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INMATES MAY WORK, BUT DON'T TELL SOCIAL SECURITY

Stephanie Hunter McMahon

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I. INTRODUCTION

Much of the public is aware that the United States has the highest incarceration rate in the world, and as a result of films like *13th*, *When They See Us*, and *Just Mercy*, many recognize the inequities of mass incarceration.¹ Therefore, it may be unsurprising that “[c]ontact with the criminal justice system” comes with many negative long-term consequences, including restrictions on employment, housing, and voting, as well as negative impacts on physical and mental health.² It should also be unsurprising that these negative consequences affect some communities more than others.³

1. Inst. for Crime & Just. Pol’y Rsch. & Birbeck Univ. of London, *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [https://perma.cc/FU63-82DK].

2. Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1796 (2017).

3. See generally Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [https://perma.cc/G3JE-4W2H] (analyzing racial disparities in the criminal justice system).

One specific issue that has gained attention is the employment status of inmates engaged in prison labor.⁴ The Thirteenth Amendment made involuntary servitude unconstitutional “except as a punishment for crime whereof the party shall have been duly convicted,” and a long history of prison labor has resulted.⁵ The desire to encourage inmate labor is, if anything, increasing. The First Step Act, signed into law on December 21, 2018, requires that the Attorney General submit a report to Congress assessing the Bureau of Prisons’ efforts to enable 75% of the eligible minimum and low-risk offenders to participate in a prison work program for not less than twenty hours per week.⁶ The goal is to require all able inmates to participate in some form of work assignment.⁷ How that goal is interpreted depends on whether the prison is federal or state, whether the prison is public or private, and whether the institution has a relationship with local private employers.⁸

Despite a prevailing requirement that inmates work and despite them being forced to work under threat of punishment, inmates are not “employees” or “workers” in the commonly understood sense.⁹ Through judicial interpretation of the law, inmates are denied the protections afforded for workers under the Fair Labor Standards Act.¹⁰ Consequently, because their

4. Darius Rafieyan & Cardiff Garcia, *The Uncounted Workforce*, NPR: THE INDICATOR FROM PLANET MONEY (June 29, 2020), <https://www.npr.org/transcripts/884989263> [<https://perma.cc/N3VJ-VUDA>]; Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/5829-NGRV>]; Daniel Mortiz-Rabson, “*Prison Slavery*”: *Inmates Are Paid Cents While Manufacturing Products Sold to Government*, NEWSWEEK (Aug. 28, 2018), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729> [<https://perma.cc/3RG5-JTM8>]; Angela Hanks, *How to End Prison Labor Exploitation and Invest in Incarcerated People*, FORBES (Aug. 23, 2018, 10:00 AM), <https://www.forbes.com/sites/angelahanks/2018/08/23/from-exploitation-to-investment-how-to-end-low-wage-prison-labor/> [<https://perma.cc/9V93-M8RC>]; Chandra Bozelko, *Give Working Prisoners Dignity—and Decent Wages*, NAT’L REV. (Jan. 11, 2017), <https://www.nationalreview.com/2017/01/prison-labor-laws-wages/> [<https://perma.cc/6TCA-C66B>]; Lindsay Putnam, *The Seven Weirdest Jobs That Prisoners Do*, N.Y. POST (June 23, 2015), <http://nypost.com/2015/06/23/the-seven-weirdest-jobs-that-prisoners-do/> [<https://perma.cc/GM8N-THC2>].

5. U.S. CONST. amend. XIII, § 1.

6. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5205–06.

7. 28 C.F.R. § 545.20(a)(2) (2021).

8. See German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019, 9:42 PM), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform> [<https://perma.cc/Y358-MHFQ>]; Liliana Segura, *The First Step Act Could Be a Big Gift to CoreCivic and the Private Prison Industry*, THE INTERCEPT (Dec. 22, 2018, 9:20 AM), <https://theintercept.com/2018/12/22/first-step-act-corecivic-private-prisons/> [<https://perma.cc/EL94-6GFD>].

9. Bennis, *supra* note 4; Mortiz-Rabson, *supra* note 4.

10. Renee Elaine Henson, *Picking Cotton for Pennies: An Exploration into the Law’s Modern Endorsement of a Free-Prison Workforce*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 193, 200–01 (2018).

wages generally need not be set at a market price, inmates are often uncompensated or poorly compensated—some only two cents per hour.¹¹ These low wages are often garnished by the government. Prisoners have gone on strike as a result of their low or non-existent pay, but some advocates urge them, instead, to strike over their classification as non-workers.¹²

From a tax perspective, prison labor raises critical issues for payroll taxes and the benefits funded by those taxes. As discussed more fully in Part II, there are three categories of work prisoners undertake, only one of which requires the payment of Social Security and Medicare taxes and, consequently, may contribute toward inmates' ability to receive future benefits.¹³ In the U.S. system, the Federal Insurance Contributions Act (FICA) is the largest payroll tax, and it raises almost 35% of the federal government's revenue.¹⁴ FICA finances much of the American social safety net in the form of Social Security, disability, and Medicare.¹⁵ Although the Bureau of Prisons is required to help federal prisoners apply for federal and state benefits upon release, time spent working in the prison system generally does not contribute toward earning those benefits.¹⁶ This is only one of over 38,000 provisions imposing collateral consequences as a result of conviction.¹⁷

The consequences of incarceration generally, and with respect to benefits specifically, have a disparate impact on various segments of society. As of 2020, the American criminal justice system incarcerates almost 2.3 million people, and despite African-Americans comprising only 13% of U.S. residents, they are 40% of those incarcerated.¹⁸ Although incarceration rates have fallen since 2008, 1.5% of Black adults were imprisoned (as opposed to serving time) in 2018 as compared to 0.8% of Hispanics and 0.3% of whites.¹⁹ With 4.88% of the adult male African-American population in jail and 10.26%

11. Bennis, *supra* note 4.

12. Bozelko, *supra* note 4.

13. See *infra* Part II.

14. Federal Insurance Contributions Act, I.R.C. §§ 3101–3128; Federal Unemployment Tax Act, §§ 3301–3311; see § 1401 (a)–(b); § 3101(a)–(b); § 3111(a)–(b); OFF. OF MGMT. & BUDGET, HISTORICAL TABLES 32 tbl.2.1 (2021), <https://www.ssa.gov/benefits/retirement/planner/credits.html> [<https://perma.cc/9YDE-9FS9>].

15. Although Social Security is expected to be fully funded by targeted tax revenues, Medicare has four parts and FICA only partially funds Part A. JULIETTE CUBANSKI ET AL., THE FACTS ON MEDICARE SPENDING AND FINANCING 6 (2019).

16. 18 U.S.C. § 4042(a)(6)(A); 20 C.F.R. §§ 404.468(a), 416.1325(a) (2021).

17. Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII in Discrimination Against Persons with Criminal Records*, 12 SEATTLE J. FOR SOC. JUST. 109, 112 (2013).

18. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/8FPF-AWPB>].

19. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2018, at 10 tbl.6 (2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf> [<https://perma.cc/2WHG-PZAK>].

having been in prison or on parole,²⁰ the impact of limitations on the ability to earn toward Social Security and Medicare is tremendous for former inmates, their dependents, and their communities more broadly.

This Article examines the ways in which inmates are carved out of the protections offered by the Social Security and Medicare systems. By statute, inmates are unable to receive Social Security or disability benefits while incarcerated.²¹ Additionally, in many circumstances, their labor does not constitute employment for purposes of calculating quarters of employment for benefits.²² Therefore, inmates may work their entire prison sentence and, yet, on release discover that they no longer have sufficient years left in their working lives to earn the benefits of Social Security for themselves or their dependents.²³ As the United States grapples with its mass incarceration problem, remedying the narrow issue of Social Security and Medicare entitlement for individuals who are clearly working, and often without the choice of whether to do so, is one way to ease the damage of incarceration on many communities.

II. PRISON LABOR

In 2020, more than 2.3 million inmates resided in American jails and prisons.²⁴ These jails and prisons, in addition to parole and probation, cost the federal and state governments an estimated \$80.7 billion per year.²⁵ Concern for this cost drives some policies regarding prison labor but so does a desire to increase job training, reduce recidivism, and decrease violence in prisons, all of which appear to be aided by prison employment.²⁶ What is not always examined is the impact that employment has on inmates themselves. This Part focuses on the financial aspect of that impact.

