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Article

Ethan Heben[a1]

PRISONERS AS "QUASI-EMPLOYEES"

Abstract

Prison laborers represent a unique class within the workforce of the United States. Prisoners do not meet the definition of "employee" under the Fair Labor Standards Act (FLSA), but the products and services they generate create significant profits for private companies and, in general, the prison industrial complex (PIC). The PIC has seen tremendous growth in recent years, but Congress and courts have been slow to provide the necessary protections required for inmate laborers. The dual problems of prisoners' limited compensation and protections are only compounded by the prison population's disproportionate number of minority inmates. Any potential reform of the PIC must consider these discriminatory effects in light of historical discrimination--including slavery and the convict-labor system--within the United States. Congress, working with key stakeholders, has the rare opportunity to address this issue on a clean slate, as there are no current statutes that adequately address prison laborers' status and rights.

This Article argues that a new statutory regime should classify working prisoners as "quasi-employees" due to the innate pecuniary nature of certain prison labor, especially when the labor is for private companies. This regime should focus on the reality of each employer-prisoner relationship, take into consideration the human dignity of each prisoner, and endorse policies to reduce recidivism and the debilitating effects of incarceration on future employment. In turn, this regime would remove the ambiguity of applying the FLSA to prisoner laborers, address the current pay deficiencies, and mitigate the discriminatory effects of racial disparity in the PIC.

*184 Introduction

Prisoners constitute a unique class of laborers in the United States workforce. They do not fit squarely within the definition of "employee" under the Fair Labor Standards Act (FLSA), and at the same time their work--and its fruits--cannot be classified as merely a consequence of their incarceration.[1] The prison industrial complex (PIC), and specifically the private prison industry, have grown considerably in recent years.[2] This growth in private industry indicates that prison labor is not merely penological in nature, but also pecuniary. Despite the proliferation of the PIC, Congress has not addressed inmate labor statutorily, and the courts have consistently held that prisoners do not meet the requirements for protections under the FLSA.[3] Courts, in denying FLSA claims by inmates, have focused on the incompatible nature between the statuses of ***185** "prisoner" and "employee," viewing each status as mutually exclusive.[4] This Article argues that a new statutory regime should, instead of focusing on the FLSA, develop a "quasi-employee" status specifically tailored to prison laborers, especially when working for private companies, due to the pecuniary aspects of their labor. This quasi-employee status should focus on the reality of each employer-prisoner relationship, take into consideration the individual dignity of each prisoner, and promote policies that will reduce recidivism and the overall stigma of incarceration.[5]

Part I describes a brief history of prison labor in the United States, the PIC, and other relevant background information.[6] Part II discusses current case law in the United States and how courts have dealt with the dilemma of how to classify prisoners under the FLSA.[7] Part III addresses both the arguments for and against classifying prisoners as "employees" under the FLSA.[8] Part IV explains why a new legal regime and specially tailored classification are necessary, reviewing various international approaches to prison labor and focusing on prison labor's unique racial implications within the United States.[9] Part V advocates for a new quasi-employee status for prison labor with its own comprehensive legal regime.[10] The conclusion underscores the practicality and necessity of the proposed regime.[11]

I. An Introduction and Brief History of Prison Labor in the United States

Historically, prisoners have been required to perform physical labor as part of their punishment.[12] The Thirteenth Amendment, enacted to ban slavery and involuntary labor, specifically exempted prisoners, providing that "[n]either 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."[13] This carve-out, preserving the constitutionality of "involuntary servitude" ***186** insofar as it is imposed on convicts, has been integral in the development of the modern PIC.

Indeed, prisons and their populations have proliferated in ways the framers of the Thirteenth Amendment likely could not imagine. The United States has 122 federal prisons spread throughout the country,[14] and "[e]ach state also has its own prison system."[15] According to the Bureau of Justice Statistics (BJS), in 2016, the United States had an estimated 1.5 million prisoners, with over 1.3 million under state jurisdiction and over 189,000 under federal jurisdiction.[16] There also were approximately 740,000 jail inmates in city and county jails.[17] Federal prisoners, pursuant to federal law, are required to work unless they pose too high of a security risk or have a limiting medical condition.[18] An estimated one-half of prisoners work full-time--approximately 750,000--and that number rises to over one million if jail inmates working in city and county jails are included.[19] The gradual loosening of restrictions on inmate-produced goods, coupled with this increase in the prison population, has made prisoners an attractive work pool for both government and private-run industries.

