

EMANCIPATE THE FLSA: TRANSFORM THE HARSH ECONOMIC REALITY OF WORKING INMATES

PATRICE A. FULCHER*

ABSTRACT

Prisoner labor is a booming American industry. The 2.3 million people in the United States of America (“U.S.”) behind bars serve as human resources sustaining the Prison Industrial Complex. In a less economically depressed market, perhaps there would be national prison reform campaigns geared toward decreasing the prison population. But in today’s economic climate, the increase of U.S. inhabitants sentenced to prison has helped to quench the thirst for cheap, and in many instances, free laborers. Proponents of the use of inmate labor in the U.S. have argued that inmates should not be paid minimum wages because working for free is a part of the punishment for their crime. However, critics maintain that forcing inmates to work for free is the rebirth of chattel slavery.

In order to protect the rights of workers, Congress passed the Fair Labor Standards Act (“FLSA”) in 1938, which in part, established the national minimum wage requirement. Prison laborers were not specifically addressed in the FLSA because the Act was designed to protect the working blue-collar class and prevent unfair competition towards the end of the Great Depression. Yet recently, U.S. courts have been faced with the challenge of deciding whether inmate workers are covered under the FLSA. In determining whether working prisoners should be paid wages under the FLSA, courts decide whether prisoners are considered employees as contemplated by the Act; as an employee, wages are guaranteed. Some circuits categorically deny coverage to working inmates by saying they are not employees, whereas other circuits make their determination based on an economic realities test. Under this test, courts ascertain the economic reality of the situation by determining whether the prisoner stood in an employer-employee relationship with the entity for which he worked. This application of the economic realities test is not only a rigid formulation, but also undermines the basic purpose of the FLSA. Consequently, this Article argues that the economic realities test should not be utilized to determine

whether working inmates are employees. The FLSA should categorically apply to all inmate laborers.

The Article first, traces the use of cheap labor from the early economic reliance on indentured servants and slaves, to prison laborers. Second, it discusses modern state and private prison labor system. Third, it explores the creation of the FLSA and the ambiguities with regard to prisoners. Fourth, it dissects the economic realities test and establishes its ineffectiveness as applied to prisoners. Finally, the Article calls for the application of the FLSA to all working inmates, leading to judicial uniformity, and the redistribution of wealth from the prisons to the working inmates thereby reducing recidivism.

*Associate Professor, Atlanta's John Marshall Law School. J.D., Emory University School of Law; B.A., Howard University. This article is dedicated to my aunt Barbara, my cheerleader and friend, who passed away in May 2013, and to the millions of prisoners and their families who have become unwitting hostages in the Prison Industrial Complex. I would like to thank my friends and colleagues for commenting on the final draft, and my phenomenal research assistants Chad Alexis and Campbell Williamson for their fortitude and outstanding work. I would also like to thank my family, for their continued encouragement, love and patience.

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I. Introduction

It has become quite apparent that the United States of America (“U.S.”) has the largest number of people incarcerated than anywhere else in the world. Astonishingly, there are over 2.3 million people imprisoned in the U.S.,¹ which is 25% of the people in the world’s prison population.² Numerous factors influence the continued growth of the prison population. Among the primary influences are drug laws and other sentencing schemes that lock up more non-violent offenders, and the profit motives of private prison companies, prison construction companies, and criminal injustice systems. The secondary influences include politicians and elected officials, courts, and investment banks. The media, and victim rights and other groups exert ideological influence. In sum, these influences have led to today’s reality: an oppressive system of inequity that has stripped over 2 million human beings of their humanity and sense of self worth.

Each year, it costs approximately 63 Billion dollars to house the U.S. prison population: \$31,000 a year per prisoner.³ Yet the U.S. continues to incarcerate non-violent offenders at exorbitant rates,⁴ and supports practices that incentivize incarceration.⁵ One incentive to keep prisons filled with human commodities is to quench the Country’s thirst for cheap labor. There are between six hundred thousand and a million prisoners working full-time in jails and prisons throughout the U.S.⁶ The labor of these working inmates create profits for federal, state, and private prisons,

1 Kim Koratsky, *We’ve Come A Long Way, Maybe*, THE FEDERAL LAWYER, June 2013, at 4, 11.

2 Lauren Salins & Shepard Simpson, *Efforts to Fix A Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1157 (2013) (315 million in the US, 7 billion in the world).

3 Martha Teichner, *The cost of a nation of incarceration*, CBS NEWS.COM (April 22, 2012 5:15 PM), http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration.

4 See John Schmitt, Kris Warner, and Sarika Gupta, *The High Budgetary Cost of Incarceration*, CENTER FOR ECONOMIC AND POLICY RESEARCH (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

5 See generally Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 610 (2012).

6 Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAN. L. REV. 857-958 (2008).

as well as private corporations because they are paid little to nothing for their work. For example, state prisons pay working inmates an average of \$0.93 to \$4.73 per hour; federal prisons pay \$0.00 to \$4.73 per day; and private prisons, \$0.16 to \$0.50 per hour.⁷ Consequently, the use of inmates as laborers has become a part of a multi-million dollar industry called the Prison Industrial Complex (“PIC”), now contracted out to UNICOR.⁸ The PIC has become a profiteering system of incentivized mass incarceration, fueled by the economic interests of federal and state correctional institutions, private corporations, and politicians.⁹

In order to protect the rights of workers, The Fair Labor Standards Act (“FLSA”) was created in 1938 in part, to establish a national minimum wage requirement and prevent unfair competition.¹⁰ However, working inmates were not specifically included or excluded in the FLSA. Now faced with lawsuits from inmate laborers, U.S. Courts have either categorically refused to say the prisoners are employees under the FLSA, or adopted various tests to determine prisoners’ employee status.¹¹ One such test is the economic realities test that determines whether an inmate is an employee based on the employer’s control over the inmates working environment.¹² These current tests produce arbitrary and capricious results because U.S. Courts do not have a clear understanding of how to treat inmate laborers. This article first argues that the economic realities test should be abolished and inmates categorically should be treated as employees under the FLSA. This will result in needed judicial uniformity. Second, this article opines that if working prisoners are given the opportunity to earn minimum wage and save a majority of their earnings, they are less likely to return to criminal activities upon their release. Thus, the prison recidivism rate will decrease. This article addresses whether the minimum wage requirements of the FLSA should apply to working prisoners. It does not examine other mandates of the FLSA. Additionally, this article does not address issues of unfair competition regarding the use of uncompensated or minimally compensated inmate labor.

7 CRIMINAL JUSTICE INSTITUTE, THE 2001 CORRECTIONS YEARBOOK 130-131 (2002).

8 Sara Flounders, *The Pentagon and Slave Labor in U.S. Prisons*, INTERNATIONAL ACTION CENTER (Jun 11, 2011 1:30 PM), <http://www.globalresearch.ca/the-pentagon-and-slave-labor-in-u-s-prisons/25376>.

9 See generally Fulcher, *supra* note 5, 603.

10 See William P. Quigley, “A Fair Day’s Pay for a Fair Day’s Work”: *Time to Raise and Index the Minimum Wage*, 27 ST. MARY’S L.J. 513, 528-529 (1996).

11 See Zatz, *supra* note 6, at 867.

12 *Id.* at 872.

II. THE SEARCH FOR CHEAP LABOR IN THE U.S.: INDENTURED SERVANTS, SLAVES, AND PRISONERS

Profiting from the use of forced human labor is not a novel concept in the U.S. The U.S. began to satisfy the need for cheap labor through the use of indentured servants and enslaved Africans, and now has turned to using inmate laborers in order to make a profit.

A. U.S. Reliance On Indentured Servants And Slaves

The early seeds of the Prison Industrial complex grew from the demand for cheap laborers to help colonize and build the economic foundations of the “New World”. Colonial America needed a strong labor force to grow and develop its agricultural wealth (cotton, tobacco, sugar, etc.). With large amounts of cheap land available, the first laborers to foot this economic bill were indentured servants,¹³ and then enslaved Africans.¹⁴

In the early 1600’s, indentured servants from Britain and other countries voluntarily came to the colonies to work as servants for a period of four to seven years, and then gained their freedom.¹⁵ The first African indentured servants came to Jamestown in 1619 and worked alongside whites in the tobacco fields of Virginia.¹⁶ This system of labor appeared to be mutually beneficial; it helped to cultivate the land, and at the same time, paid servants freedom dues, normally clothing and a plot of land, once they gained their freedom.¹⁷ However, most indentured servants were treated harshly and approximately 60% died prior to receiving their freedom.¹⁸

By the nineteenth century the use of indentured servants declined. Some scholars argue that this decline was due to the increase of free laborers in Pennsylvania,¹⁹ while others argue that immigrant families in the U.S. developed the ability to pay for their relatives’ passage to the U.S. such that

¹³ See SLAVERY AND THE RISE OF THE ATLANTIC SYSTEM (Barbara L. Solow ed., Cambridge University Press, 1991).