Built on the Black Codes and cheap—often African-American—labor to pay the costs of incarceration, the modern prison system developed dependent on inmate labor; however, the type of labor was restricted.²⁷ In 1935, prison

20. Shannon et al., *supra* note 2, at 1805 tbl.1.

21. 42 U.S.C. § 306(a); *see also* 20 C.F.R. § 404.468(a) (2021).

22. *See infra* Section III.B.

23. *See infra* Section III.B.2.

24. Sawyer & Wagner, *supra* note 18.

25. 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/343M-LPVB>].

26. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., INMATE WORK AND PERFORMANCE PAY 1 (2008) [hereinafter PROGRAM STATEMENT NO. 5251.06]. Studies show the Prison Industry Enhancement Certification Program (PIECP) accomplishes many of its objectives. *See, e.g.*, CINDY J. SMITH ET AL., CORRECTIONAL INDUSTRIES PREPARING INMATES FOR RE-ENTRY: RECIDIVISM & POST-RELEASE EMPLOYMENT 8–9 (2006).

27. Henson, *supra* note 10, at 196–98.

employment was limited when the Ashurst-Sumners Act made it illegal to knowingly transport convict-made goods through interstate or foreign commerce with notable exceptions for agricultural goods and service operations, such as refurbishing goods.²⁸ The Ashurst-Sumners Act was primarily motivated by the fear that prison labor would unfairly compete with free labor because, as a captive pool of labor, prisoners were paid little.²⁹

Due to concerns over competition, the proper level of wages for inmate workers has long been controversial.³⁰ Worried about displacement and unfair competition, organized labor tends to support the highest “prevailing” wage for inmate laborers, and possibly desiring a competitive advantage, corrections administrators tend to support sub-minimum wages.³¹ One compromise to appease both groups (but not the inmates themselves) is to require payment of the federal minimum wage and then permit the garnishment of those wages to pay for the costs of incarceration, including room and board as well as other expenses—such as fees and restitution.

Prison labor can be provided either to the prison and prison community or to external consumers in the form of goods or services.³² Labor for consumption within the prison is commonly referred to as a prison work assignment.³³ According to one estimate, 53% of over one million eligible inmates have a work assignment—although all federal inmates are required to have one unless they are medically disabled.³⁴ The other type of prison labor is for external consumption: to produce goods and services that are consumed outside of the prison.³⁵ Within the latter category, employers may be either the government or private businesses.³⁶ In 2003, 7% of federal and state inmates—about 23% of those eligible in federal prisons and about 6% in state prisons—worked in prison industry programs.³⁷ This variety of work arrangements gives rise to much of the complexity within the tax treatment of prison labor.

28. 18 U.S.C. § 1761(a)–(b).

29. *E.g.*, *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir. 1977) (“Sections 1761-62 embody Congressional interest in free labor and were designed to protect private business from competition from goods produced with inexpensive convict labor.”).

30. ROB ATKINSON & KNUT A. ROSTAD, *CAN INMATES BECOME AN INTEGRAL PART OF THE U.S. WORKFORCE?*, at 23 (2003).

31. *Id.*

32. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 869–70 (2008).

33. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., *FEDERAL PRISON SYSTEM: FY 2021 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 8* (2020).

34. ATKINSON & ROSTAD, *supra* note 30, at 4.

35. Zatz, *supra* note 32, at 869–70.

36. *Id.* at 869.

37. ATKINSON & ROSTAD, *supra* note 30, at 4.

For prisoners receiving work assignments, their pay is generally low, although the amount depends on whether the inmate is at a federal or state facility.³⁸ States are free to establish their own pay scale with little or no payment.³⁹ For example, in eight states (Alabama, Arkansas, Florida, Georgia, Mississippi, Oklahoma, South Carolina, and Texas), prisoners are not paid for their work assignments.⁴⁰ The typical inmate earns, on average, between \$0.14 and \$0.63 for work assignments.⁴¹

Inmates can produce goods or services for external consumption through two types of work arrangements, though both limit inmate labor's competition with non-inmate labor.⁴² In the first instance, the Federal Bureau of Prisons operates the Federal Prison Industries (FPI) program, and many states have equivalents.⁴³ At the federal level, Congress limits FPI's competition by prohibiting sales outside of the government.⁴⁴ In the second instance, Congress enacted the Prison Industry Enhancement Certification Program (PIECP), permitting private employers to hire inmate labor at the prevailing local wage of non-inmate labor.⁴⁵ Both programs are thus limited for non-inmate considerations.

FPI is a wholly-owned federal corporation that employs federal prisoners to make goods for sale to the federal government.⁴⁶ As of 2019, FPI marketed numerous products and services in seven business lines—agribusiness, clothing and textiles, electronics, fleet, office furniture, recycling, and services—under the tradename of UNICOR, with sixty factories and two farms located at fifty-two prison facilities.⁴⁷ That year, 17,505 inmates worked

38. See *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html [<https://perma.cc/F4CZ-ECN6>].

39. See, e.g., *Murray v. Miss. Dep't of Corr.*, 911 F.2d 1167, 1168 (5th Cir. 1990) (noting that “compensating prisoners for work is not a constitutional requirement but, rather, is by the grace of the state” (quoting *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990))).

40. Mortiz-Rabson, *supra* note 4.

41. 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/3HFG-9WXG>].

42. JULIE GOODRIDGE ET AL., NORTHSTAR ASSET MGMT., PRISON LABOR IN THE UNITED STATES: AN INVESTOR PERSPECTIVE 18–19 (2018) (listing PIECP and non-PIECP opportunities).

43. *Id.*

44. 18 U.S.C. § 1761(a).

45. GOODRIDGE ET AL., *supra* note 42, at 18. Additionally, written assurances must document that non-inmate workers will not be displaced or severely impacted, and organized labor and local private industry must be consulted before start-up. ATKINSON & ROSTAD, *supra* note 30, at 3.

46. GOODRIDGE ET AL., *supra* note 42, at 19.

47. FED. PRISON INDUS., INC., FISCAL YEAR 2019 ANNUAL MANAGEMENT REPORT 3 (2019).

in an FPI program.⁴⁸ FPI's goal is to employ inmates within three years of release, and in 2020, FPI's goal was to employ 19,255 employees.⁴⁹ Because FPI is intended to employ as many workers as possible, it does not always make a profit. For example, in 2001, although FPI employed 22,500 prisoners and had sales of more than \$583 million, it made a profit of only \$4 million and in 2000, it actually lost \$12.8 million.⁵⁰

Although the statute governing FPI does not state specific wage requirements, FPI workers are paid according to pay grades established by the FPI board.⁵¹ Pay grades are set “[i]n recognition of budgetary constraints and for the effective management of the overall performance pay program” such that each grade includes a certain percentage of inmates.⁵² The top grade, for example, can only have 5% of the institution's assignments.⁵³ Current rates range from \$0.23 to \$1.15 per hour, with a premium pay rate of an additional \$0.20 per hour; inmates may qualify for overtime at double pay and earn toward a five-day paid vacation (although when the vacation can be claimed is limited).⁵⁴

In addition to the FPI program, Congress has permitted some inmates to work for private businesses after liberalizations to the Ashurst-Sumners Act in 1979.⁵⁵ Through the PIECP, approximately 5,000 inmates work for private businesses that contract with the state, and they earn “wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed”—often called the “prevailing local wage” of non-inmate labor.⁵⁶ On average, workers earned \$1,816.63 for the quarter ending June 30, 2020, but some wages were especially low: for example, Georgia averaged \$217, Mississippi \$246, and Montana \$417 per person.⁵⁷ According

48. *Id.* at 9.

49. *Id.*

50. ATKINSON & ROSTAD, *supra* note 30, at 16.

51. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., WORK PROGRAMS FOR INMATES – FPI 1 (2017) [hereinafter PROGRAM STATEMENT NO. 8120.03]. For more on UNICOR, see generally UNICOR, FACTORIES WITH FENCES: 85 YEARS BUILDING BRIGHTER FUTURES (2019), https://www.unicor.gov/publications/corporate/FactoriesWithFences_FY19.pdf [<https://perma.cc/UL3-VXVT>].

52. PROGRAM STATEMENT NO. 5251.06, *supra* note 26, at 8.

53. *Id.*

54. PROGRAM STATEMENT NO. 8120.03, *supra* note 51, at 25–29; PROGRAM STATEMENT NO. 5251.06, *supra* note 26, at 11.

55. Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827, 93 Stat. 1167, 1215 (codified at 18 U.S.C. § 1761(c)).