Even early prison reform legislation contained major exceptions permitting trade in prisoner-made goods, and such restrictions on the use of prison labor and goods have only decreased over time.[20] During the New Deal era, Congress passed the Ashurst-

Sumners Act, which restricted the transportation of inmate-produced goods in interstate ***187** commerce.[21] However, the Act exempted government purchasers, which is to say, it permitted "state use" of prisoner-made goods.[22] Over the past forty years--possibly due to prison overcrowding and the war on drugs[23]--increasingly more exceptions have been made to this restriction.[24] Due to the continual relaxation of such restrictions, the PIC now employs inmates for a wide variety of labor tasks.

Inmates are typically commissioned for various duties, ranging from unskilled to skilled labor. Most of the prisoners working full-time either perform "prison housework," a subset of the "state use" exception that includes "cooking meals, doing laundry, or cleaning the facilities,"[25] or produce low-value items such as license plates and road signs.[26] Inmates reportedly make $0.12 to $0.40 per hour for these types of jobs.[27] An additional 80,000 inmates work for what are known as the "prison industries"--although they produce goods mostly for "state use," they also provide goods for the private sector.[28]

The PIC has developed two dominant systems to facilitate the production of goods and the doling out of inmates as a labor force. Typically, prisoner laborers fall either under a "state account" system or a "contract" system.[29] The former is a government agency that "wholly manages the facility and work process, sells the products, and receives the revenue."[30] The latter, as the name suggests, consists of a contract between a private firm and the prison, in which the firm performs those same managerial functions.[31] "Leasing systems" have historically been prevalent in the South, where the contractor pays the state "per capita per prisoner and is responsible for managing the prison, in exchange for all the labor the contractor can derive from the prisoner for the duration of the contract."[32] Under "contract systems," the contractor pays for each prisoner and is responsible for providing "food, work equipment, and materials" in exchange for "the fruits of the prisoners' labor to the contractor," but the state maintains control of the prison and its ***188** management.[33] There are also "special contract systems" where the "contractor pays no fee to the state for the prisoners," "but the prisoners are under the full responsibility of the private contractor, which manages the labor, pays the wages, and collects the profits for itself."[34] In addition, the federal government has spearheaded its own programs, namely Federal Prison Industries, Inc. (which does business as "UNICOR") and the Private Industry Enhancement (PIE) initiative, to provide more advanced labor opportunities for inmates and to reduce recidivism.

While UNICOR and PIE create opportunities for inmates to engage in skilled labor, they entrench the profound disparity between prisoners' wages and their labor's true market worth, simultaneously enhancing these enterprises' profitability. Prisoners working for UNICOR engage in many different types of labor practices, including call centers, vehicle repairs, and furniture production.[35] Most of these products are sold to the federal government.[36] According to its website, 7% of eligible prisoners--around 12,000--are employed by UNICOR.[37] Though a government-owned corporation that controls the production of prison goods and services, UNICOR has long been compelled to act as a private company.[38] Congress designated it a self-supporting agency in 1988, and it regularly receives scrutiny of its finances from both the public and Congress.[39] With no federal appropriations, the main source of its revenue is its sales.[40] UNICOR puts 72% of its revenue toward the purchase of materials and supplies and 23% toward staff salaries, while only the remaining 5% goes toward the inmates' pay.[41] The pay from UNICOR is more financially rewarding for inmates than "prison housework," as most wages from that housework are charged back to the prison for upkeep.[42] Yet the program only pays inmates between $0.23 to ***189** $1.15 per hour,[43] well below the federal minimum wage of $7.25 per hour.[44] Some states have their own similar programs--which sell primarily to state and local governments--but in some of these state systems, the workers do not even receive wages.[45]