¹⁴ See generally RONALD SEGAL, THE BLACK DIASPORA: FIVE CENTURIES OF THE BLACK EXPERIENCE OUTSIDE AFRICA (1995).

¹⁵ See Alfred L. Brophy, *Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania*, 28 WILLAMETTE L. REV. 69, 76 (1991).

¹⁶ See Veronica Hendrick, *Codifying Humanity: The Legal Line Between Slave and Servant*, 13 TEX. WESLEYAN L. REV. 685, 692 (2007).

¹⁷ *Id.*

¹⁸ *Indentured Servants*, INDEPENDENCE HALL ASSOCIATION, (Jun. 30, 2013), <http://www.ushistory.org/us/5b.asp>.

¹⁹ See SHARON SALINGER, TO SERVE WELL AND FAITHFULLY: LABOR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682-1800 148, 150-151 (Cambridge University Press, 1987); see also CHEESMAN HERRICK, WHITE SERVITUDE IN PENNSYLVANIA: INDENTURED AND REDEMPTION LABOR IN COLONY AND COMMONWEALTH 265-266 (Negro University Press, 1969).

they did not have to become indentured servants.²⁰

In order to fill the labor gap caused by the decline of voluntary indentured servants, Britain passed the Transportation Act in 1718.²¹ The Transportation Act of 1718 allowed the transportation of British prisoners to the colonies to work as indentured servants as punishment for their crimes.²² While these first prison laborers fueled the needs of the capitalist class, they also allowed Britain to dispose of political insurgents and criminals.²³ This act is one of the earliest instances of utilizing inmates to satisfy economic, as well as political needs as an accepted policy. Yet fearful of the demand for land by freed servants, colonist soon turned away from indentured servitude in 1775 and started to rely on the labor of enslaved Africans to fulfill their economic needs.

Landowners looked to African slaves as a more profitable source of labor; slave labor was cheaper and renewable because slaves and their children were bound to their masters for life.²⁴ Over 12 million Africans were enslaved, transported across the Atlantic, and sold in order to fill the shortage of cheap labor.²⁵ Although this statistic is staggering, it still does not account for the millions of other enslaved Africans who were captured, but died prior to being sold.²⁶ The exploitation of enslaved African laborers during the 16th through the 19th Centuries is unquestionable. Enslaved Blacks suffered many uncountable atrocities in a system motivated by profit and racism.²⁷ Africans, targeted solely because of their race and a belief by slave owners that they were uncivilized, were forced to work without any form of compensation.²⁸ Therefore, the forced labor of slaves proved to be even more profitable than the use of indentured servants. Enslaved Africans provided immeasurable income to private landowners, built city and state infrastructures, and became *the* capital wealth for the U.S. in the 19th Century.²⁹

20 Farley Grubb, *The End of European Immigrant Servitude in the United States: An Economic Analysis of Market Collapse, 1772-1835*, 54(4) THE J. OF ECON. HIST. 794, 804-805 (1994).

21 See generally A.T. EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775 (Clarendon Press, 1987).

22 *Id.*

23 *Id.*

24 David Menschel, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784-1848*, 111 YALE L.J. 183, 209 (2001) (discussing how, consequently any hope of freedom possessed by African indentured servants was gone with the passage of slave laws).

25 Segal, *supra* note 14, at 4.

26 DAVID ELTIS & DAVID RICHARDSON, THE NUMBERS GAME. IN: NORTHRUP, DAVID: THE ATLANTIC SLAVE TRADE, 96 (Houghton Mifflin Co. 2nd ed. 2002).

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

28 *Id.*

29 Walter Johnson, *King Cotton's Long Shadow*, THE NEW YORK TIMES, March 30, 2013,

As the U.S.'s economic reliance on enslaved Africans grew, the initiative to have inmates work while in prison started to take root in Pennsylvania at the same time.

B. The Early Rise And Fall Of The First U.S. Prison Labor Systems

In 1773, the Philadelphia Walnut Street Jail (“WSJ”) was the first U.S. penitentiary constructed.³⁰ Initially, the WSJ required inmates to work as a means of rehabilitation and not for economic gain.³¹ The operators of WSJ believed that the principle cause of crime was idleness, so prison labor would “. . . discipline the body, teach new habits, and lead to a recovery of lost virtue”.³² WSJ later adopted a piece-price system of prison labor; private contractors provided the raw materials, purchased the finished product and sold it on the open market, while the state managed the production of the goods.³³ Gradually this system became unproductive due to overcrowding at the jail.³⁴

Soon other prisons in the North adopted the concept of utilizing prisoners as free laborers. Yet instead of having inmates work as a form of rehabilitation, the prisons contracted out the labor of their inmates in order to cover mounting costs of running their facilities.³⁵ This contract system proved to be successful and became the dominant form of prison labor throughout the Northern region of the U.S.³⁶ For example, states such as New York, Connecticut and Massachusetts contracted the labor of their inmates in search of increased revenues and profits.³⁷

Prior to the end of slavery, Southern states also utilized prison labor, but adopted the convict-lease system.³⁸ Under the convict-lease system, prisoners were leased to work in labor-intensive industries such as plantations, railroads, and mines.³⁹ Although the convict lease system existed in the South, it was not fully utilized until after the Civil War.⁴⁰ As

http://opinionator.blogs.nytimes.com/2013/03/30/king-cottons-long-shadow/?_php=true&_type=blogs&_r=0 (“[f]our million people worth at least \$3 billion in 1860, which was more than all the capital invested in railroads and factories in the United States combined”).

³⁰ Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 348 (1998).

³¹ *Id.* at 349.

³² *Id.*

³³ *Id.* at 350.

³⁴ *Id.*

³⁵ E.T. Hiller, *Development of the Systems of Control of Convict Labor in the United States*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 241, 243-244 (1914).

³⁶ Garvey, *supra* note 30, at 353.

³⁷ *Id.*

³⁸ *Id.* at 355.

³⁹ Sharon Dolovich, *State Punishment And Private Prisons*, 55 DUKE L.J. 437, 452 (2005).

⁴⁰ *Id.*

discussed below in Section C, Southern states used the convict-lease system to re-enslave African prisoners long after the Civil War in order to replenish lost slave laborers.⁴¹ As early as 1825, Southern states started to lease out the management of entire prison facilities to private entities.⁴² These privately run prisons in turn contracted out the labor of the prisoners in order to cover costs. In 1825, the state of Kentucky leased its prison and inmates to Joel Scott,^{43a} a private businessman, and Louisiana also turned to private entities in 1835 because they could not afford to pay for the state's penitentiary.⁴⁴

By the late 1800s, the use of prison labor in the North and South came under attack,⁴⁵ as well as the management of prisons by private entities.⁴⁶ Labor unions across the country complained that the use of inmate labor caused unemployment,⁴⁷ and prison reformers objected to poor living and working conditions found in private prison institutions.⁴⁸ Due to these mounting pressures, the contract system diminished in the North between the 1870's and 1890's and they settled on a state-use system.⁴⁹ The state use system mandated that the "state would be the only buyer of their [prison] labor and the only market for their goods."⁵⁰ Southern states also abolished the convict-lease system and adopted a state-use system, but not until well into the 20th century.⁵¹

C. The End Of Slavery And The Rebirth Of Prison Labor With The Passage Of The 13th Amendment: Black Codes And The Convict Lease System

During slavery, nearly half of all the capital and investments in the Deep South⁵² were in enslaved Africans.⁵³ When the Thirteenth Amendment⁵⁴

41 DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 54-56 (Anchor Books 2009).

42 *Id.*

43 See Alexis M. Durham III, *Lease System*, *ENCYCLOPEDIA OF AMERICAN PRISONS* 277, 278 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

44 See MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 8-9 (1971).

45 Garvey, *supra* note 30, at 363-364.

46 David E. Pozen, *Managing A Correctional Marketplace: Prison Privatization In The United States And The United Kingdom*, 19 *J.L. POLITICS* 253, 258 (Summer 2003).

47 Garvey, *supra* note 30, at 362.

48 Pozen, *supra* note 46, at 257.

49 Garvey, *supra* note 30, at 364-365.

50 *Id.* at 362-363.

51 See generally Blackmon, *supra* note 41.

52 The Deep South was considered to be "The southeastern region of the United States: South Carolina and Georgia and Alabama and Mississippi and Louisiana; prior to the American Civil War all these states produced cotton and permitted slavery", *THE FREEDICTIONARY.COM*, (last visited February 26, 2012). <http://www.thefreedictionary.com/Deep+South>.

53 James Grossman, *PBS special Slavery by Another Name by Douglas A. Blackmon*, PBS (Feb. 18, 2012), <http://video.pbs.org/video/2176766758>.

ended chattel slavery in 1865, it resulted in a colossal loss of wealth for slaveholders.⁵⁵ (The 13th Amendment was ratified by a majority of the states in 1865. However, Mississippi did not ratify the 13th Amendment until 1995, and the state did not file notice of its ratification with the Office of the Federal Register until February 2013).⁵⁶ Yet surprisingly, the Thirteenth Amendment proved to be a friend to wealthy Southerners; it again provided them access to potential slave laborers.