56. 18 U.S.C. § 1761(c); BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1 (2004); GOODRIDGE ET AL., *supra* note 42, at 18.

57. See NAT'L CORR. INDUS. ASS'N, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM CERTIFICATION & COST ACCOUNTING CENTER LISTING: STATISTICS FOR THE

to one study, between 1998 and 2001—when a worker had to earn \$830 per quarter, or \$3,320 per year, to earn a quarter year of credit toward Social Security—PIECP inmates had an annual gross income of \$785 in the twenty-fifth percentile; \$2,345 at the median; \$3,755 at the mean; and \$16,187 at the maximum.⁵⁸ Therefore, only about one-half of PIECP employees earned toward Social Security in 2001.⁵⁹

In both FPI and PIECP employment, inmates do not receive every dollar of their wages. Under FPI, Congress requires withholding at least 15% for costs associated with the inmate's release from prison; the statute does not provide an upper cap on garnishment.⁶⁰ Under PIECP, Congress limits garnishment to a maximum of 80% of gross wages.⁶¹ Therefore, if an inmate works on a PIECP project paying the federal minimum wage of \$7.25 per hour, the inmate may only currently net \$1.45 per hour—some additional amount is held in an interest bearing account for the inmate's release.⁶² Between 1979 and 2003, jurisdictions operating a PIECP program paid over \$264 million in wages but deducted over \$146 million from those payments—in part for room and board, taxes, child support, and victim compensation funds.⁶³ Thus, parties other than inmates are the first beneficiaries of these incomes: 30% is paid to the prison for room and board, 11% to Social Security and Medicare, and 9% to crime victims.⁶⁴

State treatment of inmate labor largely mirrors the federal system. With respect to internal work assignments, most states pay some small amount per hour of work.⁶⁵ Additionally, many operate state-owned businesses or participate in PIECP.⁶⁶ For example, Missouri requires inmates to work unless they present proof of inability, and inmates make a host of products—from practical to patriotic.⁶⁷ Similarly, in 1994, over 70% of Oregon voters

QUARTER ENDING JUNE 30, 2020, at 1 (2020); NAT'L CORR. INDUS. ASS'N, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM QUARTERLY REPORT: STATISTICS FOR THE QUARTER ENDING JUNE 30, 2020, at 1 (2020). To calculate the gross wages, the total should be reduced by amounts given for FPI (\$755,491), leaving \$9,239,362.

58. PETERSIK ET AL., IDENTIFYING BENEFICIARIES OF PIE INMATE INCOMES: WHO BENEFITS FROM WAGE EARNINGS OF INMATES WORKING IN THE PRISON INDUSTRY ENHANCEMENT (PIE) PROGRAM?, at 49 tbl.20 (2003); *Quarter of Coverage*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/QC.html> [<https://perma.cc/9VL9-BNB6>].

59. See PETERSIK ET AL., *supra* note 58, at 49 tbl.20.

60. 18 U.S.C. § 4126(c)(4).

61. § 1761(c)(2).

62. GOODRIDGE ET AL., *supra* note 42, at 19.

63. BUREAU OF JUST. ASSISTANCE, *supra* note 56, at 4.

64. PETERSIK ET AL., *supra* note 58, at 17, 53.

65. See *State and Federal Prison Wage Policies and Sourcing Information*, *supra* note 38.

66. See Sawyer, *supra* note 41.

67. MO. ANN. STAT. § 217.337 (West 2020); see also *Oldcroft v. Mo. Bd. of Prob. &*

approved a ballot measure mandating all prisoners work forty hours per week and requiring the state to actively market inmate labor to private employers.⁶⁸ Further, although Massachusetts prohibits private companies from employing inmates, it has a long history with its own prison industries program, MassCor.⁶⁹ Thus, states have a range of work arrangements for inmates much like the federal government.

III. MECHANICS OF THE PAYROLL TAX SYSTEM

American payroll taxes are earmarked for particular expenditures, notably for Social Security and Medicare.⁷⁰ The link between the tax and its related benefits was once thought to be an important political choice to ensure the continuation of the benefit programs.⁷¹ Nevertheless, this link is not necessary, and with respect to prison labor, it does not always exist and is sometimes selectively retained.⁷²

A. Taxes Under FICA

1. In General

FICA imposes limited taxes that have greater financial impact on low-income taxpayers.⁷³ For 2021, the portion of FICA that funds Social Security is a 12.4% tax on the first \$142,800 of an employee's wages (this cap is indexed annually for inflation).⁷⁴ This means that, in 2021, the maximum Social Security tax an employee can pay is \$8,853.60, and any wages earned in excess of \$142,800 are not subject to the Social Security tax. The portion of FICA that funds Medicare is a 2.9% tax not subject to a wage cap and can,

Parole, No. 4:12-CV-66, 2012 WL 1205119, at *3–4 (E.D. Mo. Apr. 11, 2012); *Missouri Bicentennial Limited Edition Commemorative Items*, MO. VOCATIONAL ENTERS.: CORR. INDUS., <https://docservices.mo.gov/mve/index.html> [<https://perma.cc/VA63-LY76>] (providing examples of the variety of products made by Missouri inmates).

68. *Oregon State Prison Inmates Required to Work Full Time, Measure 17 (1994)*, BALLOTPEdia, [https://ballotpedia.org/Oregon_State_Prison_Inmates_Required_to_Work_Full_Time_Measure_17_\(1994\)](https://ballotpedia.org/Oregon_State_Prison_Inmates_Required_to_Work_Full_Time_Measure_17_(1994)) [<https://perma.cc/C4B8-5Y2M>]. In 1999, Oregon's Measure 68 created a semi-independent state agency called Oregon Corrections Enterprises, which provides inmates with training and work opportunities. *About Us*, OR. CORR. ENTERS., https://oce.oregon.gov/content/OCE_About_Us.asp [<https://perma.cc/VTH7-B4RH>].

69. See MASS. GEN. LAWS ANN. ch. 127 § 51 (West 2020).

70. I.R.C. § 3101(a).

71. STEPHANIE HUNTER MCMAHON, *PRINCIPLES OF TAX POLICY* 1 (2d ed. 2018).

72. *Id.* at 267.

73. *Id.* at 260.

74. Janet Berry-Johnson, *FICA Tax: Everything You Need to Know*, BENCH (May 12, 2020), <https://bench.co/blog/tax-tips/fica-tax/> [<https://perma.cc/8GAP-YFNK>].

therefore, be a significantly larger tax for high-wage taxpayers.⁷⁵ One half of FICA is imposed on employers, and the other half is imposed on employees.⁷⁶ Because the Social Security portion of FICA is limited by the wage cap, the tax is regressive and constitutes a larger percentage of wages for low-wage employees.⁷⁷

Additionally, FICA does not apply to all workers.⁷⁸ Employment that is taxed for Social Security and Medicare is “covered” employment, whereas employment that is exempt is “noncovered” employment.⁷⁹ For example, some state, county, and municipal employees may be entitled to state-funded retirement benefits and not required to pay FICA, in which case their work is noncovered.⁸⁰ Other examples of noncovered employment include certain on-campus college jobs, certain religious work, and all inmate labor.⁸¹

For covered employment, FICA generally applies to the first dollar earned.⁸² In limited circumstances, Congress has set a minimum threshold so that payroll taxes do not apply.⁸³ For example, Social Security and Medicare only apply to employers who pay more than \$2,300 to a household worker and more than \$1,800 to an election worker; more special limits apply for the tax’s application to farm workers.⁸⁴ Once above the threshold, I.R.C. § 6051(a) requires employers report compensation subject to FICA.⁸⁵

Currently, both the employer’s and employee’s taxes operate through withholding wages or based on those wages.⁸⁶ To the extent an employee has multiple employers, the employee receives a refundable credit for his or her portion paid on wages in excess of the cap; however, each employer must always pay its full portion, which can result in employers collectively paying more than the \$8,537.40 maximum per employee.⁸⁷ Employers must deposit

75. *Id.* Additionally, a 0.9% tax is imposed on those with income above \$250,000 for joint returns or \$200,000 for individual filers. § 1401(b)(2).

76. Berry-Johnson, *supra* note 74. Compare § 3101(a)–(b) (providing for individual income tax), with § 3111 (a)–(b) (providing for employer payroll tax).