PIE, on the other hand, relies on the open market by bringing private companies into prisons and giving them access to prisoners as a work force.[46] The Justice System Improvement Act of 1979 created the Prison Industry Enhancement Certification Program

(PIECP) as an exemption to the Ashurst-Sumners Act.[47] The PIECP allows prison-made goods to be sold in the open market and not solely to state entities.[48] The PIECP allows "state and local corrections agencies to contract with private sector firms for purposes of running those firms' operations within prisons."[49] Currently, forty-five out of a possible fifty PIECP certifications have been granted, with 5,063 inmates employed.[50] A stated goal of PIE is to avoid the displacement of local workers.[51] According to the statute, the prisoners working under these programs must:

> [H]ave, in connection with such work, received 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, except that such wages *may be subject to deductions* which ***190** shall not, in the aggregate, exceed *80 per centum of gross wages* [.[52]

These deductions drastically reduce the net wages for prisoners. For example, during the quarter ending December 31, 2020, the gross wages for all PIECP programs totaled $11 million, while net wages totaled only $6 million.[53] Since 1979, the program has deducted nearly 60% of all wages from prisoners.[54] Therefore, even with the statutory wage requirement, inmates working under PIE make significantly less per hour than civilians performing the same labor, and in most cases make significantly below minimum wage.[55] While the low hourly wages provided by UNICOR and PIE are concerning, a trend that may be of even greater concern, to those interested in a system that recognizes human dignity for inmates, is the growth of privately run prisons.

Indeed, over 6% of prisoners under state jurisdiction and 18% of prisoners under federal jurisdiction are inmates of private prisons, an industry with revenues estimated to exceed $2.9 billion.[56] The private prison industry's size has increased steadily, from 90,815 prisoner occupants in 2000 to 130,941 prisoner occupants in 2011.[57] Looking at prison privatization on a global scale, "the number of inmates in fully privatized prisons remains relatively low, but the prison industry is, nonetheless, growing steadily, controlled primarily by a limited number of international corporations."[58] The two biggest prison corporations in the United States are CoreCivic (formerly Corrections Corporation of America) and The GEO Group.[59] Each fully operates prisons under contracts with either the federal or state governments.[60] While neither CoreCivic nor GEO Group provide easily accessible salary information, ***191** some sources have stated that workers earn around $0.17 to $0.50 per hour--even for high-skilled positions.[61] Such paltry wages for even skilled labor, which directly enhances the profitability of privately run prisons, indicates the need for comprehensive reform.

Ultimately, the combination of these systems has formed the modern "prison labor system."[62] While these programs may reduce recidivism and idleness in prisons, they also use prisoners to produce profit-making goods-- such as retail items for the garment industry--while paying below-average salaries.[63] Prisoners not only earn relatively little income, but the training that they receive through these programs serves little use in removing the barriers ex-convicts face when attempting to find employment in post-prison life, such as automatic disqualification after a background check.[64] While incarcerated, these inmates are earning--in many cases--well below $1.00 per hour, whereas the participating corporations generate profits from the cheap substitute labor.[65] To date, the question of how to classify prisoners and whether they should receive a minimum wage or other protective rights for their labor has turned on the definition of "employee" under the FLSA.[66] Though prisoners are not specifically excluded from the "employee" category in the FLSA or any other major employment statute,[67] case law interpreting prisoners' employment status is fractured and uncertain.[68] Surprisingly, Congress has not expressly addressed this issue under the federal labor laws.[69]

II. The Current State of Case Law Under the FLSA

The dispositive legal question governing whether a class, such as prisoners, is recognized as an "employee" under the FLSA is "whether an employment relationship exists."[70] Courts typically answer this question by looking to the economic nature of the relationship at issue.[71] The Thirteenth Amendment[72] appears to have influence over inmates' ***192** employment status,[73] and the Eleventh Circuit, in *Villarreal v. Woodham*,[74] held that "the FLSA presupposes a free-labor situation constrained by the Thirteenth Amendment, which does not apply to convicted inmates."[75] However, courts have consistently confirmed that "prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners."[76] Instead, the coverage normally turns case-by-case on the question whether inmates satisfy the statutory definition of "employee," which then courts consistently answer in the negative.[77]