The Thirteenth Amendment mandates that “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”. So, in response to the abolition of slavery and the passage of the 13th Amendment, Southern legislatures created laws called “Black Codes”. These seemingly race neutral statutes allowed newly freed Africans to be arbitrarily arrested and imprisoned.⁵⁷ Once convicted of a crime, a formerly enslaved African was again forced to work for free under some type of prison labor system.⁵⁸

One such prison labor system was the convict-lease system. Relying on the language of the 13th Amendment, arrested and convicted Africans were leased to farm plantations, coalmines, railroads, brickyards, and lumber camps under the convict-lease system.⁵⁹ The convict lease system mimicked slavery because there were a large number of Africans working for the benefit of wealthy Southerners for free.⁶⁰ The use of inmate labor

54 U.S. CONST. amend. XIII, § 1.

55 Grossman, *supra* note 53.

56 *Mississippi Ratifies 13th Amendment Banning Slavery*, HUFF POST LIVE (February 20, 2013), http://www.huffingtonpost.com/2013/02/18/mississippi-13th-amendment_n_2712289.html.

57 *Black Code, United States History*, THE BRITANNICA ENCYCLOPEDIA ONLINE, <http://www.britannica.com/EBchecked/topic/67722/black-code> (“From 1865-1866, Black Codes were laws created after the Civil war to ensure the continuance of white supremacy, the steady supply of cheap labor, and the assumed inferiority of African Americans.”); Vagrancy laws for example were one type of legislation enacted under the Black Codes (Weaver & Purcell, *supra* note 27, at 355); A vagrant was defined as “[a]ny person who is wandering or strolling about in idleness, who is able to work, and has no property”. In other words, Vagrancy laws made it a crime to be unemployed. (*Id.*); (As a result of vagrancy laws and other Black Codes, tens of thousands of newly freed Africans were arbitrarily arrested and wrongfully convicted.); COMMISSION ON INTERRACIAL COOPERATION, BURNT CORK AND CRIME, 1-4 (1944) (In 1944, the Commission on Interracial Cooperation (CIC) documented the enslavement of blacks for slave labor. The CIC published a book of summarized accounts of press reports throughout the South recounting instances where White men had either dressed up as Blacks and committed crimes or falsely accused Blacks of crimes. These “burnt cork crimes” encompassed a large number of offenses so that Blacks would be charged and arrested).

58 Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U CHI. L. REV. 1161, 1170 (1984).

59 Blackmon, *supra* note 41, at 54-56, 74, 343-346, 350, 351.

60 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 (1982) (The Convict-lease system was one of the most inhuman systems of forced labor in the United States during the Reconstruction Era and well into the twentieth century.); See also John M. Brackett, *Cutting Costs by Cutting Lives: Prisoner Health and the Abolishment of Florida's Convict-Lease System*, 14 SOUTHERN

through the convict-lease system proved to be profitable as it rebuilt the post-Civil War infrastructure in the South and throughout the entire U.S.⁶¹ The convict-lease system endured from the Civil War until World War II, although it was one of the most torturous prison labor systems in the U.S.⁶² Eventually, the efforts of alarmed unions (concerned with the expanded use of prison labor and intervention into the free market), along with the work of prison labor abolition groups, resulted in the elimination of the convict-lease system.⁶³ Yet in no time, other prison labor systems, such as the state-use system and chain gangs, took the place of the convict-lease system.⁶⁴ In order to quell market concerns of the unionist, the state-use system allowed the use of prison labor solely for state projects.⁶⁵ Chain gangs were also a form of forced labor, but it was also an extreme system of control over prisoners. Chains were wrapped around the ankles of five prisoners while they worked, ate, and slept.⁶⁶ The use of these two prison labor systems as originally enacted declined. However, the fundamental philosophy behind state controlled prison labor still drives existing U.S. federal, state, and private prison labor system.

III. PRISON LABOR REGULATIONS ON FEDERAL, STATE, AND PRIVATE PRISON LABOR SYSTEMS

As government and private industries increased their reliance on inmate labor to produce goods, U.S. labor unions and small businesses pressured the government for tougher regulations on prison-made products.⁶⁷ Consequently, Congress passed several measures restricting the interstate sale of prison-made goods. In 1929, Congress passed the Hawes-Cooper Act, which prevented states from selling goods made by prisoners in other states.⁶⁸ The thought behind the act was that it would help decrease the effect of the availability of cheap prison-made goods on the open market.⁶⁹

STUDIES: AN INTERDISCIPLINARY JOURNAL OF THE SOUTH 2 69-83 (2007) (Numerous African Americans died due to a lack of adequate food, medical care, shelter and clothing).

61 ELINOR MYERS MCGINN, *AT HARD LABOR: INMATE LABOR AT THE COLORADO STATE PENITENTIARY, 1871-1940*. (P. Lang, 1993).

62 Blackmon, *supra* note 41, at 1-9.

63 Ira Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 607-608 (1989).

64 Garvey, *supra* note 30, at 339; WALTER WILSON, *FORCED LABOR IN THE UNITED STATES*, 68 (AMS Press, Inc. 1933).

65 Garvey, *supra* note 30, at 339.

66 Wilson, *supra* note 64, at 68.

67 William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1162 (2004).

68 Weaver & Purcell, *supra* note 27, at 366-367.

69 *Id.*

In 1935, Congress extended the law even further with the passage of the Ashurst-Sumners Act which made it a federal crime to “knowingly transport prison-made goods into a state that prohibited their sale”; and in 1940, the Ashurst-Sumners Act was amended, making the interstate transportation and sale of prison-made goods a federal crime no matter what state law provided.⁷⁰ Hence, with the passage of these laws, the use of prison laborers to produce goods was drastically reduced during that time.⁷¹

However, with today’s exploding prison population, contemporary federal, state, and private correctional institutions have found ways to increase the use of inmate laborers. Numerous government and private agencies use prisoners to cut the cost of confinement and increase profits.⁷² U.S. correctional institutions use prison labor to directly benefit prisons and government agencies, or outsource the work of prison laborers via contracts with private corporations.⁷³ Private companies such as IBM, Boeing, Motorola, TWA, Nordstrom’s, Revlon, Macy’s, Pierre Cardin, Target Stores, Microsoft, AT&T Wireless, and Dell, are just a few of the corporate elite who rely on cheap inmate labor in order to produce their goods under cost.⁷⁴ One obvious benefit of using a captive and cheap workforce is that a corporation does not have to outsource its production to other countries; it can pay U.S. prison workers slave wages then proudly slap a “MADE IN AMERICA” sticker on the products. Another advantage of using prison labor is that the federal government rewards private companies with tax credits. Under the federal Work Opportunity Credit legislation (“WOTC”), private-sector employers who use prisoners may reduce their federal income tax liability between \$2,400 and \$9,600 per employee hired.⁷⁵ For example BP received lucrative tax write offs under the WOTC for using inmates in Louisiana to clean up the oil spill in the Gulf of Mexico.⁷⁶ It was estimated that BP received \$2,400 for every work release inmate they hired to clean up the oil spill, and earned back up to 40 percent of the wages they

⁷⁰ Quigley, *supra* note 67, at 1162.

⁷¹ *Id.*

⁷² David Leonhardt, *As Prison Labor Grows, So Does the Debate*, THE NEW YORK TIMES, Mar. 19, 2000, at A1, <http://www.nytimes.com/2000/03/19/business/as-prison-labor-grows-so-does-the-debate.html?pagewanted=all&src=pm>.

⁷³ Vicky Pelaez, *The prison industry in the United States: big business or a new form of slavery?*, GLOBAL RESEARCH (March 10, 2008), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>.

⁷⁴ *Id.*

⁷⁵ UNITED STATES DEPARTMENT OF LABOR, *Work Opportunity Tax Credit*, <http://www.doleta.gov/business/incentives/opptax/wotcCommunityPartners.cfm> (last updated Jan. 6, 2014).

⁷⁶ Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, THE NATION (July 21, 2010), <http://www.thenation.com/article/37828/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle?page=0,1>.

paid to the inmates.⁷⁷

Although federal, state, and private prison agencies are utilizing prison labor under the limitations of the Ashurst-Sumners Act; each labor system operates under different parameters.

A. Federal Prison Labor Systems

In 1930, the Bureau of Prisons (“BOP”) was created within the Department of Justice and charged with the “management and regulation of all Federal penal and correctional institutions.”⁷⁸ Originally, there were only 11 federal prisons; today there are 119 federal prisons in the U.S. that are responsible for the custody and control of approximately 218,171 offenders.⁷⁹ Approximately 81 percent of federal prisoners are housed in federal-operated facilities, while the balance is confined in privately managed or community-based facilities, and local jails.⁸⁰

Every inmate in the U.S. federal prison system is required to work if he or she is medically able.⁸¹ Unlike typical employees, federal inmates work without minimum wage, overtime pay, health and safety protections, social security withholdings, or union protection.⁸² The primary goals for forcing Federal inmates to work have remained consistent over the years: (1) reducing “idle hands,” (2) instilling discipline, and (3) promoting prison self-sufficiency.⁸³ Federal inmates have the option of earning from 12¢ to 40¢ an hour working jobs within the institution (working as orderlies, plumbers, painters, or groundskeepers, or in food service or the warehouse), or earning 23¢ to \$1.15 per hour working in the Federal Prison Industries (“FPI” or its trade name UNICOR)⁸⁴ factories (making office furniture, electronics, textiles, solar panels, the call center solutions, laundries, printing, solar & renewable energy, and numerous other

⁷⁷ *Id.*

⁷⁸ FEDERAL BUREAU OF PRISONS, *A Brief History of the Bureau of Prisons*, <http://www.bop.gov/about/history.jsp>.

