SC Data under the four prongs of the economic reality test, finding that “[p]laintiff was not hired or terminated by SC Data Central. Nor were his pay, working conditions or work schedule determined by SC Data Center, and SC Data Center kept no records of plaintiff's individual work or performance.”<sup>369</sup> The court also found that despite being under the control<sup>370</sup> of Prison Industries, plaintiff had no employment relationship with Prison Industries, characterizing his work essentially as penological and rehabilitative and not pecuniary.<sup>371</sup>

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363. *Id.* at 882.

364. *Id.*

365. 884 F. Supp. 329, 330 (W.D. Wis. 1995).

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 332.

370. See *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (“The DOC’s ‘control’ over [inmate] . . . does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself.”). This sort of control is not “market” control, and hence according to the court, not useful for determining the existence of employment. *Id.*

371. *George*, 884 F. Supp. at 333.

In essence, the penal setting categorically extinguishes the market dimension of the work—strangely, no one is his employer—and his status as an incarcerated person wipes out any possibility that the work is deemed part of an employment relationship. Once incarcerated, people are in the “prison” box (nonmarket), not the “economic” box (market). Indeed, “prisoners are essentially taken out of the national economy.”<sup>372</sup>

Similarly, focusing less on the location of the job and more on the putative objective of inmate rehabilitation, courts have the latter as a shield to deny inmate workers employee status. In *Harker v. State Use Industries*, the Fourth Circuit declared that “[i]nmates perform work for [Maryland State Use Industries] not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training.”<sup>373</sup> As one commentator observed, “[d]riving this argument is the notion that rehabilitative or educational value to the inmate is incompatible with economic benefit to the putative employer.”<sup>374</sup> Under the facts of *Harkey*, the prisoner was working for the State Use Industries, an organization within the Department of Corrections. One could reasonably concede that these governmental organizations had no pecuniary interest in the labor of its prisoners. But that argument dissipates when the incarcerated person works for a private company, whether that private company is outside or inside prison grounds. In that case, the private company certainly is receiving an economic benefit and it is certainly motivated by profit, not inmate rehabilitation, even if the prison labor program has a rehabilitative function.

Nonetheless, courts have held that market activities on prison grounds—whether for the prison itself or for private companies entering prison compounds—cannot be economic or deemed a part of the employment relationship because, as courts put it, there is no bargained-for exchange.<sup>375</sup> As the Eleventh Circuit court observed approvingly in *Villareal v. Woodham*, “These cases generally have involved inmates working for prison authorities or for private employers *within* the prison compound.”<sup>376</sup> In explaining the rationale for such holdings, the *Villareal* court declared, “these decisions note that the ‘economic reality’ test does not apply in the inmate-jailer context because the FLSA presupposes a free-labor situation constrained by the Thirteenth Amendment, which does not apply to convicted inmates.”<sup>377</sup> Economic activities within prison grounds (whether for a private company or for prison authorities) presumably are either never market or always coercive and thus such workers cannot be employees.

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372. *Vanskike*, 974 F.2d at 810.

373. 990 F.2d 131, 133 (4th Cir. 1993).

374. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 889.

375. *George*, 884 F. Supp. at 333.

376. 113 F.3d 202, 206 (11th Cir. 1997) and cases cited therein.

377. *Id.*



Interestingly, there are also courts that have approved FLSA denials but have nonetheless found that the inside vs. outside the prison distinction makes little sense as a marker for determining employment status. For example, the D.C. Circuit in *Henthorn v. Dep't of Navy* aptly asked: “should a prisoner working for a private employer who sets up shop within the prison compound not be paid minimum wage because he does not leave the prison grounds to do his work, while a prisoner performing the same work for the same employer but in a facility outside the prison should receive FLSA protection? . . . Neither the inside/outside nor the public/private distinction alone provides an adequate answer to which prisoner work situations should be covered by the FLSA.”<sup>378</sup> Instead, the *Henthorn* court suggested that courts should give points for market indicators and deduct points for coercion indicators, so that “the more indicia of traditional, free-market employment the relationship between the prisoner and his putative ‘employer’ bears, the more likely it is that the FLSA will govern the employment relationship.”<sup>379</sup>