77. See Berry-Johnson, *supra* note 74.

78. See § 3121 (clarifying taxable wages and employment exceptions).

79. See §§ 3101(a)–(b)(1), 3121(b).

80. Social Security Protection Act of 2004, Pub. L. No. 108-203, § 419, 118 Stat. 493.

81. I.R.C. § 3121(b)(2), (b)(7)(C)(i), (b)(8).

82. See Berry-Johnson, *supra* note 74.

83. See, e.g., § 3121(b)(7).

84. *Topic No. 756 Employment Taxes for Household Employees*, INTERNAL REVENUE SERV. (Jan. 6, 2021), <https://www.irs.gov/taxtopics/tc756> [<https://perma.cc/CPH9-BME7>]; *Election Workers: Reporting and Withholding*, INTERNAL REVENUE SERV. (Dec. 3, 2020), <https://www.irs.gov/government-entities/federal-state-local-governments/election-workers-reporting-and-withholding> [<https://perma.cc/8RXL-89F6>]; INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, (CIRCULAR A), AGRICULTURAL EMPLOYER’S TAX GUIDE 11–12 (2019).

85. § 6051(a).

86. Berry-Johnson, *supra* note 74.

87. § 6413(c)(1).

withheld and owed taxes according to one of two deposit schedules: monthly or semi-weekly.⁸⁸ A 15% penalty may be imposed on employers if deposits are not timely.⁸⁹ If employers do not properly withhold wages, employees still owe their share of FICA.⁹⁰

2. *Prison Specifics*

In most cases, inmate labor does not constitute covered employment.⁹¹ Therefore, any earnings inmates receive are generally not subject to FICA.⁹² Congress included the current exclusion in 1950.⁹³ Today, employment is defined for FICA purposes to exclude services performed “in a hospital, home, or other institution by a patient or inmate thereof.”⁹⁴ Congress also exempts such work from the additional 0.9% Medicare tax.⁹⁵ The only exception is when inmates work for PIECP, in which case their labor is generally, but not always, subject to the tax.⁹⁶ One result of the exclusion is that employers enjoy a reduced cost of labor.⁹⁷

Work in prison—either through a prison assignment, FPI, or (in some cases) PIECP—does not constitute covered employment for purposes of FICA.⁹⁸ PIECP is difficult because its governing rules are ambiguous.⁹⁹ The Social Security Administration describes FICA’s applicability to prison labor as dependent on a common law test for employment status.¹⁰⁰ “This includes the ability of the employer to select, dismiss, and control the worker

88. *See Form 941 for 2021: Employer’s QUARTERLY Federal Tax Return*, INTERNAL REVENUE SERV. (rev. Mar. 2021), <https://www.irs.gov/pub/irs-pdf/f941.pdf> [<https://perma.cc/5B86-E2XX>]; INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, (CIRCULAR E), EMPLOYER’S TAX GUIDE 26 (2019).

89. § 6656(b)(B)(ii).

90. 26 C.F.R. § 31.3102-1(c) (2021). Moreover, employers are liable for 20% of that employee’s share of FICA (40% if the employer failed to file information return without reasonable cause), plus the employer’s portion of FICA. I.R.C. § 3509(b)(1); Rev. Rul. 86-111, 1986-2 C.B. 176.

91. I.R.C. § 3121(b)(6)(A).

92. *See id.*

93. Social Security Amendments Act, P.L. 81-734, 64 Stat. 477, § 210.

94. I.R.C. § 3121(b)(7)(F)(ii). Therefore, shifting from incarceration to supervision of convicted persons may not change the tax result. *See id.*

95. § 3121(u)(3), (u)(2)(B)(ii)(II).

96. § 3121(b)(7)(C)(i).

97. *See* § 3111 (prescribing that, as taxable wages decrease due to exemptions, the total amount required by employers will also decrease because they are taxed at a percentage of the taxable wages paid).

98. *See* § 3121(b)(6)(a).

99. *See id.*

100. *Program Operations Manual System*, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0301901560> [<https://perma.cc/U88V-RT2B>]; 20 C.F.R. § 404.1007(a) (2021).

inmate.”¹⁰¹ Thus, the issue for private employers within PIECP is whether the relationship qualifies under the common law definition of employment for Social Security and Medicare. Despite this legal ambiguity, many inmates working in PIECP programs contributed up to \$1.75 million (or 6%) of their wages in 2003, and employers contributed 5.4% that same year.¹⁰²

When inmates are excluded from FICA, their employers enjoy real world advantages. Prisons can operate at lower costs because of inmate labor.¹⁰³ Prison industries can enjoy the value and existence of a regular, low-price workforce without funding their share of inmates’ eventual use of the American social safety net.¹⁰⁴

However, if inmates and their employers were to pay FICA taxes (as occurs with some PIECP employment), the amount owed might be negligible due to the low rate of inmate wages. As discussed in Part II, in most instances, inmate wages are not set at the prevailing or market rate—although the gross wage would be used for FICA as it is for individuals who have wages garnished outside of the prison system.¹⁰⁵ For example, a worker earning \$1.15 per hour and working forty hours per week for fifty-two weeks per year would earn a gross income of \$2,392 annually. The tax for Social Security on this amount would be \$148.30 for both the employer and the employee. The tax for Medicare would be \$34.68 for each. This tax revenue would help fund benefits for others but, as discussed in the next Section, not for working inmates.¹⁰⁶

B. Benefits of FICA

1. In General

In a statutory regime separate from the Internal Revenue Code, Congress authorized the Social Security Administration to administer the Social Security program and authorized the Department of Health and Human Services’ Centers for Medicare and Medicaid Services to administer Medicare.¹⁰⁷ This administration is critical as Social Security and Medicare

101. *Program Operations Manual System*, *supra* note 100.

102. PETERSIK ET AL., *supra* note 58, at 52.

103. Mortiz-Rabson, *supra* note 4.

104. *See* I.R.C. § 3121(b)(6)(A).

105. *See* §§ 3121(a)(6), 3306(b)(6); 26 C.F.R. §§ 31.3102(a)(6)-1, 31.3306(b)(6)-1, 31.3401(a)-1(b)(5) (2021).

106. *See* PETERSIK ET AL., *supra* note 58, at 26.

107. Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 VA. TAX REV. 1, 3 (2006); *How Is Medicare Funded?*, MEDICARE.GOV, <https://www.medicare.gov/about-us/how-is-medicare-funded> [<https://perma.cc/2R8V-8XFS>].

are two of the largest entitlement programs in the United States, constituting over 36% of federal expenditures in 2019.¹⁰⁸ These programs are deemed “entitlement programs” because their benefits are owed regardless of annual appropriations legislation.¹⁰⁹ A change in underlying legislation would be required to alter payout structures.

To qualify for Social Security benefits, workers born after 1928 must accumulate at least forty quarters of work in “covered employment.”¹¹⁰ A quarter generally means the three-month calendar quarter that, in 2021, generates at least \$1,470 of wages (the threshold amount is adjusted each year for inflation). However, if an employee’s earnings are not spaced evenly throughout the year, the Social Security Administration divides the total annual earnings by \$1,470 to see how many quarters, up to four, the employee could have earned.¹¹¹ As of 2021, if a worker surpasses the forty quarter threshold, the worker qualifies for full retirement benefits at age sixty-five, sixty-six, or sixty-seven, depending on the worker’s year of birth.¹¹² Choosing to receive payments earlier (as early as sixty-two) reduces the annual benefit, and delaying receipt until age seventy increases the annual benefit.¹¹³

Social Security benefits are calculated based on the beneficiary’s earnings subject to Social Security taxes over his or her highest earning thirty-five-year period.¹¹⁴ This salary index is allocated among three brackets—90%, 32%, and 15%—at amounts that adjust annually with inflation.¹¹⁵ The retiree’s total monthly benefit is a combination of each bracket.¹¹⁶

108. See OFF. OF MGMT. & BUDGET, HISTORICAL TABLES 60 tbl.3.2 (2021), https://www.whitehouse.gov/wp-content/uploads/2020/02/hist_fy21.pdf [<https://perma.cc/PN3W-SWS6>].

109. See MCMAHON, *supra* note 71, at 504 (using the Social Security program as an example of “mandatory spending,” meaning the expense is set by existing law rather than the appropriations process).

110. *Retirement Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/planner/credits.html> [<https://perma.cc/9YDE-9FS9>].