⁷⁹ FEDERAL BUREAU OF PRISONS, *Quick Facts About the Bureau of Prisons*, <http://www.bop.gov/news/quick.jsp#1>, (last updated May 25, 2013).

⁸⁰ FEDERAL BUREAU OF PRISONS, *About the Bureau of Prisons*, <http://www.bop.gov/about/index.jsp>.

⁸¹ FEDERAL BUREAU OF PRISONS, *Work Programs*, http://www.bop.gov/inmate_programs/work_prgms.jsp.

⁸² Flounders, *supra* note 8.

⁸³ Michael C. Groh, *Far (8.602) Gone: A Proposal To Maintain The Benefits Of Prison Work Programs Despite The Restructuring Of Federal Prison Industries' Mandatory Source Status*, 42 PUB. CONT. L.J. 391, 394-395 (Winter 2013).

⁸⁴ The FPI was created in 1934 and is a wholly owned U.S. for-profit corporation. See UNICOR, FACTORIES WITH FENCES 16 (2009), http://www.unicor.gov/information/publications/pdfs/corporate/CATMC1101_C.pdf.

industries).⁸⁵ Yet whatever option they choose, these federal inmates are forced to work for what is tantamount to slave wages, while government corporations reap the benefits.⁸⁶ Additionally, if a federal inmate chooses to work for FPI, 50% of their income goes to the Inmate Financial Responsibility Program (“IFRP”). The IFRP requires inmates to make payments from their earnings to satisfy court-ordered fines, victim restitution, child support, and other monetary judgments; most fines and restitution payments go to a crime victim fund and not towards their support upon release.⁸⁷

In 2011, FPI’s net sales were 745 million dollars and their earnings were 62 million dollars.⁸⁸ Restricted to sell its products only to federal agencies, FPI’s largest purchaser is the U.S. Department of Defense, which makes up 52% of its revenues.⁸⁹ The FPI used to have a mandatory source requirement for all federal agencies, but it was amended to prohibit any federal agency from purchasing FPI products or services, unless the agency determines that the products offered are the “best value”.⁹⁰ So in addition to making license plates, furniture and other typical prison-made goods, thousands of federal inmates work for FPI making supplies for the U.S. military. FPI inmates who are given this assignment find themselves making anti-tank missiles, body armor, land mine sweepers, components for fighter aircrafts, and other gear for the Pentagon.⁹¹

Consequently, an inmate who works within the federal prison labor system may make a maximum of \$64.00 a month (prior to any state deductions for room and board, taxes, etc., assuming an inmate works 5 days a week for 8 hours), and a maximum of \$92.00 a month (subtracting 50% of the wages for the IFRP, assuming an inmate works 5 days a week for 8 hours) if he works for FPI.

B. State Prison Labor Systems

There are approximately 1,382,000 inmates in state prisons in the U.S.⁹²

⁸⁵ *Work Programs*, *supra* note 81; UNICOR, *Home*, <http://www.unicor.gov/>.

⁸⁶ Flounders, *supra* note 8.

⁸⁷ *Work Programs*, *supra* note 81.

⁸⁸ FEDERAL PRISON INDUSTRIES, INC., ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2012, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL AUDIT DIVISION AUDIT REPORT 13-03, December 2012, <http://www.justice.gov/oig/reports/2012/a1303.pdf>, (last visited June 26, 2013).

⁸⁹ FEDERAL BUREAU OF PRISONS, UNICOR FEDERAL PRISON INDUSTRIES, INC, http://www.bop.gov/inmate_programs/unicor.jsp.

⁹⁰ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 637, 118 Stat. 2809, 3281 (2004).

⁹¹ Flounders, *supra* note 8.

⁹² E. ANNE CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, p. 2 (Dec. 2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

State prisoners work within varying labor systems while incarcerated.⁹³ State inmates may (1) work within the confines of a prison, where state or private entities manage the facility, sell the products produced, and receive the profits, (2) work in jobs directly benefiting prison operations by cleaning, cooking, or doing laundry, or (3) work outside of prison walls laboring for the state or private companies.⁹⁴ Over the last 30 years, at least 37 states have enacted laws permitting the use of inmate labor by private enterprise.⁹⁵ State inmates' wages are determined by the state in which they are incarcerated, and may be affected depending on whether the state correctional facility is certified under the Prison Industry Enhancement Certification Program.

1. State Prison Labor

Under The Prison Industry Enhancement Certification Program ("PIE")

In 1979, Congress passed the Prison Industry Enhancement Certification program ("PIE") under the Justice System Improvement Act.⁹⁶ The PIE exempts state and local correction departments from the Ashurst-Sumners Act legislation, which placed restrictions on the interstate sale and transportation of prison-made goods.⁹⁷ The specific goal of the PIE was to provide private-sector work opportunities to prisoners by certifying 50 state correctional agencies to sell prison made goods interstate and to the Federal Government (over the original \$10,000 limitation).⁹⁸ Once a state agency is certified under the PIE, its corrections department may either sell prison made goods on its own, or enter into prison labor contracts with private companies to sell goods in the free market.⁹⁹

In order to qualify for PIE certification, correctional agencies have to apply through the Bureau of Justice Assistance ("BJA") or the National Correctional Industries Association, pay state prisoners a prevailing wage, and meet several other statutory requirements.¹⁰⁰ Paying inmate workers

⁹³ See Zatz, *supra* note 6, at 870.

⁹⁴ *Id.* at 871.

⁹⁵ Pelaez, *supra* note 73.

⁹⁶ Justice System Improvement Act, Pub. L. No. 96-157, § 827, 93 Stat. 1167 (1979) (codified as amended at 18 U.S.C. § 1761 (1988)); RICHARD R. NEDELKOFF, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PRISON ENHANCEMENT CERTIFICATION PROGRAM, p. 3 (July 2002), www.ncjrs.gov/pdffiles1/bja/193772.pdf.

⁹⁷ Nedelkoff, *supra* note 96 at 1.

⁹⁸ *Id.* (The PIE originally authorized the certification of 7 state correctional agencies, but later expanded it to 50); Prison Industries Enhancement Certification Program, 49 Fed. Reg. 31346-03 (Aug. 6, 1984).

⁹⁹ Garvey, *supra* note 30, at 372-373.

¹⁰⁰ 50 Fed. Reg. 12,663 (1985). State agencies have to meet all of the following requirements to be certified under the PIE: (1) All states (including the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands) and units of local government authorized by law to administer prison

prevailing wages under the PIE may appear equitable on its face, but it is not. Most inmates see only 20% of their gross wages because the PIE also allows for 80% wage deductions for room and board, victim assistance, taxes, and family support.¹⁰¹ While expecting convicts to defray the cost of their incarceration and victim services is reasonable, as will be seen in part x of this article, the current scheme is short sighted and unwise because, among other things, so little attention is given to reducing recidivism through prison programs and support for newly released inmates.

According to the Bureau of Justice Assistance, there were 37 state, and 4 county-based PIE certified correctional industry programs in the U.S. in 2011.¹⁰² These PIE programs include the management of at least 175 business partnerships with private industry.¹⁰³ In 2012, the number of PIE certifications increased to 45; these certified correctional agencies employed a total of 4,700 inmates.¹⁰⁴ Furthermore, the 45 certified PIE agencies generated \$9,780,130 in gross salary revenues in 2012.¹⁰⁵ A majority of those earnings went to net inmate salaries (\$3,958,354), then correctional institution for room and board (\$3,482,883), state and federal taxes (\$989,503) victims' programs (\$947,770), and the lowest amount to inmate family support (\$401,620).¹⁰⁶ Therefore, each of the 4,700 prisoners working for PIE certified programs made approximately \$842.00 in 2012, which equates to \$70.00 a month.

industry programs and projects are eligible to apply for project certification, (2) applicants must be able to collect and provide for financial support to a crime victim compensation program, or crime victim assistance program, (3) consult with local union central bodies, or similar labor organizations prior to the submission of the application for project certification, (4) consult with representatives of local business that may be affected prior to the submission of the application for project certification, (5) must have verified by the appropriate State agency that the proposed wage plans are comparable to wages paid for work of a similar nature in the locality in which the project is located, (6) must have verified by the State Department of Economic Security that paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services, (7) must assure that inmate participation is voluntary and that inmate workers have agreed in advance to the specific deductions made from their gross wages and all other financial arrangements, (8) must provide for inmate worker entitlement to benefits and compensation as a result of injuries sustained in the course of employment related to project certification, and (9) must provide for substantial involvement of the private sector.