Ironically, even while conceding that “most courts refuse to hold that prisoners are *categorically* barred from ever being ‘employees’ within the meaning of the FLSA merely because of their prisoner status,”<sup>380</sup> the *Henthorn* court’s analysis of the economic reality test will almost always result in inmates being unable to be classified as employees because they are inmates and are embedded in an involuntary setting—prison. Rather than focusing on whether the incarcerated person is performing market-based work, courts tend to focus on how much voluntariness there is; given that inmates are, by virtue of their status, inmates, courts will easily conclude there is not enough voluntariness to find the requisite bargained-for exchange for a finding of “employment.” But as Judge Norris found in his dissent in *Hale v. Arizona*, “[t]he fact that prisoners are forced to work is irrelevant because the unfair competitive effect is the same regardless whether the worker is forced to work or free to work. Indeed, the less bargaining power workers have, the greater the need to apply the FLSA to protect them and those who compete against them.”<sup>381</sup> Moreover, “[t]he fact that a prisoner may lack the choice not to work does not reduce the unfair competitive effect of his work product when it enters the channels of commerce.”<sup>382</sup>

In a curious twist, courts such as the D.C. Circuit in *Henthorn* claim that when incarcerated people work for private employers outside the prison, they are volunteering for such work.<sup>383</sup> Conversely, when incarcerated people work for

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378. 29 F.3d 682, 685 (D.C. Cir. 1994).

379. *Id.* at 686.

380. *Id.* at 685.

381. 993 F.2d 1387, 1403 (9th Cir. 1992) (Norris, J., dissenting).

382. *Id.*

383. 29 F.3d at 685. “In cases such as *Watson* and *Carter* where the prisoner is voluntarily selling his labor in exchange for a wage paid by an employer other than the prison itself,” employment status could be found. By contrast, for these courts, when inmates work inside the prison,

private employers within prison compounds, courts have found that voluntariness is somehow diminished and employment status in that case would be inappropriate. Cases where employment status was denied are replete with language about voluntariness or lack thereof. Inmate plaintiff and prison authority defendant “have not made the ‘bargained-for exchange of labor’ for mutual economic gain that occurs in a true employer-employee relationship. . . . They do not deal at arms’ length.”<sup>384</sup>

And yet the line between voluntariness and coercion is not as clean as many courts suggest. In reality, inmates “can be forced to work under threat of punishment as severe as solitary confinement.”<sup>385</sup> The General Accounting Office (“GAO”) reported, for example, that at all the prisons operated by the Federal Bureau of Prisons the GAO visited, “[a]ll able-bodied sentenced prisoners were required to work, except those who participated full time in education or other treatment programs or who were considered security risks.”<sup>386</sup> Given that prison labor is a requirement in U.S. prisons, it will be the case that some prisoners will either work within prison compounds or will be leased out. Whether they are classified as employees should not be based on whether they work inside or outside the prison, or whether their work is considered “voluntary,” because in most instances, they are required to work.<sup>387</sup> Nor should it matter whether there is sufficient control exercised by the private company—the facts can be contorted to manufacture the desired result. As discussed above, if the private control has “too much” control, courts can find coercion and lack of bargained-for, voluntary exchange. And if the private company has “too little” control, courts can also find insufficient market indicators to conclude the private company is in fact an employer. It is neither shocking nor unusual that complete voluntariness will likely be absent in a prison environment and that conversely, elements of control and coercion are likely to be present.

A different approach, one that does not eliminate market or economic features from a relationship or categorically denies employment status merely because it has mixed characteristics, is needed. Some have advocated a pragmatic approach, finding an economic relationship exists when the private company benefits from inmates’ labor.<sup>388</sup> In *Hale v. Arizona*, the question the Ninth Circuit had to decide was “whether inmates working for a prison, in a program structured by the prison pursuant to state law requiring prisoners to work at hard

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the element of coercion overrides the economic dimension of their work, and there is no bargained-for exchange, and hence there is no employment. The boundary drawn is still an inside/outside the prison boundary, despite judicial disavowal of the boundary.