Typically, outside the prisoner context, courts rely on the four factors in *Bonnette v. California Health & Welfare Agency*,[78] to determine if an employment relationship exists: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[79] Courts have recognized since the 1980s that prison labor usually satisfies these tests,[80] but nevertheless "have consistently held that the FLSA employment relationship is much narrower for prisoners than for individuals in the private market."[81] In *Vanskike v. Peters*,[82] the Seventh Circuit expressly rejected the *Bonnette* test for prisoners[83] and held that "inmates could not demand the minimum wage for their work as janitors, kitchen aides, and garment workers in an Illinois prison."[84] *Vanskike*--followed by a majority of the jurisdictions to address the issue--held that inmates lack an "economic relationship" to the prison ***193** and therefore cannot be employees or guaranteed laborer rights.[85] These courts--recognizing that there is a difference between ordinary employment and prison labor--held that there can be no employment relationship even in the face of "sufficient control and no applicable statutory exception."[86] Rather than apply *Bonnette*, the courts have developed two overriding approaches when evaluating prison laborers' employment status.

The two leading approaches courts use when determining "employee" status for prisoners are (1) the "exclusive market" approach and (2) the "productive work" approach.[87] The "exclusive market" approach--used in the majority of cases--focuses on "employment's economic character."[88] Courts generally classify inmate work as noneconomic due to its penological nature and deny employee status.[89] The "productive work" approach--a minority method-- finds an economic relationship when "the putative employer benefits economically from inmate's labor, either by selling the resulting goods and services or by avoiding the hiring of other workers."[90] This second approach is much easier to satisfy, but rarely applied.[91] Even with this traditional reluctance to recognize prisoners as employees, there are some circumstances where "employee" status is, in fact, recognized.

Indeed, courts have recognized prisoners as "employees" when they are working for private firms as part of certain work release programs.[92] In *Watson v. Graves*,[93] the Fifth Circuit held that an employment relationship existed "where a Louisiana sheriff farmed out jail inmates to his son-in-law's construction company at a rate of $20 a day [and] when not at work they returned to the prison."[94] In the work release program setting, "prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison."[95] However, even in the work release program context, courts have not extended the employment relationship to the prison, but only to the contracting company.[96] A few courts look at "whether the goods or services in question are for the prison's use," and avoid dependence on geographic ***194** location or managerial arrangement.[97] The National Labor Relations Board (NLRB) has repeatedly--with similar reasoning to the courts--indicated that inmates in work release programs are "employees." The NLRB's test distinguishes prisoners' status while on work release

and in an "employment relationship" from the "ultimate control [they] may be subjected to at other times," such as in a prison.[98] However, the NLRB does not apply this test in other prison labor contexts. The narrow scope of these present rules' coverage suggests the need for a comprehensive reevaluation of prison laborers' employment status.

III. Should Inmates be Classified as "Employees"?

A. *Arguments in Favor of Classifying Prisoners as "Employees" Under FLSA*

Most courts agree that prisoners qualify as employees under some circumstances, such as when they are in work release programs.[99] However, the two tests currently used by courts to determine "employee" status for inmates are either under- or over-inclusive.[100] First, the "exclusive market" test can never truly be satisfied.[101] For instance, a work release program should not qualify as employment under this test due to the inseparable penological--and therefore noneconomic--status of the prisoner and his or her work performed in such program. The "productive work" test is insufficient because it ignores important--and sometimes nuanced--characteristics of affiliations, sweeping in too many relationships that would widely be rejected as employment.[102] For example, a child's chores around the house for an allowance or even gratuitous familial favors could qualify under this test as work that benefits a supervisor in a pecuniary manner. This begs the question whether inmate workers should therefore be recognized as employees under the FLSA.