¹⁰¹ *Id.*; Nedelkoff, *supra* note 96, at 3.

¹⁰² Julius C. Dupree, Jr., *Bureau of Justice Assistance, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM (PIECP)* (July 7, 2011), *available at* <http://www.ojp.usdoj.gov/BJA/grant/piecp.html>.

¹⁰³ *Id.*

¹⁰⁴ PRISON INDUSTRIAL ENHANCEMENT CERTIFICATION PROGRAM, *Certification & Cost Accounting Center Listing, Statistics for the Quarter Ending* December 31, 2012, *available at* <http://www.nationalcia.org/wp-content/uploads/Q4-2012-PIECP-Certificate-List.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

2. State Prison Labor Without PIE Protections

State correctional industries without PIE protections are prohibited from selling prison-made products interstate.¹⁰⁷ They also are under no federal obligation to pay working prisoners prevailing wages as required for certification under PIE.¹⁰⁸ Depending on the facility, these state correctional agencies typically require inmates to work, and pay inmates from \$0.17 to \$5.35 per hour.¹⁰⁹ There are also several state-operated correctional institutions that force prisoners to work, but pay them absolutely nothing for their labor. For example, the Georgia Department of Corrections does not pay working inmates.¹¹⁰ Once a person is sentenced to one of the Georgia's 31 state prisons, he or she will be ordered to either work jobs that directly benefit the prison, make products to be sold to government agencies, or perform city work detail jobs without getting paid a cent.¹¹¹ In light of these facts, it is not surprising that on December 9, 2010, thousands of Georgia inmates staged the largest prison protest in U.S. History.¹¹² Through the use of contraband cell phones, Georgia inmates in at least seven different state prisons coordinated a nonviolent prison strike.¹¹³ These protesting inmates had several demands, but high on their list was to be paid a living wage for work.¹¹⁴ "If they would start paying us, that would reduce crime behind the walls," said Mike, one of the protesting prisoners, "inmates would have the means to get hygiene [items] and food from the commissary."¹¹⁵ The protest lasted approximately 5 days and unfortunately, the prisoners' demands have still not been met.¹¹⁶ Almost all Georgia state-prisoners are still working for free, at least three inmates have publically complained that they were brutally beaten for their involvement in the protest, and in July 2012 several Georgia prisoners went

¹⁰⁷ 18 U.S.C. § 1761(a).

¹⁰⁸ *Id.*

¹⁰⁹ See Zatz, *supra* note 6, at 870.

¹¹⁰ Rhonda Cook, *Inmates use technology to organize state prison protest*, ATLANTA JOURNAL-CONSTITUTION, Dec. 14, 2010, <http://www.ajc.com/news/news/local/inmates-use-technology-to-organize-state-prison-pr/nQnsN/>; *Interview with Laura Sullivan: Inmates' Jobs, From Call Centers To Paint Mixing*, Neal Conan, NPR police and prison correspondent, (NPR December 16, 2010), http://pd.npr.org/anon.npr-mp3/npr/totn/2010/12/20101216_totn_03.mp3?dl=1.

¹¹¹ FACILITY DESCRIPTIONS, GEORGIA DEPARTMENT OF CORRECTIONS, <http://www.dcor.state.ga.us/pdf/facilitiesDocument.pdf>; Sullivan, *supra* note 110.

¹¹² Sarah Wheaton, *Prisoners Strike in Georgia*, NY TIMES (December 12, 2010), http://www.nytimes.com/2010/12/12/us/12prison.html?_r=0.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Sullivan, *supra* note 110.

¹¹⁶ Bruce Dixon, BLACK AGENDA REPORT, December 21, 2011, <http://blackagenda.com/print/content/georgia-prison-strike-one-year-later-activists-outside-walls-have-failed-those-inside-walls>.

on a hunger strike to protest additional inhumane punishments stemming from the 2010 prison protest.¹¹⁷

Finally, state prisoners labor for correctional institutions that fall under the supervision of state departments of correction, but are separate self-sustaining corporate entities. Some of the prison industries have PIE certification for all of their work programs while others certify only certain jobs under PIE. Two such institutions in the U.S. are the Georgia Correctional Industries (“GCI”) and the Oregon Corrections Enterprise (“OCE”).¹¹⁸ GCI and OCE utilize state inmate labor to produce and sell a plethora of services and products to state and local government agencies.¹¹⁹ For instance, GCI employs 1,400 Georgia inmates, who manufacture garments and bedding, institutional and office furniture, cleaning chemicals, perform embroidery, screen printing, reupholstering, engraving, optical, and framing services, work in milk and meat processing plants, and on farms to produce beef and pork, and harvest fruits and vegetables, eggs, grits, and corn.¹²⁰ GCI has some work programs certified under PIE, but a majority of the employed inmates work for less than minimum wage.¹²¹ GCI boast on its website that they “maintain one of the lowest raw food costs in the nation—\$1.57 per day per inmate”.¹²² So inmates laboring in GCI food production factories and fields in the sweltering heat of the Deep South are paid roughly \$31.40 a month if they are lucky (prior to state deductions and if they work 5 days a week). Approximately 1,100 of Oregon’s 14,300 prisoners work for OCE and perform a variety of services for Oregon government agencies; printing, call centers, laundry service, and mailing projects, and document scanning to name a few.¹²³ OCE has

117 Kristi E. Swartz, *Prisoner rights group protests alleged beatings*, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 6, 2011), <http://www.ajc.com/news/news/local/prisoner-rights-group-protests-alleged-beatings/nQpST/>; Tom Gagne, *Support the Georgia Prisoners’ Hunger Strike*, SOCIALISTWORKER.COM, <http://socialistworker.org/2012/07/12/georgia-prisoners-hunger-strike>.

118 *History*, GEORGIA CORRECTIONAL INDUSTRIES, http://www.gci-ga.com/index.php?option=com_content&view=article&id=17&Itemid=42; *About*, OREGON CORRECTIONS ENTERPRISE, <http://oce.oregon.gov/about-oce>.

119 *Id.*

120 *About*, GEORGIA CORRECTIONAL INDUSTRIES, http://www.gci-ga.com/index.php?option=com_content&view=article&id=9&Itemid=38; *About*, GEORGIA CORRECTIONAL INDUSTRIES, http://www.gci-ga.com/index.php?option=com_content&view=article&id=17&Itemid=42; *Food and Farm*, GEORGIA CORRECTIONAL INDUSTRIES, http://www.gci-ga.com/index.php?option=com_content&view=article&id=12&Itemid=39.

121 *Prison Industries Enhancement*, GEORGIA CORRECTIONAL INDUSTRIES, http://www.gci-ga.com/index.php?option=com_content&view=article&id=25&Itemid=31.

122 *Food and Farm*, *supra* note 120.

123 Les Zaitz, *Oregon Corrections Enterprises needs changes to survive, PSU report says*, THE OREGONIAN (March 14, 2014), http://www.oregonlive.com/politics/index.ssf/2013/03/oregon_corrections_enterprises.html.

PIE certification, but it is difficult to determine whether it applies to all of their work programs since inmates' wages still appear to be low.¹²⁴ In a study conducted by University of Oregon students, three inmates at OCE reported that after working each month, they had \$50.00 to send home to their families or add to phone call accounts.¹²⁵

C. Private Prison Labor Systems

State governments turned to prison privatization in order to solve the problems arising from the mass incarceration of people in the U.S.¹²⁶ Thus, the top two private prison corporations in the U.S., Corrections Corporation of America, Inc. ("CCA") and The GEO Group, Inc. ("GEO"), have made billions from acquiring state and federal contracts to manage prisoners.¹²⁷ CCA is the leading private prison in the U.S. for it profits from housing more than 80,000 prisoners in the U.S.¹²⁸ GEO, is one of the world's largest private prison corporations with approximately 80,000 beds and 114 facilities located in the U.S., the United Kingdom, Australia, and South Africa.¹²⁹ GEO is only second to CCA in the U.S. because GEO has 56 Facilities and a bed capacity of 61,132,¹³⁰ while CCA 60 facilities with a bed capacity of more than 90,000.¹³¹

It is clear that CCA and GEO deliver profits to their shareholders from housing inmates, but they also create wealth through forced prison labor. CCA maintains that inmates work in vocational jobs including carpentry, computer applications, construction and building trades, electrical, horticulture and landscaping, masonry, painting, and plumbing.¹³² GEO also reports that it provides vocational training, but does not list the specific jobs that inmates perform.¹³³ Since the PIE only applies to state correctional agencies, CCA and GEO are unable to apply directly for certification. As a result, CCA and GEO are under no obligations to pay their inmates prevailing wages.

¹²⁴ PRISON ENHANCEMENT CERTIFICATION PROGRAM, *supra* note 104.