384. *Harker v. State Use Ind.*, 990 F.2d 131, 133 (4th Cir. 1993).

385. Bennis, *supra* note 258.

386. GEN. ACCOUNTING OFFICE, GAO/GGD-93-98, PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE 19 (1993).

387. *Prison Labour is a Billion Dollar Industry*, *supra* note 3 (“Prison labour is legally required in America.”).

388. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 883.

labor, are ‘employees’ of the prison within the meaning of the FLSA.”<sup>389</sup> The majority said no and pointed to factors discussed above: inmate’s lack of bargaining power to enter into employment contracts, and inmate’s lack of control over their own labor.

The dissent’s reasoning deserves to be examined here. It correctly points out that the majority’s approach was “focus[ed] too narrowly on the technical legal relationship between the State of Arizona and [the inmate Richard Berry.]”<sup>390</sup> Instead of slicing and dicing to determine whether an inmate works inside or outside prison grounds, or whether and to what degree the inmate is coerced or volunteers, the dissent pointed to the plain language of the FLSA to show that plaintiff should be deemed an “employee.”

Although the FLSA contains a list of exemptions from its coverage, prison labor is not included, which means Congress never intended to unequivocally exclude inmate workers from FLSA coverage. Moreover, as the dissent pointed out, the Supreme Court noted that Congress had chosen to define the verb “employ” “expansively to mean ‘suffer or permit to work’”<sup>391</sup>—a definition “whose striking breadth we have previously noted . . . stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>392</sup> The majority recognized this instruction from the Supreme Court, as the majority opinion itself observed: “The Supreme Court has instructed that courts are to interpret the term ‘employ’ in the FLSA expansively.”<sup>393</sup>

Accordingly, as the dissent correctly observed,

[t]he economic reality is that [inmates] work. Their labor produces goods and services that are sold in the channels of commerce. And [Arizona prison industry] pays them for their efforts. Common sense tells us this relationship is both penological *and* pecuniary. . . . The majority fixates on whether the prisoners have a contractual right to bargain for their labor. This technical legal concept, unrelated to Congress’ design in the FLSA, diverts the analysis from the economic *reality* of this case.<sup>394</sup>

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389. 993 F.2d 1387, 1393 (9th Cir. 1993).

390. *Id.* at 1400.

391. *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1350 (1992).

392. *Id.*

393. *Hale*, 993 F.2d at 1393. For Supreme Court case law requiring courts to interpret “employee” and “employer” expansively, see *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295–96 (1985); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947); *United States v. Rosenwasser*, 323 U.S. 360, 362–63 (1945).

394. *Hale*, 993 F.2d at 1403 (Norris, J., dissenting) (emphasis in original).

Courts routinely acknowledge that Congress was concerned with the detrimental impact cheap labor would have on interstate commerce, declaring that

the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . [and] (3) constitutes an unfair method of competition in commerce.<sup>395</sup>

“[G]oods produced at a subminimum wage” by some workers and sold in interstate commerce are likely to put downward pressure on the wages of other workers.<sup>396</sup> It hardly matters whether the workers paid subminimum wage work inside or outside the prison, or for private companies. Consistent with the Congressional objective to prevent subminimum wage and unfair competition, courts should instead consider the effect of prison labor on third parties. “Common sense economics” means that prison workers produce goods “that may be sold at prices that put downward pressure on prices charged by other producers of [such goods], producers who must pay their workers at least [the minimum wage.] To compete, such producers must cut costs—by lowering wages to the minimum if they are not already there, by reducing other employee benefits, or by laying off workers.”<sup>397</sup> Put another way, “[e]mployers of prison labor can substitute inmates for other workers, and consumers can substitute products of inmate labor for those produced by other means.”<sup>398</sup>