Some would argue--and with solid reasoning--that prisoners should have the same rights as employees under the FLSA.[103] Looking at the most basic functions of employment, for instance, prison industries regularly use "wage differentials and other perquisites to motivate inmate ***195** workers," specifically to mimic the civilian labor market environment.[104] Looking on a larger scale, employers can substitute inmates as cheap labor, which in turn leads consumers to substitute more expensive products for cheaper prisoner-made products, changing the nature of the market and displacing civilian competitors.[105] Also, if prisoners were not providing the services or products they currently produce, outside firms could step-in and generate more revenue for themselves.[106] For example, "[t]o the extent that prison laundry is cleaned by prisoners, either the prison or its contractor need not hire employees out of the ordinary labor market."[107] Therefore, regardless of whether the prisoners are working for a private firm or government agency--including the prison--that entity "produces widgets with fewer [non-prisoner] workers and ... competes with other widget makers who lack a [cheap prison] labor supply."[108] For example, Colorado provides its farmers with state prisoners "as a substitute for the customary agricultural workforce of undocumented migrant workers from Mexico."[109]

UNICOR advertises its call centers with the catch phrase "Imagine ... [a]ll the benefits of domestic outsourcing at offshore prices. It's the best kept secret in outsourcing!"[110] Theoretically, UNICOR can be classified as an "outsourcing provider" because "it draws on labor segregated from the domestic labor force by a state border (i.e., prison walls) that demarcates a legal differential of wages and hours, among other things."[111] The discriminant treatment of prisoners under federal law--for the same work that can be provided by a civilian laborer--provides strong ammunition for those who would classify prison laborers as employees.

Likewise, under PIE, prisoners earn wages comparable to, but lower than, local competition for similar work.[112] These prisoners are more compliant than civilian competition and are unable to rely on the protections of FLSA.[113] Therefore PIE, like UNICOR, allows private ***196** companies to directly benefit from the cheaper or "outsourced" labor within prison walls. The outsourcing decision is made without regard to the penological nature of a prisoner's punishment. Furthermore, prison laborers as a class have little, if any, negotiating power.

Indeed, the coercive nature of imprisonment and weak bargaining power of inmates should elicit moral concerns that are core to a liberal society and the purpose of FLSA, especially where there is no union representation to offset the power discrepancy.[114] Experts agree that "restor[ing] dignity, integrity, and self-confidence" is critical to successful rehabilitation.[115] Subpar wages have the opposite effect by demeaning prisoners and lowering their self-worth.[116] On these grounds, among others, some scholars claim that "any violation of a right outside the prison walls is also a violation within the prison walls, and prisoners have the right not to be offered any work that is *not legal* outside of the prison walls," or under conditions worse than the legal minimum.[117]

Advocates of applying FLSA to prison laborers also point to the fact that patient-workers at mental hospitals have been deemed, in *Souder v. Brennan*,[118] to have an employment relationship with the mental institution.[119] In many instances, these workers perform tasks similar to those performed by prison laborers.[120] Therefore, it is arguable that the reasoning in *Souder*--refusing to imply an exception to the FLSA where none existed--could naturally be extended to the prison labor context.[121] This extension, however, is unlikely because it ignores the penological nature of prisoner status--absent in the case of a mental patient and clearly recognized by the courts as the primary reason for exclusion under the FLSA.[122]

A less ambitious approach to the "employee" question is to differentiate between the status of prisoners based on whether they are managed by state-run industries or private prison industries. This argument starts with the premise that a state's profits can be seen as "minimizing [the public's] expenses," while private prison industry profits can be seen as "pure benefit from the misfortune of others."[123] The International Labor Organization (ILO) denounced forced prison labor for private profit, while recognizing the "state use" exception, in the ***197** Forced Labor Convention of 1930 ("Convention No. 29").[124] Convention No. 29 supports an argument that unfair competition and abuse of power justifies a "deep suspicion" of private entity involvement with the control and use of prison labor for profit.[125] Article 2, Section 2 states that the definition of "forced or compulsory labor" does not include:

> (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and *that the said person is not hired to or placed at the disposal of private individuals, companies or associations*[.[126]