¹²⁵ *Behind These Walls*, UNIVERSITY OF OREGON STUDENTS, 2010, http://www.youtube.com/watch?feature=player_embedded&v=bzipCCRlnAs.

¹²⁶ See Fulcher, *supra* note 5, at 590.

¹²⁷ *Id.* at 602-603.

¹²⁸ *About CCA*, CORRECTIONS CORPORATION OF AMERICA, <http://cca.com/who-we-are> (last visited June 30, 2013).

¹²⁹ See Fulcher, *supra* note 5, 603.

¹³⁰ *Id.*

¹³¹ *About CCA*, *supra* note 128.

¹³² *Vocational Training*, CORRECTIONS CORPORATION OF AMERICA, <http://cca.com/inmate-services/inmate-reentry-programs/vocational-training>, (last visited June 30, 2013).

¹³³ *Who we are*, THE GEO GROUP, INC., http://www.geogroup.com/about_us, (last visited June 30, 2013).

It is difficult to determine how much private prisons actually pay working inmates, but there is nothing to dispute that private prisons also force able inmates to work. It is estimated that private prisons on average pay inmates 17¢ per hour for a maximum of six hours a day, with CCA paying working prisoners the most at .50¢ per hour for “highly skilled positions”.¹³⁴ Other sources suggest that CCA pays working inmates \$1.00 a day, and at the same time charges them \$5.00 a minute for telephone calls.¹³⁵ Additional reports indicate that private prisons pay an average of 93¢ to \$4.73 per hour.¹³⁶

Private prison companies also capitalized on the growing incarceration of undocumented workers in the U.S. by obtaining million dollar federal detention contracts to house detainees for Immigration and Customs Enforcement (“ICE”).¹³⁷ Like the other inmates they house, private prison companies also force immigration detainees to work.¹³⁸ CCA operates an immigration detention center in Gainesville, Georgia.¹³⁹ Female detainees in this facility have complained that they are paid subminimum wages for their work and about inadequate medical and living conditions.¹⁴⁰

IV. FAIR LABOR STANDARDS ACT AND PRISONERS

The FLSA, as enacted in 1938, is a Federal statute mandating that employees engaged in commerce, or in the production of goods for commerce, are to be paid a mandatory minimum wage.¹⁴¹ “To be engaged in commerce, individual employees must be performing work involving or related to the movement of persons or things¹⁴² between states.”¹⁴³ The primary purpose of the FLSA was to maintain a necessary standard of living for optimal health, efficiency, and general well being of workers.¹⁴⁴

¹³⁴ Pelaez, *supra* note 73.

¹³⁵ Michael Snyder, *Private Prisons: The More Americans They Put Behind Bars The More Money They Make*, ECONOMIC COLLAPSE (March 11th, 2013), <http://theeconomiccollapseblog.com/archives/private-prisons-the-more-americans-they-put-behind-bars-the-more-money-they-make>.

¹³⁶ *Big Business Or Slave Labor? What Prisoners Make In Jail*, NEWS ONE (October 3, 2011), <http://newsone.com/1562805/prison-labor-statistics-wiki/>.

¹³⁷ *Immigrants’ Rights Fact Sheet, Securely Insecure The Real Costs, Consequences, and Human Face of Immigration Detention*, ACLU OF GEORGIA, <http://www.acluga.org/our-work/immigrants-rights-project/immigrants-rights-fact-sheet/>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 29 U.S.C. § 206(a)(1) (2002).

¹⁴² “Things” may be tangibles or intangibles, and include information and intelligence.

¹⁴³ TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW PRIVATE ORDERING AND IT’S LIMITATIONS* 692 (Aspen Publishers 2011).

¹⁴⁴ 29 U.S.C. § 202(a) (2002).

Congress also wanted to prevent the spread of substandard labor conditions among the several States.¹⁴⁵

Since its enactment, the FLSA has been amended several times to further broaden its scope.¹⁴⁶ However, subsequent amendments have also been made to exempt certain groups, thus narrowing its coverage. Prisoners have not been made a part of any exempt group.¹⁴⁷

A. FLSA- Ambiguity With Regard To Prisoners

The basic operation of the FLSA provides coverage for all employees that meet the commerce requirements, but not for those who are in the exempted category.¹⁴⁸ At first impression, the question of whether prisoner labor was contemplated as within the scope of the FLSA should be easy to answer. It should follow under established rules if statutory construction that groups of workers not specifically exempted from the FLSA should remain within its scope.¹⁴⁹ Therefore, if prisoners were not specifically listed as an exempted group, they should benefit from the equitable labor protections afforded under the FLSA.

Prisoners not working for PIE certified correction agencies have sued in order to obtain higher wages under the Fair Labor Standards Act.¹⁵⁰ However, depending on the jurisdiction, most courts have found that the FLSA does not apply to inmates through a finding that that prison workers are not employees.¹⁵¹ These circuit courts opine that the exempted groups of workers under the FLSA are individuals who would have ordinarily been thought of as “traditional employees” if not for the exemption.¹⁵² Thus, these circuit courts describe the proposal of prisoners being considered as traditional employees as “too outlandish to occur to anyone when the legislation was under consideration by Congress.”¹⁵³ This belief has led to verdicts against prisoners seeking wages, and has been the justification for

¹⁴⁵ *Id.*

¹⁴⁶ Mathew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 192 (2002).

¹⁴⁷ See 29 U.S.C. § 213 (2002); 29 U.S.C. § 214(a) (2002).

¹⁴⁸ See 29 U.S.C. § 213.

¹⁴⁹ *Powell v. United States Cartridge Co.*, 339 U.S. 497, 512 (1950).

¹⁵⁰ James Haslam, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage an Minimum Wage?*, 1994 B.Y.U. L. REV. 369, 371 (1994).

¹⁵¹ See *Gambetta v. Rison Rehabilitative Indus.*, 112 F.3d 1119 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F. 3d 37 (2d Cir. 1996).

¹⁵² See Lang, *supra* note 146, at 208.

¹⁵³ *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (citing *Bennett v. Frank*, 395 F.3d 409, 409-10 (7th Cir. 2005); see also *Franks v. Okla. State Indus.*, 7 F.3d 971, 972 (10th Cir. 1993); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir.1993); *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992); *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir.1977).

denying working inmates the benefits of FLSA coverage.¹⁵⁴

B. The Ashurst-Sumners Act: Not Dispositive Proof Of Congress's

INTENT TO EXCLUDE PRISONERS FROM THE FLSA

The Ashurst-Sumners Act (“ASA”) specifically deals with prisoner labor and makes it a criminal offense to knowingly transport interstate, prison-made good for commerce.¹⁵⁵ Similar to the FLSA, the ASA was aimed at preventing the competitive advantage that employers gain by utilizing cheap prisoner labor.¹⁵⁶ The ASA was created three years before the FLSA; many critics use this timeline as evidence of Congress’ intent on the categorization of prisoner workers.¹⁵⁷ Critics argue that FLSA coverage would create an inconsistency with ASA when the two statutes are read together.¹⁵⁸ They argue that if prison workers have the right to earn wages under the FLSA, then, by virtue of them earning wages, there should be no unfair competitive advantage; and thus no need to criminalize the commerce of prison made goods. Accordingly, they conclude that such logic renders the ASA superfluous.¹⁵⁹ Many courts that have adopted this view hold that the problem of unfair competition resulting from prisoner labor should be dealt with through the ASA and not the FLSA.¹⁶⁰

Further, critics argue that two amendments made to the ASA in their interpretation. The first amendment, the governmental use exemption, was developed to allow federal, state, and local governments to use prison labor as a means of offsetting costs of incarceration.¹⁶¹ The second amendment

¹⁵⁴ See e.g., *Vanskike v. Peters*, 974 F.2d 806 C.A. (1992).

¹⁵⁵ Section 1 of the Ashurst-Sumners Act, as amended, provides:

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise, manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. 18 U.S.C. § 1761(a)(1) (1988) (amended 1992).

¹⁵⁶ S. Rep. No. 906, 74th Cong., 1st Sess. (1935); 29 U.S.C. § 202(a) (2002).

¹⁵⁷ See *Vanskike*, 974 F.2d at 812 (“the Ashurst-Sumners Act supports the conclusion that Congress did not intend to extend the FLSA’s definition of “employee” to prisoners working in prison. The Ashurst-Sumners Act was enacted in 1935-just three years before the enactment of the FLSA. It is difficult to imagine that Congress would have enacted legislation in 1938 that rendered its recently passed prison-goods law essentially superfluous.”).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Kentucky Whip & Collar Co. v. Illinois Cent. R.R. Co.*, 299 U.S. 334 (1937); *Hale v. Arizona*, 993 F.2d 1387, 1395-98 (9th Cir.); *Harker v. State Use Indus.*, 990 F.2d 131, 134-35 (4th Cir.), *Vanskike v. Peters*, 974 F.2d 806, 811-12 (7th Cir. 1992); *McMaster v. Minnesota*, 819 F. Supp. 1429, 1438-39 (D. Minn. 1993).