111. See 42 U.S.C. § 414; *Quarter of Coverage*, *supra* note 58.

112. § 416(l)(1). For a full description of benefits, see SOC. SEC. ADMIN., UNDERSTANDING THE BENEFITS (2021).

113. § 402(w); *Starting Your Retirement Benefits Early*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/planner/agereduction.html> [<https://perma.cc/XH5X-85U5>].

114. §§ 401–434. For the federal government’s description of the formula process, see *Primary Insurance Amount*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/COLA/piaformula.html> [<https://perma.cc/2FGM-VJZB>].

115. *Primary Insurance Amount*, *supra* note 114.

116. *Id.*

| Bracket | Average Indexed Monthly Earnings (AIME) | Entitlement |
|-----------------|---|-------------|
| Lowest Bracket | Up to \$996 | 90% of AIME |
| Middle Bracket | Between \$996 and \$6,002 | 32% of AIME |
| Highest Bracket | Between \$6,002 and \$11,900 | 15% of AIME |

The income a person earns above FICA's ceiling—\$142,800 in 2021—is not considered in this calculation and is not taxed.¹¹⁷

The percentages used for calculating benefits provides a greater return for lower income wage earners.¹¹⁸ The result is that the return for workers who pay into Social Security and are in the bottom 20% of earners is almost three times greater than that of the top 20%.¹¹⁹ Their benefits, when viewed as a percentage of their lifetime average income and as a percentage of their total Social Security benefits, are more than those with higher lifetime average incomes.¹²⁰

In addition to the Social Security benefits a worker may receive, the worker's spouse, children, and parents may also receive benefits based on the worker's qualification.¹²¹ Benefits can be paid to a child or spouse even if the worker does not have the required number of credits (one credit per qualifying quarter) so long as the worker had credits for eighteen months in the three years immediately preceding death.¹²² In limited circumstances, reduced benefits are available at age sixty, or possibly earlier, if the recipient is disabled, an un-remarried widow or widower, or an unmarried child.¹²³ With exceptions, a parent can receive benefits if the worker provided at least half of the parent's support and the parent is not personally entitled to receive a larger benefit.¹²⁴ There is a limit—generally between 150% and 180% of the basic benefit rate—on the combined amount family members can receive; excess benefits are reduced proportionally.¹²⁵

On the other hand, some individuals pay FICA but find their contributions are not used to calculate their benefits. For example, if one spouse's benefits

117. *Contribution and Benefit Base*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/COLA/cbb.html> [<https://perma.cc/3T5L-RETU>].

118. See CONG. BUDGET OFFICE, IS SOCIAL SECURITY PROGRESSIVE?, at 1 (2006).

119. *Id.*

120. *Id.*

121. For the federal government's description of survivor benefits, see *Planning for Your Survivors*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/survivors/onyourown.html> [<https://perma.cc/9ASX-DJLT>].

122. *Id.*

123. *Id.*

124. 42 U.S.C. § 402(h)(1).

125. § 403(a).

are sufficiently greater than the other spouse's benefits, the spouse with lower benefits can choose 50% of the greater benefits and receive no benefit from his or her personal contributions.¹²⁶ More detrimental to recipients is that, although U.S. residency is typically not required, benefits may be suspended if an individual lives in certain countries, such as North Korea or Cuba, or lives abroad for more than six months.¹²⁷ Also, undocumented workers are generally denied benefits unless a change in status entitles them to recognition of prior contributions.¹²⁸

Medicare Part A benefits are available if workers are sixty-five years or older, have been permanent legal residents for five continuous years, *and* they or their spouse (or qualifying ex-spouse) have paid Medicare taxes for at least forty quarters of covered work.¹²⁹ If contributions were for less than forty quarters, workers must pay monthly premiums for Part A coverage.¹³⁰ In 2019, Medicare covered 61.2 million individuals and had an average growth of 6.5% in incurred outlays—compared to a 4.1% growth in gross domestic product—constituting over 14% of the federal budget.¹³¹

The lifetime benefits of Social Security and Medicare are significant and estimated to be greater (on average) than FICA recipients' pay.¹³² Largely as a result of increasing Medicare costs, benefits are also expected to grow significantly in future decades. Consequently, some couples pay only 70% of their retirement benefits in FICA.¹³³

Possibly a lesser known FICA benefit is the provision of disability benefits. Technically, there are two disability programs operated through

126. § 402(b)(2), (c)(2); 20 C.F.R. §§ 404.330(d), 404.333 (2021).

127. SOC. SEC. ADMIN., *YOUR PAYMENTS WHILE YOU ARE OUTSIDE THE UNITED STATES* 1, 3 (2020) (providing a discussion of payment limitations).

128. For a discussion of the tax treatment of undocumented workers, see Luz Arévalo et al., *Who Said Your Immigrant Client Cannot Get Credit for Social Security Payments?*, 19 BENDER'S IMMIGR. BULL. 1181, 1181–86 (2014); Stephen Goss et al., Soc. Sec. Admin., *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, ACTUARIAL NOTE NO. 151, Apr. 2013, at 5; Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 5–6 (2006).

129. 42 U.S.C. § 1395c; 20 C.F.R. §§ 406.5(b), 406.11(b), 406.20(b) (2021); *see also* 42 U.S.C. § 413(a) (defining “quarter” and “quarter of coverage”); *id.* § 414(a) (requiring forty quarters of coverage for an individual to be considered “fully insured”).

130. 42 U.S.C. §§ 1395i-2(a)(4), 1395i-2a(a)(2)(c)(3).

131. BD. OF TRUSTEES, FED. HOSP. INS., & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, 2020 ANNUAL REPORT 6, 180 (2020); *see* OFF. OF MGMT. & BUDGET, HISTORICAL TABLES 50 tbl.3.2 (2021), https://www.whitehouse.gov/wp-content/uploads/2020/02/hist_fy21.pdf [<https://perma.cc/PN3W-SWS6>] (providing a breakdown of federal outlays); *Budget Basics: Medicare*, PETER G. PETERSON FOUND. (July 29, 2020), <https://www.pgpf.org/budget-basics/medicare> [<https://perma.cc/ZC4T-5BT8>].

132. Eugene Steuerle & Adam Carasso, *Lifetime Social Security and Medicare Benefits*, STRAIGHT TALK ON SOC. SEC. & RET. POL'Y, Mar. 2003, at 1, 2.

133. *Id.*

Social Security: Social Security Disability Insurance (SSDI), for those who worked long enough and paid Social Security taxes, and Supplemental Security Income (SSI), which pays based on financial need.¹³⁴ SSDI is funded with FICA and is payable to disabled workers who have completed at least twenty quarters of coverage during the previous forty quarters (or five of the past ten years) in a job or multiple jobs where Social Security taxes were withheld.¹³⁵ Alternatively, SSI is funded by general government funds.¹³⁶

In October 2020, SSDI and SSI made payments to over 9.6 million beneficiaries.¹³⁷ Similar to Social Security payments, payments of SSDI are based on average past earnings.¹³⁸ In October of 2020, the average monthly disability payment was \$1,128, and monthly benefits paid from the Disability Insurance Trust Fund totaled almost \$11 billion.¹³⁹ Payments of SSI are tied to income, and more than 8 million payments averaged \$580 per month.¹⁴⁰

Unlike Social Security, disability benefits are not automatically awarded; SSDI and SSI only apply if an individual cannot work because of a severe medical condition that is expected to last at least one year or result in death.¹⁴¹ Although payment amount is not tied to the severity of a worker's disability, the medical condition must significantly limit the worker's ability to do basic work activities.¹⁴² Applicants' doctors are now given controlling weight in that determination, which has resulted in a larger percentage of claimants having low-mortality disorders, such as mental illness and back pain.¹⁴³

Social Security, Medicare, and SSDI operate as primary components of the American social safety net and provide their benefits only to those who qualify through employment.¹⁴⁴ By tying benefits to employment, these programs reinforce and validate worker status. Only through worker status can Americans maximize assistance in the event they are unable to take care of themselves.

134. 42 U.S.C. §§ 401–434; §§ 1381–1385.

135. § 423(c); 20 C.F.R. § 404.130(b) (2021).

136. *Understanding Supplemental Security Income (SSI) Overview—2020 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-over-ussi.htm> [<https://perma.cc/F9N6-AL38>]. For a discussion of how the United States has historically funded social security programs, see Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, 66 SOC. SEC. BULL., no. 1, 2005, at 3–10.