In accordance with Congressional objective behind the FLSA, judicial focus on the impact of prison labor on third parties is the correct approach. However, courts that have this objective in mind have done so in an unduly formalistic, technical, and convoluted manner, drawing distinctions, once again, between “work for private firms located inside prisons (not employment) versus outside prisons (employment).”<sup>399</sup> Indeed, as I have noted above, even as the *Watson* court found in favor of inmate plaintiff, it reinforced the inside/outside prison dichotomy, holding that where inmates work for private companies in prison compounds, “the ‘hard time’ inmates’ labor did indeed ‘belong to the institution’ [and] . . . there is no need to ‘protect the standard of living and general well-being of the worker in American industry.’”<sup>400</sup> Consequently, according to the

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395. *Id.* at 1401 (quoting 29 U.S.C. § 202(a) (2000)).

396. *Hale*, 993 F.2d at 1401.

397. *Id.* at 1401–02.

398. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 893.

399. *Id.*

400. *Watson v. Graves*, 909 F.2d 1549, 1555 (citation omitted).

court, “[f]rom that fact alone it is evident there was no unfair competition among workers in job markets outside the prison.”<sup>401</sup>

This distinction is hard to justify. As Judge Nelson incisively observed in his dissent in *Gilbreath v. Cutter Biological Inc.*, “the court’s logic escapes me. If the concern is with the impact of cheap labor on the economy . . . , the pertinent distinction is between work performed, say, for prison maintenance and work performed for outside commerce. Whether the private company moves to the prison or the inmates migrate to the outside world is, from this perspective, irrelevant.”<sup>402</sup> The dissent found that inmates should have been deemed employees of both the private plasma company operating inside the prison as well as of the state Department of Corrections. Both entities had hired inmates “to produce a product for interstate commerce.”<sup>403</sup>

Despite much-cited language that “[t]he definition of ‘employer’ under the FLSA is not limited by the common law concept of ‘employer,’ and is to be given an expansive interpretation in order to effectuate the FLSA’s broad remedial purposes,”<sup>404</sup> courts continue to hew to other formalistic distinctions. Should there be an exemption of FLSA coverage for incarcerated people who work in so-called “‘prison-structured’ programs,” [even though the term] is so lacking in definition that it has no meaning as a limiting factor”?<sup>405</sup> The answer should be no, “[s]ince . . . prison authorities exercise virtually total control over prisoners’ activities, including their work, . . . any work program using inmate labor is presumably ‘prison-structured.’”<sup>406</sup> And as a result, prisons and their private sector partners can always structure a program in a way to make it qualify as “prison-structured,” hence bypassing the wage mandate of the FLSA.<sup>407</sup>

Should there be a legal distinction between incarcerated people who work for a government agency, such as the prison itself, versus those who work for a private firm (whether on or off prison grounds)? Even Judge Nelson in her dissent in *Gilbreath*, as mentioned, drew a distinction between a “hypothetical case of a prison requiring its inmates to perform prison maintenance work or produce goods used solely by the state for less-than-minimum wages. In this situation,

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401. *Id.*

402. *Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320, 1334 n.5 (9th Cir. 1991) (Nelson, J., dissenting).

403. *Id.* at 1337.

404. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469–70 (9th Cir. 1983) (citing *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 754, 784 (9th Cir. 1979)); accord *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

405. *Arizona v. Hale*, 993 F.2d 1387, 1403 (9th Cir. 1993) (Norris, J., dissenting).

406. *Id.* at 1403.