¹⁶¹ Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage*, 67 TEMP. L. REV. 295, 303 (Spring 1994).

created PIE, which allows for the transportation of prison-made goods in interstate commerce.¹⁶²

These arguments may be helpful in determining Congress' intent. However, there are a few things to consider: (1) in light of the Circuit split on the issue, Congress has yet to make a concrete amendment or determination that definitively answers the question of prison labor wages; (2) allowing federal state and local governments to benefit from prison labor does not mean that minimum wage under the FLSA is to be ignored; (3) there was no special allowance for private prisons to directly acquire these benefits under these amendments, and they are one of the most egregious offenders of prisoner labor exploitation;¹⁶³ and (4) under the PIE program the prisoners are actually getting prevailing market wages as if they were employees.

C. The Economic Realities Test: Uneven Fit As It Pertains To Prisoners

Some courts have interpreted FLSA to cover working inmates; yet there is still no guarantee of wage payments.¹⁶⁴ Working inmates must first be determined to be an employee of the entity for which he works before receiving wages.¹⁶⁵ If a prisoner is not considered an employee of the entity, his or her labor belongs to the penitentiary and it is not compensable.¹⁶⁶ When the penitentiary is deemed to be the owner of labor, it is at the disposal of the warden,¹⁶⁷ which means that inmates are probably going to be paid little to nothing for their work.

Determining whether an individual is an employee is not a straightforward task for courts. The FLSA defines "employee" as "any individual employed by an employer"; "employ" is defined as "to suffer or permit to work".¹⁶⁸ Relying on these definitions, the Supreme Court has held that FLSA coverage is determined by the "economic reality" of the employment relationship.¹⁶⁹ In these circumstances, the court utilizes what is known as an economic reality test ("ERT").¹⁷⁰ This test has gone through

¹⁶² 18 U.S.C. § 1761(c). (this section of the Ashurst-Sumners Act concerns goods produced under the Bureau of Justice's Private Sector/Prison Industry Enhancement Certification Program).

¹⁶³ Pelaez, *supra* note 73.

¹⁶⁴ See e.g., Carter v. Dutchess Community College, 735 F.2d 8, 15 (2nd Cir. 1984) ("[A]n inmate may be entitled under the law to receive the federal minimum wage from an outside employer, depending on how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent").

¹⁶⁵ *Id.* at 6.

¹⁶⁶ Alexander v. Sara, Inc., 721 F.2d 149 (5th Cir. 1983).

¹⁶⁷ *Id.*

¹⁶⁸ See 29 U.S.C. § 203(e)(1)(g).

¹⁶⁹ Lang, *supra* note 146, at 197.

¹⁷⁰ See *Id.*

many modifications in its application towards prisoners,¹⁷¹ but today, there is a consistent trend in the factors that Courts consider.¹⁷² These factors include (1) the right to hire and fire the inmates, (2) supervising and controlling the work, and (3) the maintenance of any existing employment records.¹⁷³ Most often, control is the most heavily weighted factor.¹⁷⁴ So the less control an employer has over a working inmate, the less likely it is that the inmate will be considered to be an employee.

The ERT, outside of its application to prisoners, is generally used in two situations.¹⁷⁵ The first is when distinguishing between an employee and an independent contractor,¹⁷⁶ and the second is when there are two or more employers and a question of employer liability arises.¹⁷⁷ In the latter situation, the task is to determine who was the employer of the employee.¹⁷⁸

The inclination in these situations is to find that the ERT not only defines the status of the plaintiff, but also to presuppose that someone bears the burden of wage payments. In the case of an employee, the employer bears the burden.¹⁷⁹ In the case of an independent contractor, the contractor himself bears the burden of paying himself wages out of the money for which he has bargained.¹⁸⁰ In sum, the ERT determines whether an individual receives wage payments, as well as who pays and how payment is made. Employees are paid at least a minimum wage and independent contractors are paid based on what they bargained for.

Utilizing the ERT to determine the status of non-prison workers is related to furthering the policies behind the FLSA.¹⁸¹ Wage requirements are important as they ensure a “minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹⁸² In addition, the uniformity in wage requirements prevents uneven and substandard labor

171 *Id.*

172 *See e.g.*, *Gofron v. Piscal Technologies, Inc.*, 804 F.2d 1030, 1044 (5th Cir. 2011).

173 *Id.*

174 *See Id.*

175 *See Zatz, supra* note 6, at 871-872.

176 Glynn, *supra* note 143 at 5, citing Restatement Second Of Agency, § 2(3) (an independent contractor is one “[w]ho contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”); *Zatz, supra* note 6. (when someone works independently of any employer’s control, she is “in business for herself,” an independent contractor rather than an employee).

177 *See e.g.*, *Falk v. Brennan*, 414 U.S. 190, 195 (1973).

178 *Id.*

179 29 U.S.C. § 206(a)(1) (2002).

180 *See Glynn, supra* note 143, at 5.

181 29 U.S.C. § 206(a)(1) (2002).

182 29 U.S.C. § 202(a) (2002).

conditions, and unfair competition in commerce.¹⁸³ However, because correctional institutions control the daily activities of working prisoners, an application of the ERT is replete with inconsistencies, which is evident by the split in circuit court decisions. Thus, reliance on the ERT to determine FLSA coverage for working inmates should be abandoned.

V. CONCLUSION: EMANCIPATE THE FLSA, PAY ALL WORKING PRISONERS

“No work is insignificant. All labor that uplifts humanity has dignity and importance and should be undertaken with painstaking excellence.”¹⁸⁴ As the U.S. continues to be confined in prisons, and forced to labor for the good of government and private entities, it is imperative that we bear in mind that all labor is essential. Whether vital to prison operations or fulfilling consumer needs, the work inmates perform is critical to the success of almost every U.S. industry. So as inmates painstakingly labor for the betterment of society, the “dignity and importance” of their work must be honored with equitable compensation.

The FLSA was created to address the needs of the working class; the forgotten laborers who were keeping the country afloat, but whose rights had been disregarded.¹⁸⁵ Prisoners now find themselves in a similar predicament, but 80-foot walls and steel cages stifle their voices; no union representative express their concerns, no protections separate them from harsh and unjust work environments. If a person works outside prison walls, he or she is typically considered to be an employee, and the FLSA mandates that they at least be paid minimum wage. Working prisoners deserve nothing less. Granting working inmates FLSA coverage will bring dignity to their work, and at the same time, move towards judicial uniformity in sentencing, and reduce prison recidivism.

A. Eliminate The Economic Realities Test for Judicial Uniformity

Currently there is no way to predict the outcome of an inmate’s FLSA claim. Given the continued split in circuit decisions surrounding this issue, it is likely that similarly situated working prisoners will be treated differently across the country. Therefore, I tend to agree with the proponents of uniformity in Federal decisions when determining whether

¹⁸³ *Id.*

¹⁸⁴ Dr. Martin Luther King Jr., Address To Local 1199 Salute To Freedom (March 10, 1968).

¹⁸⁵ 29 U.S.C. § 202(a) (2002).

the FLSA should apply to prison workers.¹⁸⁶ Specifically, uniformity is necessary to protect the integrity of the FLSA and the legitimacy of judicial decision-making relating to the protections afforded to working prisoners.

The language of the FLSA is clear regarding the definitions of employer and employee as well as those who are specifically exempt from FLSA coverage. Nevertheless, the use of the ERT to determine whether working inmates are employees undermines the integrity of the FLSA and its designs. As outlined above, the ERT is clearly inapplicable to working prisoners. At no point in time do inmates bargain for the benefit of their work, or have any significant control over their labor. Furthermore, determining whether a working inmate is an employee by the degree of control exerted over him or where he works is equally irrational. Inmates who are forced to work inside prison walls washing clothes, cooking food, and mopping floors, for thousands of other inmates each day, are just as deserving of compensation as inmates who are forced to call voters on behalf of a political candidates, sew clothes for Victoria's Secret and JC Penney,¹⁸⁷ or fight forest fires.¹⁸⁸

Therefore, in order to preserve the legitimacy of judicial decisions and bring about uniformity regarding FLSA treatment of working prisoners, the FLSA should be interpreted in accordance with the language of the statute.¹⁸⁹ Because working prisoners are not specifically excluded under the FLSA, and are “. . . individual[s] employed by an employer,” they are employees deserving of coverage under the FLSA.¹⁹⁰ If this approach is adopted, litigants as well as courts will have a clearer understanding of how to interpret the FLSA's application to working prisoners thereby creating desired judicial uniformity.¹⁹¹

186 Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1584 (2008).

187 Caroline Winter, *What do Prisoners Make for Victoria's Secret?*, MOTHERJONES.COM- Politics (July /August 2008), <http://motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret>.