137. SOC. SEC. ADMIN., MONTHLY STATISTICAL SNAPSHOT, OCTOBER 2020 tbls.2 & 3 (2020).

138. 42 U.S.C. § 1382.

139. SOC. SEC. ADMIN., *supra* note 137, at tbl.2.

140. *Id.* at tbl.3.

141. § 423(d)(2)(A)–(B).

142. § 423(d)(2)(A).

143. 20 C.F.R. § 404.1527(c) (2021).

144. David Autor et al., *Disability Policy, Program Enrollment, Work, and Well-Being Among People with Disabilities*, 80 SOC. SEC. BULL., no. 1, 2020, at 57.

2. *Prison Specifics*

Although inmate workers may be aware that Congress denies them Social Security and disability benefits they might have previously earned—an exclusion that dates back to the original Social Security Act¹⁴⁵—they may reasonably assume they are working toward benefits similar to those workers receive outside of the prison industrial complex. That assumption is generally untrue, having repercussions not only for current and former inmates but also for their families and communities. If inmates are otherwise unable to meet requisite thresholds, their spouses, children, and parents may fail to qualify for benefits,¹⁴⁶ thus reducing resources in communities that are already struggling in the absence of incarcerated members.

Inmate labor does not earn toward benefits for two reasons: first, it is carved out of the statute defining covered employment, and second, even when it may constitute covered employment (as with some PIECP jobs), most inmates do not earn sufficient income per quarter to surpass the statutory thresholds.¹⁴⁷ Because gross wage income must be more than \$5,880 annually, or \$490 per month, to earn a full year of credits,¹⁴⁸ the low wages paid to inmates are a double-edged sword. Inmates have less disposable income in the first instance and are less likely to be entitled to the social safety net upon release and retirement. If inmates can surpass the threshold, their low wages are partially compensated for by Medicare coverage and the progressive payout structure of Social Security. Social Security benefits are, in fact, intended to help low-income retirees stay out of poverty and give the greatest return to those who earned the lowest wages—unless the wages were earned during incarceration.¹⁴⁹

145. 42 U.S.C. § 402(x); Social Security Act of 1935, ch. 531, 49 Stat. 620, § 3(a)(1); *see also* I.R.C. § 32(c)(2)(B)(iv) (excluding an earnings received for services provided while incarcerated from counting toward an inmate's earned income tax credit); *Rogers v. Comm'r*, 88 T.C.M. 392, 392 (2004) (highlighting that status as an inmate is the determinative factor and noting that the exclusion applies to services performed at a location outside the penal institution, as well as to services paid for by private entities); *Wilson v. Comm'r*, 81 T.C.M. 1745, 1748 (2001) (“[A]ll wages for services provided by inmates of penal institutions are expressly excluded from the earned income credit . . .”).

146. *See supra* notes 121–122 and accompanying text.

147. 42 U.S.C. §§ 410(a)(6)(A), 418(c)(6)(B) (prohibiting states from voluntarily extending coverage by contract); *see supra* Part II.

148. *See* SOC. SEC. ADMIN., UPDATE 2021 (2021) (noting that an individual can receive a maximum of four credits). In 2020, individuals had to earn \$1,410 to receive one credit, and in 2021, individuals must earn \$1,470 to receive one credit. *Id.* Thus, in 2020, individuals had to earn at least \$5,640 annually to receive their maximum number of credits, and in 2021, individuals will have to earn \$5,880 to receive the same. *See id.*

149. CONG. BUDGET OFF., *supra* note 118, at 1.

For disability benefits, Congress greatly limits when inmates may claim those benefits. First, Congress generally denies payments to inmates while they are confined, although it does permit payments to an inmate's family members if those family members would otherwise receive benefits based on the inmate's prior qualification.¹⁵⁰ Second, Congress also prohibits payments for physical or mental impairments that arise in the commission of a felony or during imprisonment for a felony.¹⁵¹ Third and finally, because inmate labor is not covered employment, it does not qualify toward the threshold of credits (albeit a lower one) necessary to earn the right to SSDI.¹⁵²

Although the injustice of not covering inmate employment applies to all inmates, it is impossible to calculate how many lose their benefit qualification as a result of this exclusion. Prisons either fail to release or fail to maintain sufficient data to determine how many, or which, inmates would earn quarters while within the prison system to combine this information with inmates' prior work experiences.¹⁵³ Therefore, despite knowing that more than 600,000 inmates were released from prison in 2019 and that nearly one in three individuals have some type of criminal record, only indirect information can gauge the impact of this exclusion.¹⁵⁴

From the information that can be gathered, it is likely harder for inmates—particularly inmates of color—to surpass the thresholds established by Social Security, Medicare, and SSDI because they do not have long employment periods outside of prison to earn coverage.¹⁵⁵ Although the average time served by inmates is approximately three years, some inmates have longer periods of incarceration, and recidivism remains a problem.¹⁵⁶

150. 42 U.S.C. § 402(x)(2).

151. § 423(d)(6); *see also* Social Security Amendments of 1981, Pub. L. No. 97-123, 95 Stat. 1659, § 6(3) (codified at 42 U.S.C. § 423) (allowing the Department of Health and Human Services access to Social Security numbers to ensure ineligible prisoners do not receive disability).

152. 42 U.S.C. §§ 402(x)(2), 423(j).

153. Press Release, Bernadette Rabuy & Daniel Kopf, Prison Pol'y Initiative, Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/2C6T-EX54>].

154. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2019, at 13–14 tbl.8 (2020); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/4CCH-SZGK>].

155. To be covered, an individual typically must earn forty credits. *See* § 414(a). A maximum of four can be earned a year, and thus, it generally takes ten years for an individual to earn all forty credits. *See* § 414(a)(3).

156. MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES 39 tbl.7.11 (2015) (highlighting that the average time served by federal prisoners was 37.5 months); DANIELLE KAEBLE, U.S. DEP'T OF JUST., TIME SERVED IN STATE

The average age of inmates in the federal system is forty-one, and the average sentence imposed is 11.75 years, with 97% of inmates required to serve a period of supervision after release.¹⁵⁷ In 2019, 34.3% of prisoners were sentenced between ten and twenty years, 14.4% were sentenced to twenty years or more, and 2.6% were sentenced to life.¹⁵⁸ Over 11% of federal prisoners are fifty-six and older, putting these prisoners at risk of never qualifying for benefits if they had not done so before imprisonment.¹⁵⁹ Moreover, of state prisoners released in 2005, 44% were arrested at least once in the next year, and 83% were arrested at least once during the nine-year period following release—shortening their lifetime earning capacity.¹⁶⁰ Exactly how many individuals spend a significant chunk of their working lives behind bars is impossible to quantify.

The time lost by 5 million formerly incarcerated individuals also hinders their ability to gain employment upon release, making it all the more difficult to qualify for the social safety net.¹⁶¹ Even before COVID-19, of individuals aged twenty-five to forty-four who wished to work, the unemployment rate of formerly incarcerated individuals was 27.3%, compared to 5.8% for the general public.¹⁶² Thus, even though some studies have shown these individuals are more stable employees than their peers, incarceration

PRISON, 2016, at 1 (2018) (noting that the majority of violent offenders released from state prison in 2016 served less than three years); *see also* MARIEL ALPER ET AL., U.S. DEP'T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014), at 1 (2018) [hereinafter PRISONER RECIDIVISM] (highlighting that 83% of state prisoners released across thirty states in 2005 were arrested at least once within nine years).

157. U.S. SENTENCING COMM'N, QUICK FACTS - FEDERAL OFFENDERS IN PRISON - MAY 2019, at 1, 2 (2019).

158. *Id.* at 2.

159. *See Inmate Age*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp [<https://perma.cc/SHZ8-MQRD>].

160. PRISONER RECIDIVISM, *supra* note 156, at 1.

161. Shannon et al., *supra* note 2, at 1796, 1804; *see also* Elizabeth Westrope, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute Is a Necessary Remedy*, 108 J. CRIM. L. & CRIMINOLOGY 367, 370 (2018); Lucius Couloute & Daniel Kopf, *Out of Prison and Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/6HN3-BHS6>]; Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 263–64 (2014). For a discussion on the effects of incarceration for black and white men, see Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOCIO. REV. 355, 365–66 (2005) (finding that race was an immaterial factor regarding the likelihood of ex-convict receiving a callback). *But see* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960–62 (2003) (finding that, although substantial barriers to employment exist for all individuals with prior felony convictions, such barriers are much higher for African-American males than their white counterparts).