This provision highlights the difference between governmental and private use of prison labor. There is a strong international consensus that a state can force prisoners to work,[127] and only "involvement of private entities in prisoner employment will generally, unless under voluntary terms, constitute a violation of the Convention."[128] Convention No. 29's impact on actual practices is questionable, though, because states--even ones who have ratified Convention No. 29--"allow private involvement in forced prison labor without insisting on the safeguards set in Convention No. 29."[129] For example, in Germany, a 2009 report to the ILO stated that "almost twelve percent of its prison population had been employed with the participation of private companies due to job shortages in public prisons."[130] Similarly, as of 2007, Israel had private companies involved with the employment of about 1,000 prisoners per year, including work in "trades, such as apparel, printing, and woodworking."[131] Regardless, the United States is not a party to Convention No. 29 and the use of prisoners by private companies has been on the rise.[132]

198 B.** ***Arguments Against Classifying Prisoners as "Employees" Under FLSA

Any view that would outright give prisoners full rights under the FLSA necessarily ignores certain key stakeholders outside of prisoners themselves, including correctional officers, prison administrators, lawmakers, victims of crimes, the government, and the public-at-large. First, "[p]rison administrators and correctional officers have a legitimate interest in maintaining order within the prison."[133] This order necessitates "limiting the number of prisoners who can gather at a given time, where they can gather, and at what times they can gather," which in turn severely limits the practicality of traditional union organizing and negotiation methods.[134] For example, the power of labor strikes in the prison setting "cannot be hermetically sealed off from other aspects of imprisonment, in particular considerations of authority and discipline."[135] Instead of striking for fair wages, inmates, if granted the power to strike, may do so over prison conditions unrelated to their work, causing administrability and disciplinary problems within these facilities.[136]

Second, opening the door to FLSA employment status would not only allow prisoners to demand the minimum wage--which itself raises sustainability concerns--but also would open the door for prisoners to sue for worker's compensation, unemployment benefits, vacations, overtime, and incentive pay.[137] These additional costs could end up burdening the state--in a severely negative manner--which would adversely affect taxpayers.[138] There are other serious economic restraints preventing the United States from recognizing prisoners under the FLSA. To do so would take away from the internationally and constitutionally recognized power of the State to force prisoners to work. Also, private companies may be less willing to hire prison laborers if forced to pay market rates or even minimum wages due to the regulatory hurdles required to initiate and maintain a prison laborer program. Therefore, to keep the incentivization for hiring prison laborers at the appropriate levels needed to meet objectives such as reduced recidivism, there naturally needs to be a correlating discount built into the prison labor force.

Third, the payment of these benefits could have other unintended consequences, such as reducing the deterrent effects of incarceration in general and increasing the frequency of crime in communities--making ***199** it more profitable for some citizens to spend time in prison than out in the civilian population.[139] Studies have shown that "crimes are more likely to be committed by unemployed persons who would stand to benefit economically from either perpetrating crime or prison employment."[140]

Finally, Congress's silence on the treatment of prisoners in the language of the statute and subsequent inaction strongly suggests that it was not Congress's intent for the FLSA--in its current form--to extend to prisoners.[141] Some proponents of the prison industry go even further, arguing that "managing wages and barring union activity" should not only be allowed but also encouraged as necessary to "maintain competitive advantage over the off-shore alternatives."[142]

The treatment of prison labor under the FLSA is currently ambiguous[143] and therefore is ready for new legislation. Arguments on each side of the current dichotomy are strong, and many are valid.[144] This Article advocates that a new legal regime should step away from the definition of "employee" under FLSA and craft specific legislation around the quasi-employee nature of prisoners.[145] This new legal regime needs to take into account all the key stakeholders, including prisoners, prisoners' families, prison administrators, correctional officers, victims, victims' families, the government, and the public.[146] It must acknowledge the unique nature of prisoners and their need for human dignity and abandon the unnecessary debate about the word "employee."