407. *Id.* at 1403–04 (“Furthermore, the majority points to nothing in the FLSA or its legislative history which would justify an exception that distinguishes between prisoners working in ‘prison-structured’ programs from prisoners working in ‘non-prison structured’ arrangements. Thus, the standards limiting the exception the majority writes into the FLSA are both amorphous and ad hoc.”).

the FLSA's concern about economic fairness in a competitive market does not come into play."<sup>408</sup> Similarly, in *Miller v. Dukakis*, the court said, "the payment of subminimum wages to [inmates] presents no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the [prison] does not operate in the marketplace and has no business competitors."<sup>409</sup>

This distinction is unfounded in fact. As one commentator has aptly concluded, whether the inmate works for a prison or a private company, "[e]ither way, that organization produces widgets with fewer non-inmate workers and, if it sells the widgets, competes with other widget makers who lack an inmate labor supply."<sup>410</sup> Federal Prison Industries or UNICOR, which provides a vast array of contract manufacturing opportunities for private companies, advertises its "Made in USA marketing advantage,"<sup>411</sup> along with its "reshoring initiatives."<sup>412</sup> UNICOR's website asserts that "FPI is restricted to selling its products to the Federal Government. Its principal customer is the Department of Defense, from which FPI derives 52.5% of its sales. Other key customers include: General Services Administration, Bureau of Prisons, Social Security Administration, Department of Justice, Department of Homeland Security, and United States Postal Service."<sup>413</sup> If prison labor was used to produce goods and services that are supposedly not sold in commerce, does it mean that there is no impact on the general labor market?<sup>414</sup>

The facts tell a different story. UNICOR pays its incarcerated workers subminimum wages and "gets first dibs on federal contracts over private companies as long as its bid is comparable in price, quantity and delivery. In other words: If UNICOR wants a contract, it gets it."<sup>415</sup> This has an impact on third party private companies. For example, American Apparel Inc., an Alabama company that produces military uniforms had to lay off 150 workers because it cannot compete

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408. *Gilbreath*, 931 F.2d at 1334 (Nelson, J., dissenting); see also *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir. 1997) (stating that it is doubtful Congress intended to bestow employee status to inmates working in state prison industries); *Manville v. Bd. of Governors of Wayne State Univ.*, 272 N.W. 2d 162, 164 (Mich. App. 1978) ("It is undisputed that an inmate is not entitled to the minimum wage if employed by the prison.").

409. 961 F.2d 7, 9 (1st Cir. 1992) (per curiam).

410. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 894.

411. *Contract Manufacturing Opportunities*, *supra* note 124.

412. *Reshoring—Investing in America*, UNICOR, <https://www.unicor.gov/Reshoring.aspx> [<https://perma.cc/2QDC-WNAY>].

413. Emily J. Fox, *Factory Owners: Federal Prisoners Stealing Our Business*, CNN Money (Aug. 14, 2012), <http://money.cnn.com/2012/08/14/smallbusiness/federal-prison-business/index.html> [<https://perma.cc/N8JA-DAUH>].

414. Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 895.

415. Fox, *supra* note 413.

with incarcerated workers laboring under UNICOR.<sup>416</sup> As the company's executive explained, "We pay employees \$9 on average . . . [t]hey get full medical insurance, 401(k) plans and paid vacation. Yet we're competing against a federal program that doesn't pay any of that."<sup>417</sup>

Despite judicial assertions that inmates making goods sold only to government entities or providing services only to prison do not create uncompetitive concerns for private competitors, the facts show otherwise. American apparel is not an exception. Ashland Sales and Service Company of Kentucky, which has an apparel factory to make windbreakers for the Air Force, had to reach out to Senator Mitch McConnell when it found out that UNICOR was looking for opportunities to sell the same products to the Air Force.<sup>418</sup> Ashland's representative was certain that losing the air Force contract would cause it to shut the factory and lay off its one hundred employees.<sup>419</sup>

In 2016, sales of clothing made in federal prisons run by UNICOR reached \$177 million; even though the apparel business is only one of six UNICOR sectors, it constitutes 37% of all of UNICOR sales, making UNICOR a competitive threat to the private apparel industry.<sup>420</sup> In addition, as UNICOR now has authority to bring offshore manufacturing back to the United States through its reshoring initiatives, it is all the more equipped "to go after commercial business opportunities, if it is able to determine that the sales would otherwise be sent to a foreign country."<sup>421</sup>

In sum, courts should not hew rigidly to the form or structure of prison labor. Whether inmates bargained for their work, worked "voluntarily," or were forced to work "in programs 'structured by a prison pursuant to state law requiring hard labor,'"<sup>422</sup> is beside the point. The facts are clear. They are in a penal setting, so there is a coercion element to everything that they are made to do, or "choose" to do. Additionally, whether the private company provides work inside or outside the prison compounds and whether the prison has its inmates working via FPI or UNICOR, is also beside the point.