188 Toni McAllister, *Inmate Fire Crews Focus Of New Bill From Lake Elsinore Lawmaker*, LAKE ELSINORE- WILDMOR PATCH (January 31, 2012 at 10:05p.m.), <http://lakeelsinore-wildomar.patch.com/groups/politics-and-elections/p/inmate-fire-crews-highlighted-in-new-bill-from-lake-e4839a4dd51> (more than 4,000 California prisoners are trained to fight forest fires); CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION DELTA FIRE CAMP: 2008-2009 SOLANO GRAND JURY REPORT, SOLANO COUNTY, CALIFORNIA SUPERIOR COURT, <http://www.solano.courts.ca.gov/materials/DeltaFireCamp.pdf> (California inmates trained in the Delta Fire Camp are “paid on a scale that relates to their job description; \$1.45 a day for laborers to \$3.90 a day for one lead cooks. When the inmates are employed under emergency conditions such as fire and flood, they are paid at the rate of \$1.00 an hour”).

189 Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-1796 (2005) (discussing the three concepts of Constitutional Legitimacy (1) Legal legitimacy, (2) Sociological legitimacy, and (3) Moral legitimacy).

190 See 29 U.S.C. § 203(e)(1).

191 See e.g. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096-97 (1987) (“In general, we think it more aggravating if citizens of Maine and Florida are

B. Reallocate Greater Wealth To Working Prisoners and Decrease Recidivism

Working for slave wages or as a slave without compensation is the harsh economic reality for millions of prisoners in the U.S. Then after succumbing to living a life as a slave for the duration of their sentence, these prisoners are released back to society, without any means of financial support from their labors. Often indigent, homeless, and unable to overcome the challenge of obtaining employment with a conviction, many former inmates reoffend.¹⁹² Moreover, for those who do secure jobs, their earnings are greatly limited by their criminal records. A recent PEW study revealed “past incarceration reduced subsequent wages by 11 percent, cut annual employment by nine weeks and reduced yearly earnings by 40 percent.”¹⁹³ As a result, U.S. recidivism rates will remain high unless former prisoners have economic resources immediately upon release. Thus, the FLSA should be emancipated from the constraints imposed, not by Congress, but by rigid and unsupported judicial interpretation that wrongly exclude working prisoners from its provisions. Free the FLSA and compensate working inmates; allow prisoners to accumulate capital while they are incarcerated, so they will have a means of support to help them rebuild their lives, and not have to commit crimes to survive.

Hence, I propose the following basic guidelines in providing FLSA coverage to working inmates: (1) employment should be voluntary; those who do not wish to work must take vocational classes for their entire prison sentence, (2) working inmates should be paid at least minimum wage, (3) automatic wage deductions shall be allowed for taxes and other previous court ordered obligations only, and (4) a forced 80 percent wage deduction will be deposited into an outside interest bearing bank account, accessible only upon release. In adopting this payment scheme, the economic reality for working prisoners will be greatly improved.

Utilizing the total PIE quarterly statics from 2012 mentioned above in section III(B)(1)(only subtracting family costs and taxes), each of the,

threatened with having to live under different understandings of the same federal statute (as put in place by the judgments of their respective courts of appeals) than if citizens of Illinois are faced with a unique, and possibly erroneous, reading of another statute”).

192 Eve Tahmincioglu, *Unable To Get Jobs, Freed Inmates Return To Jail*, NBCNEWS.COM (February 17, 2010), <http://www.nbcnews.com/id/15020964/#.UdSpJhblato>.

193 THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY, THE PEW CHARITABLE TRUSTS, (Pew Charitable Trusts 2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf.

4,700 inmates working in PIE programs would have received approximately \$356.00 a month instead of \$70.00.¹⁹⁴ This figure represents net wages after an 80 percent deduction of \$1,427.00 is transferred into an interest bearing account.¹⁹⁵ Additionally, since today's prisoners serve an average of 5.2 years in prison,¹⁹⁶ each of the 4,700 inmates under the proposed new FLSA guidelines would have at least \$3,567.50 upon his or her release if the 80% were placed in an account with an interest rate of at least a 3%. Granted, this amount may not seem significant, but it is better than expecting that a bus ticket and a knapsack of clothes will be enough to enable a person who has been incarcerated to build his life in free society.

Some proponents of prison slave labor argue that inmates should not be paid because they have to work off their debt to society, or that the existing labor programs are successful. My response is two-fold. First, the punishment for a crime is the sentence mandated by the court, and not additional penalties correctional institutions decide to impose. I specifically address this issue in an upcoming article, but I believe that forcing inmates to work and pay fines that are not a court ordered is tantamount to double jeopardy, punishing inmates twice for the same crime. Second, I recognize that there are modern prison work programs such as PIE that pay minimum wages to working inmates, but withholding 80 percent of inmate wages is almost as appalling as not paying them at all.¹⁹⁷ I do not dispute that working prisoners should pay taxes and any previously court ordered restitution, but there is a fundamental problem with correctional intuitions deducting room and board and forcing inmates to pay into a general victim assistance program.

First, U.S. taxpayers are required to pay for the prison operations as a part of their tax obligations. For example, taxpayers in Georgia pay \$1 billion a year to house the state's prisoners.¹⁹⁸ Therefore inmates should not be charged for room and board since taxpayers already pay the expense. Likewise, if fees for room and board have been deducted from inmate wages to offset prison costs, then who is entitled to the fees? As a Georgia taxpayer, I have yet to receive a refund check from inmate wages offsetting the prison taxes I pay. Moreover, this rationale for not paying working inmates is even weaker if inmates are confined in private prisons. The

194 See *supra* Part III.B.1 (current PIE calculations).

195 PRISON INDUSTRIAL ENHANCEMENT CERTIFICATION PROGRAM, *supra* note 104.

196 *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, JUSTICE POLICY INSTITUTE, at 20 (April 2011), <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>.

197 18 U.S.C. § 1761, *supra* note 96.

198 Bill Rankin and Carrie Teegardin, *A billion-dollar burden or justice?*, AJC.COM (May 30, 2010), <http://www.ajc.com/news/news/local-govt-politics/a-billion-dollar-burden-or-justice/nQgFp/>.

wages that inmates earn in private prisons are not going back to the government to “pay their debt to society”; they are added to the profits of private prison corporations. Thus, arguing that inmates should work as slaves for the betterment of society in the framework of prison privatization is completely meaningless.

Second, automatically deducting money from inmate wages for general victim assistance programs is also problematic. A majority of the 2 million plus people in the U.S. are incarcerated for non-violent, victimless drug crimes.¹⁹⁹ Forcing inmates to pay into a general victim fund to assist people they have not harmed, is completely inequitable and without justification. The basic principle of punishment is that people should be punished for crimes they commit or assist in committing. If prisoners have not been ordered to pay restitution, or have committed victimless crimes, then they should not be forced to pay into a general victim assistance fund. Sure, utilitarian justifications of punishment may condone punishing innocent people for the betterment of society under certain circumstances,²⁰⁰ but in this context it is clearly inequitable.

Finally, the FLSA should apply to working prisoners not only to achieve judicial uniformity and reduce recidivism rates, but also to restore the dignity and humanity of human beings imprisoned in the U.S. Mahatma Ghandi was correct when he said that a “A nation’s greatness is measured by how it treats its weakest members.” So every U.S. inhabitant should be incensed, and eager to join the movement to change the way this country treats its prisoners. The U.S. cannot afford the social costs of continued promotion and support of a system of revived slavery.²⁰¹

Affording working prisoners FLSA coverage is just another necessary step on the journey to dismantling the oppressive system we have come to know as the Prison Industrial Complex.²⁰² The magnitude of this issue mandates that all who believe in notions of decency and fairness be as courageous as Harriet Tubman and John Brown were on the issue of slavery. If we fail to answer the sacred call to justice, we will find ourselves in the same position as Pastor Martin Niemoller in 1946 when he

199 Michael Suede, *Why We Need Prison Reform: Victimless Crimes Are 86% of the Federal Prison Population*, POLICYMIC.COM (May 18, 2012), <http://www.policymic.com/articles/8558/why-we-need-prison-reform-victimless-crimes-are-86-of-the-federal-prison-population>; NATIONAL POLICY COMMITTEE, THE USE OF INCARCERATION IN THE UNITED STATES NATIONAL POLICY WHITE PAPER AMERICAN SOCIETY OF CRIMINOLOGY (Nov. 2000), <http://www.ssc.wisc.edu/~oliver/RACIAL/Reports/ascincarcerationdraft.pdf>.

200 See generally, Guyora Binder and Nicholas Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115 (2000).

201 Suede, *supra* note 199.

202 See generally Fulcher, *supra* note 5. (the first step I argue is to rid the U.S. of prison privatization).

wrote the poem *First they Came*²⁰³ about the complacency and inaction of German intellectuals following the Nazi rise to power. If we sit in silence as the profiteers of human incarceration fill their capital needs by using human beings as no more than human labor commodities, who will be left to speak up when they turn their sights on us?

203 Martin Niemöller: "*First They Came For The Socialists...*", *United States Holocaust Memorial Museum*, THE HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392>, (last visited July 3, 2013) (First they came for the Socialists, and I did not speak out-- Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out-- Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out-- Because I was not a Jew. Then they came for me--and there was no one left to speak for me).