162. Couloute & Kopf, *supra* note 161, at fig.1.

negatively impacts wage growth by approximately one-third.¹⁶³ So it should be unsurprising that a study by the Brookings Institution found that the majority of recently released individuals receive salaries at or below the federal minimum wage.¹⁶⁴

Finally, former inmates are more likely to be from poor backgrounds and communities with higher unemployment levels.¹⁶⁵ One study from 2014 found that the median annual income for incarcerated individuals before prison was \$19,185—falling well below that of similar non-incarcerated individuals even within the same race and gender.¹⁶⁶ The intersectionality of poverty with race only aggravates these problems. For African-American males, the civilian noninstitutional unemployment rate in October 2020 was 11.5%, compared to 5.8% for white males.¹⁶⁷ As a result, it is reasonable to conclude many inmates did not enter prison with numerous quarters earned under FICA and will face hurdles seeking employment upon release. Moreover, because communities of color generally have high unemployment rates on a national level,¹⁶⁸ failing to recognize work during incarceration means less of the social safety net flows into them.

These inequities are starker for wrongfully incarcerated individuals, of whom, as of 2016, at least 47% were African-American; more may have been African-American but not included in this statistic.¹⁶⁹ More, certainly, were of other minority groups. Although several states provide payments to those wrongfully imprisoned—for example, Ohio pays \$56,752.36 annually (adjusted every two years for inflation)—these payments may pale in

163. Theodore S. Corwin III & Daniel K.N. Johnson, *Plus a Life Sentence? Incarceration's Effects on Expected Lifetime Wage Growth* 16 (Colo. Coll., Working Paper No. 2019-03, 2019); Jennifer Hicks Lundquist et al., *Does a Criminal Past Predict Workers Performance? Evidence from America's Largest Employer*, 96 SOC. FORCES 1039, 1040 (2018); Dylan Minor et al., *Criminal Background and Job Performance*, 7 IZA J. LAB. POL'Y, no. 8, 2018, at 1, 2, 32.

164. ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1 (2018).

165. *Id.* at 14.

166. See Rabuy & Kopf, *supra* note 153.

167. Table A-2. *Employment Status of the Civilian Population by Race, Sex, and Age*, U.S. DEP'T OF LAB. STATS. (Jan. 8, 2021) <https://www.bls.gov/news.release/empstat.t02.htm> [<https://perma.cc/KSC4-PR2C>].

168. LOONEY & TURNER, *supra* note 164, at 2, 15–16.

169. SAMUEL R. GROSS ET AL., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [<https://perma.cc/8HE8-YHET>]; Matthew Clarke, *Racism and Wrongful Convictions*, CRIM. LEGAL NEWS (May 15, 2020), <https://www.criminallegalnews.org/news/2020/may/15/racism-and-wrongful-convictions/> [<https://perma.cc/9AR9-DPT6>]. Special thanks to Larry Y. Lee who raised this issue in a paper for Professor Bridget Crawford of Pace Law School as a result of the Symposium.

comparison to the loss of future benefits.¹⁷⁰ Additionally, these payments were not created with an understanding that they were substituting a wrongfully convicted individual's right to Social Security and Medicare.

For those who were not absolved of their crimes, the problems referenced in this Article will not be solved by the current shift away from incarceration and toward confinement within the community, but they may be mitigated depending on the terms of confinement.¹⁷¹ However, if this form of punishment provides food and shelter either directly or indirectly, the confined person still qualifies as an inmate for purposes of the FICA exclusions.¹⁷² As an example of the potential traps of confinement, individuals can only retain SSI benefits if they are not provided food and shelter; even inmates absent from institutions for up to fourteen consecutive days retain inmate status.¹⁷³ Thus, larger changes to FICA are needed to address the problems that exist today.

The negative impact of excluding inmate labor from FICA, and its corresponding reduction of opportunities to earn into the American social safety net, impacts all inmates but has a disproportionate impact on racial minorities. Although only 3% of the total U.S. adult population has been imprisoned, 15% of the African-American adult male population has been.¹⁷⁴ The intersection of race and poverty among those incarcerated emphasizes the harms of this exclusion. The harm can be somewhat lessened by recognizing inmate labor and permitting inmates to earn benefits to the same extent as other workers.

IV. PROPOSAL

For the reasons outlined in Part III, Congress should repeal the sections of the Internal Revenue Code that exclude prison labor from the FICA regime. This would require employers and employees to report and pay taxes on inmates' wages. However, even with this step, inmates working under prison work assignments and FPI labor are unlikely to earn income sufficient to

170. Letter from Keith Faber, Auditor, State of Ohio, to Anderson M. Renick, Clerk of Ct., Ohio Ct. of Claims (Jan. 27, 2021) (on file with author).

171. Faith E. Lutze et al., *The Future of Community Corrections Is Now: Stop Dreaming and Take Action*, 28 J. CONTEMP. CRIM. JUST. 42, 54 (2012); VERA INST. OF JUST., *THE NEW DYNAMICS OF MASS INCARCERATION I* (2018).

172. 20 C.F.R. § 416.201 (2021).

173. § 416.211(a)(2), (c)(2); see *Program Operations Manual System (POMS)*, SOC. SEC. ADMIN. (Sept. 11, 2013), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500520009> [<https://perm.a.cc/8AH9-DWQN>].

174. Shannon et al., *supra* note 2, at 1814; see also CARSON, *supra* note 154, at 16 tbl.20 (highlighting that, in 2019, black men were approximately 5.7 times more likely to be imprisoned than white men and noting that this trend occurred in teens, too, as black males ages eighteen to nineteen were twelve times more likely to be imprisoned than their white peers).

qualify for quarters of credit under Social Security, Medicare, and SSDI. Recognizing the political difficulty of mandating a minimum wage for prison labor, FICA needs to establish a minimum wage and require employers—in this case, prisons or private businesses employing inmates—to pay both halves of FICA.

First, in the easier context of PIECP employment where inmates are owed prevailing wages, inmates and employers currently contribute to FICA despite its ambiguity.¹⁷⁵ To the extent employment is based on a prevailing wage, that wage should generate sufficient earnings that permit inmates to gain four quarters of credit per year. Even though inmates receive a lower post-garnishment amount when compared to others, it is their pre-garnished wages that count toward FICA. Some allege the PIECP program is abused and the pre-garnished wage remains below the prevailing wage—possibly illustrated by the low average wage discussed in Part II.¹⁷⁶ Consequently, because inmate workers have little power against their employers, the presumption should be in their favor; when workers do not earn four quarters per year, an investigation should determine the reason for that failure.

For prison work assignments and FPI labor, because little to no wages are required by current systems, inmates are unlikely to earn even one quarter per year despite working full-time. In recognition of this injustice, Congress should either mandate the payment of a federal minimum wage or create an alternative measure for these benefits. Because the first option has not been, and is unlikely to become, politically popular,¹⁷⁷ Congress should develop an

175. See *Program Operations Manual System (POMS)*, SOC. SEC. ADMIN. (Aug. 19, 2008), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0301901560> [<https://perma.cc/Q2KW-WPX L>].

176. See Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should Be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/> [<https://perma.cc/BVX8-T9AF>]. Some prisons avoid the requirement of paying working prisoners prevailing wages by implementing training programs, which allow the institutions to limit paid wages. *Id.* At any time, prisoners can be moved from one training program to another. *Id.* Consequently, prisoners may work for years before qualifying to receive the prevailing wages to which they are entitled. *Id.*; see also 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, 1164 (2004) (noting that many prisoners working in federal prisons are employed by UNICOR, a government-owned corporation, and do not receive real wages).

177. See U.S. GOV'T ACCT. OFF., PRISON LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE 2, 7 (1993); Editorial, *No Higher Wages for Inmates*, DAILY GAZETTE (Feb. 8, 2019), <https://dailygazette.com/2019/02/08/editorial-no-higher-wages-for-inmates/> [<https://perma.cc/U63R-UY5D>]; *Should Prisoners Be Paid Minimum Wage?*, THE TYLT (Dec. 30, 2016), <https://thetylt.com/politics/should-prisoners-be-paid-minimum-wage> [<https://perma.cc/YQH8-3Q5H>]; Lauren Castle & Maria Polletta, *Some Prisoners in Arizona*

alternative measure to quickly mitigate harm and ensure the proper recognition of inmate labor.