The language of FLSA states that "employ" means "to suffer or permit to work."<sup>423</sup> The statute contains a list of exemption from FLSA coverage, including an exemption for "any individual who volunteers to perform services for a

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416. Derek Gilna, *Senator McConnell's Message to Unicolor: Back Off*, PRISON LEGAL NEWS (Sept. 9, 2016), <https://www.prisonlegalnews.org/news/2016/sep/9/senator-mcconnells-message-unicor-back/> [<https://perma.cc/4J6S-NPTZ>].

417. *Id.*

418. *Id.*

419. Fox, *supra* note 413.

420. Helfenbein, *supra* note 22.

421. *Id.*

422. *Arizona v. Hale*, 993 F.2d 1387, 1401 (9th Cir. 1993) (Norris, J., dissenting).

423. Wage and Hour Division, U.S. Department of Labor, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)* (revised July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf> [<https://perma.cc/S7E2-JV3U>].

public agency,”<sup>424</sup> but there is no exemption for “prisoners” or “inmates” or for “those who are *forced* to work. Indeed, if being forced to work means ‘being subject to work,’ then in forcing incarcerated people to work the state ‘suffers’ them to do so.”<sup>425</sup> Whether people in prison are subject to the obligation to work, or provided the opportunity to work, they should be deemed “employed” as that term is defined in the FLSA.<sup>426</sup>

The statutory text, combined with the FLSA’s broad concern about unfair competition from cheap labor, and the Supreme Court’s instruction that the FLSA is to be interpreted broadly rather than restrictively, should tilt the debate in favor of incarcerated workers who compete with workers in the private sector.<sup>427</sup> Additionally, as this Article has shown, although the rationale for prison labor has been touted in terms of rehabilitation, the truth is starkly different. Prison labor has become a remunerative vehicle for private sector companies to profit. It is market work and should be considered part of the market sector. People in prison work and get paid. Private companies enter prison compounds to use a pool of captive labor or arrange to have captive labor come to their facilities outside prison compounds primarily to make a profit, not to perform the social work of rehabilitation. The motive is pecuniary and the setting is penological. That prison labor can reflect both dimensions does not mean that incarcerated people who work cannot be employees.

The prison population in the United States has grown at an unprecedented rate in recent years. The renewed growth in prison labor and the variations available mean that the prison labor system has expanded exponentially—with an array of different arrangements and diversifications adopted depending on the particular correctional facility. It is imperative that the technical form of the work is not used to deny what is owed to inmates, whether they work for UNICOR or a private company on or outside prison grounds.

My proposal is simple and clear: inmates who work are employed; the institutions that hire them are the employers, and the inmates are the employees subject to the laws and regulations that protect workers in the United States, including the FLSA and antidiscrimination laws which many courts hold to be inapplicable to inmate workers.<sup>428</sup> To hold otherwise and treat inmate workers

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424. 29 U.S.C. § 203(e)(4) (2000).

425. *Hale*, 993 F.2d at 1401 (Norris, J., dissenting).

426. *Id.* at 1400–01.

427. Although this Article does not address the issue of prison labor used in routine prison maintenance projects, such as cooking or laundering, in which courts have almost uniformly found to be outside the scope of FLSA coverage, it has been noted that the impact on third parties is hardly minimal. If inmates were not used to do such routine maintenance work, it is likely the prison would have had to find a firm or a subcontractor to do such work. “Without inmate labor, firms providing these services would receive more business.” Zatz, *Working at the Boundaries of Markets*, *supra* note 155, at 895.

428. Jason Taylor Kirklín, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048, 1048 (2011).



differently and especially “less than” is to engage in discrimination. I do not rehash the well-established and widely accepted economic principle that social and economic harm flows from discrimination, or that discrimination hurts victims as well as those who discriminate.<sup>429</sup> Incarcerated people who work are treated differently from civilians who work, and this differential treatment is discriminatory. As long as safety is preserved, the criminal justice system should promote employment for inmates in the same way that our society has an interest in promoting employment for civilian workers.

## VI. CONCLUSION

Although cloaked in the rhetoric of rehabilitation and restorative justice, prison industries have an ugly and disturbing history that is entwined with slavery and post-Civil War Reconstruction-era judicial policies. The continued racial disparities in the U.S. prison system require a sustained analytical spotlight on the intersections of race, work, and incarceration. The use of prison labor has sharply increased in recent years, and has been cynically leveraged by anti-trade nationalists who have pushed for its expanded use as a means of reversing the outsourcing of manufacturing and production.

Prison industries are actors in the national economy, which makes the work performed by incarcerated people in those industries part of the U.S. gross domestic product. Prison industries are increasingly advertising their goods and services as meeting the literal definition of the “Made in USA” label and seeking new business niches. Through partnerships with private corporations making goods and services to be sold on the open market, prison industries directly and indirectly impact the national economy. Furthermore, prison industries undermine local competition because of their low production costs and their access to an unlimited supply of reliable labor.

Despite the economic impacts of prison industries, the employment status of incarcerated people engaged in these industries is regarded as ambiguous because the work is necessarily done within the prison system. However, people in prison used as a workforce for prison industries should not be denied classification as employees solely due to the penal setting of the work. Regardless of this setting, incarcerated people perform the duties that free workers in equivalent jobs might. Additionally, incarcerated people do so without the protections and benefits to which free workers are entitled. Paying those who work in prison industries subminimum wages and depriving them of the benefits and protections of employee status relegates them to the status of a shadow workforce that is ripe for exploitation, the U.S. equivalent of third-world workers. The conventional justifications for prison labor—punishment and rehabilitation—are unsatisfacto-

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429. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 19 (1957) (“[D]iscrimination by any group W reduces their own incomes as well as N’s . . .”).

ry explanations for the state of affairs. The mere fact that work may prove rehabilitative for some does not mean that work should be considered its own reward, regardless of pay.

Although inmate labor straddles nonmarket and market work, the market component is significant enough to justify a requirement that incarcerated workers be paid the minimum wage. It is true that prison labor, similar to household work, does not occur in an open labor market. However, the involuntary characteristic of their labor should not be a bar to wage protection.

Importantly, minimum wages would also allow prisoners to accrue a financial nest egg that would offer them a cushion when they are released, facilitating reentry into the post-prison world. Indeed, as a number of economists have suggested, "paying inmates at least minimum wage would have a positive effect on the national economy, by creating more spending power and reducing recidivism."<sup>430</sup> Additionally, since the rhetoric of rehabilitation will ring less hollow, the payment of minimum wage could even be used to market prison-made products to consumers leery of supporting an exploitative system.

Courts have produced inconsistent and unsatisfactory decisions on whether inmate workers should be considered employees. While caselaw is an unreliable guide to legal status of the work incarcerated people perform, the reality of their labor shows that the work itself is economic activity with implications for the national economy, even as the status of the workers remains trapped in ambiguity. People in prison work in the blurred boundaries between nonmarket work done for rehabilitation and economic activity indistinguishable from the experience of free workers in similar jobs. The overlap of a nonmarket relationship with a market relationship should not be allowed to negate the latter. Inmate labor, similar to work done by free workers, can be simultaneously rehabilitative and economic employment. When products of incarcerated labor are labeled "Made in USA," the laborer him/herself should be afforded the worker protections such a label implies.

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430. Shemkus, *supra* note 157.