One possibility would be to eliminate the tax component of these benefit systems and treat inmates engaged in full-time prison labor as earning four quarters of credit per year. This option was used in 1972 when Congress attempted to mitigate the injustice of Japanese-American internment during World War II.¹⁷⁸ Although a different context, Congress awarded formerly interned citizens of Japanese ancestry non-contributory Social Security credits if they were aged eighteen or older.¹⁷⁹ This resulted in them receiving credit toward Social Security for their period of internment, and they were not required to contribute financially for those credits.¹⁸⁰

In the context of prison labor, this option presents two problems. First, this approach does not generate new tax revenue. In the more limited context of internment, Congress authorized general revenue funds to make the Social Security and Medicare systems whole, but that option is less viable with the significantly larger prison population.¹⁸¹ Second, simply providing credits designates no clear value for calculating future benefits. For former internees, the credits and value for future benefits were based on the prevailing minimum wage or the individual's prior earnings, whichever was larger.¹⁸² Although the second problem can be fixed by assuming a minimum wage based on a fixed federal rate or the inmate's employment history, this assumption would not address the lack of tax revenue.

Another possibility would be to require the payment of FICA on deemed wages set at the minimum wage. Under this alternative, inmates would not earn minimum wage but would be treated as doing so for purposes of calculating their credits and future Social Security benefits. This would minimally increase the tax burden on both the employer and the inmate. For a thirty-hour per week job paying \$7.25 per hour, the employee portion of the tax would be \$13.49 per week. Nonetheless, based on their current net pay, many inmates would be unable to make that contribution.

Consequently, the employee's portion of FICA should be borne by their employers. This tax shifting is unusual but not unprecedented. Members of

Make 10 Cents per Hour—Should They Get a \$3 Minimum Wage?, AZ CENT. (Feb. 7, 2020), <https://www.azcentral.com/story/news/local/arizona/2020/02/07/arizona-lawmaker-proposes-3-per-hour-minimum-wage-prisoners/4681453002/> [<https://perma.cc/5MKT-BNEQ>]; Joseph Spector, *Big Raise? Prison Inmates Could Get a Major Boost in Their Wages in New York*, DEMOCRAT & CHRON. (Feb. 7, 2019), <https://www.democratandchronicle.com/story/news/politics/albany/2019/02/07/big-raise-prison-inmates-could-get-major-boost-minimum-wages-new-york/2799895002/> [<https://perma.cc/QTP5-7Z3F>].

178. Social Security Amendments of 1972, Pub. L. No. 92-603 § 231, 86 Stat. 1329.

179. 42 U.S.C. § 431(b)(1).

180. *See* § 431(b)(1), (3).

181. § 431(c).

182. § 431(b)(1)(A)–(B).

religious orders who have taken a vow of poverty are ordinarily exempt from FICA and are not covered by Social Security, but orders can make irrevocable elections to cover their members and employees.¹⁸³ In cases of election, the order pays the employer and employee portions of FICA taxes.¹⁸⁴ Congress could adopt a similar approach for inmates because, with current wage rates, they have all but taken such a vow. This would have a secondary benefit of forcing employers (whether prisons or private businesses) to internalize the costs of prison labor. In a limited way, imposing the tax would equalize businesses' costs and simultaneously address any concerns that prison labor is cheaper than other types of labor.

A problem with this approach is that the federal minimum wage is not the prevailing wage in all communities, and as a result, a different valuation is likely fairer. Several states have raised their minimum wages above \$7.25 per hour, which could lead to an argument for a higher valuation.¹⁸⁵ Nonetheless, it is unlikely that any one value should govern all inmates within a state. One valuation alternative—derived from how the government approaches members of religious orders who have taken vows of poverty—is to assign a wage amount based on the fair market value of room and board, clothing, and other perquisites inmates receive.¹⁸⁶ Although this would create inconsistencies in the treatment of employed and unemployed inmates because they are all provided similar goods, this approach better approximates the value of services that inmates receive.

With either approach for putting an artificial value on inmate labor, inmate workers can enjoy credits toward the American social safety net. The proposal does not require inmates be given benefits upon reaching the retirement age, but it identically recognizes inmate labor and labor conducted outside of prison. The same number of quarters would be required to earn benefits. Denying this treatment for employees who have worked the requisite quarters but have done so behind bars is an unconscionable use of punishment beyond that imposed by the criminal justice system.

This Article recognizes there may be a slight increase in adverse incentives created by its proposal, but this increase is so small in the context of Social Security, disability, and Medicare that it should be properly set aside.

183. § 410(a)(8)(A)–(B); see *Program Operations Manual System (POMS)*, SOC. SEC. ADMIN. (Aug. 22, 2005), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0301901620> [<https://perma.cc/5ZPC-QUJT>]; 20 C.F.R. § 404.1046(a) (2021); I.R.C. § 3121(r)(1); *Samson v. United States*, 743 F.2d 884, 887 (Fed. Cir. 1984) (holding that payment for work done by a member of a religious organization for an unrelated third party was taxable income).

184. See *Program Operations Manual System (POMS)*, *supra* note 183.

185. *State Minimum Wages*, NAT'L CONF. STATE LEGISLATURES (Jan. 8, 2021), <https://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [<https://perma.cc/7FJZ-MB8G>].

186. I.R.C. § 3121(i)(4).

The risk that individuals in high unemployment areas or with few employable skills will seek entry into the prison system to earn toward future benefits is low. If the wage system permitted qualification in a sufficiently short period and if jobs were guaranteed, this risk would be greater. But it would still be unlikely to overcome the many reasons individuals avoid incarceration. This risk could be greater if inmates were entitled to other benefits upon release, such as unemployment, because those benefits would be more immediate. Due to the different incentive effects, however, unemployment will be discussed fully in a future article.

With respect to Social Security, disability, and Medicare, this Article contends that, even with imperfections, a proper valuation regime can recognize the value of inmate labor. Whether tied to the federal minimum wage or some other measure, generally prevailing thresholds could be satisfied, allowing inmates to earn toward requisite quarters. The taxes due on inmate wages could be assigned to the employer, thereby raising the funding revenue for future benefits while also forcing employers to internalize the costs of inmate labor.

V. CONCLUSION

The United States' high incarceration rate has many consequences of which policy makers and the public may be unaware. One of those consequences is that inmates who are employed—whether for prisons, prison industries, or private employers—are all working hard, but from the perspective of Social Security, disability, and Medicare, they are hardly working. Their work is largely ignored for purposes of the American social safety net.

When inmates are not allowed to contribute to the FICA tax base, they are not earning toward the benefits these taxes fund. That harsh reality applies not only to inmates themselves but also to their dependents who may be affected to the extent inmates never qualify for benefits. This increases the chance that members of highly incarcerated populations, especially African-American and other minority populations, may find themselves without the Social Security, disability, and Medicare benefits expected from working long stretches of their lives—all because their work is defined as not, in fact, being work.

This Article argues that the discriminatory exclusion of most prison labor from FICA and its related benefit programs should be repealed. This change would permit a larger number of former inmates and their families to benefit from the American social safety net. However, simply repealing the current exclusion is insufficient. As long as the majority of prison labor pays sub-market wages, many incarcerated laborers will not earn toward future benefits

despite a life of work. Therefore, a more significant change is required by either mandating a minimum wage or creating an equivalent valuation for FICA. Doing so acknowledges that inmate labor is valuable and should receive societal recognition.

Changing this regime is not a difficult decision to make. An expansion of Social Security and Medicare is consistent with the growth these programs have experienced since their inception. The original Social Security Act of 1935 covered less than 60% of the workforce; by 1981, Social Security covered over 88%, and today, it covers more than 90%.¹⁸⁷ The difficulty is deciding Social Security's value for the formerly incarcerated. Policy makers must accept a valuation of prison labor and, by doing so, mitigate the administrative difficulties of operating the revised regime. It is time for all workers to be recognized for purposes of the American safety net.

187. William J. Nelson Jr., Soc. Sec. Admin., *Employment Covered Under the Social Security Program, 1935–1984*, 48 SOC. SEC. BULL., Apr. 1985, at 33, 33; Melissa M. Favreault, *Why Do Some Workers Have Low Social Security Benefits?*, RET. POL'Y PROGRAM, June 2010, at ii, 1 n.2.