IV. The Status Quo Must Change

A. *Racial Implications of Forced Prison Labor in the United States*

In the United States, one significant issue that must be addressed when it comes to forced labor is race.[147] Due to the history of slavery and race discrimination in the United States, policymakers should account for the impact of racial discrimination on forced prison labor. Some scholars argue that prison labor at sub-minimum wages is a form of legalized race discrimination.[148] For example, according to the BJS, black males between the ages of eighteen and nineteen are 11.8 times more likely to ***200** be imprisoned than white males of the same age.[149] This statistical disparity becomes even more problematic when coupled with the fact that there is currently a federal prison mandate for labor substantially below the federal minimum wage, with prisoners typically compensated at rates below $1.00 per hour.[150]

Proponents of the modern prison labor system argue that prisoners' labor allows them to gain skills and training essential for reentry into society.[151] However, the reality is the majority of prisoners are performing low-skill labor that will not translate into marketable skills.[152] The very idea of "[c]haracterizing inmates as in need of rehabilitation into disciplined workers" suggests longstanding racist ideas that demean people of color,[153] including the eighteen- to nineteen-year-old black males incarcerated at such disparate rates.[154] Angola, the Louisiana State Penitentiary, is located on a former slave plantation and--when medically cleared--can force prisoners to work on these same plantation fields for as little as $0.02 per hour.[155] This treatment is morally unacceptable under any legal regime, and the proper protections against this type of symbolic discrimination must be in place when regulating quasi-employees such as prisoners.

Programs like UNICOR, which may offer higher-skill positions and have some evidence of reducing recidivism,[156] provide jobs for only a small percentage of eligible inmates[157] and are not currently funded at a level that allows training for a significant number of inmates.[158] The PIC has "evolved into a creature of corporate profit" rather than one of purely penological necessity to enforce societal norms.[159] The insistence of courts to define a prisoner's rights purely in the context of whether they qualify as "employees" under the FLSA is a "stagnant" and unsatisfactory approach to a more complicated matter.[160] The current standard does not take into account the reality that, for many private companies, a prisoner is a profit-producing laborer.

These private companies have taken advantage of the outsourcing nature of prison labor, preferring, when convenient, the greater compliance and reduced rights of prison laborers over civilian employees ***201** who might perform the same manufacturing jobs.[161] For example, companies such as Victoria's Secret have not only had prisoners stitch together clothing for wages far below minimum wage, but also required criminal background checks when considering these same individuals for employment outside of prison.[162] These types of hiring discrepancies disproportionately affect black males and their ability to find work using any skills obtained from such PIC systems.[163] This exacerbates the racial discrimination innate within the prison system and shifts the same ability to discriminate, whether purposeful or not, to private companies.

When the power to deny individual liberty is given to a private company, "the legitimacy of the sanction of imprisonment is undermined [as public sanctions are shifted from the power of the state to a party that is motivated primarily by] economic considerations--considerations which are irrelevant to the realization of the purposes of the sentence, which are public purposes."[164] A certain lack of respect for the status of prisoners as human beings is reflected in "the very existence of a prison that operates on profitmaking business."[165] Prisoners and their advocates in the United States have not been blind to this discrepancy. On September 9, 2016, approximately 24,000 prisoners in at least twenty-nine prisons across the country coordinated a labor strike and refused to work.[166] Some claim that this was "the largest prison strike in U.S. history."[167] The Incarcerated Workers Organizing Committee (IWOC), a subgroup of the Industrial Workers of the World labor union, organized the strike by using mail, conference calls to prisoners and their families, and by partnering with both lawyers and activists.[168]

The rallying cry for the strike was "This is a Call to Action Against Slavery in America."[169] Clearly, there is a need for reform in the United States.[170]

B. *International Treatment of the PIC*

Convention No. 29, although not ratified by the United States, provides persuasive normative principles for regulating the PIC.[171] Currently, 178 countries have ratified Convention No. 29, including the ***202** United Kingdom, Israel, Russia, Japan, Iran, and Canada.[172] Convention No. 29 bans the use of "forced" prison labor by private industries.[173] If inmate labor is "voluntary," then it is permissible.[174] The ILO permits the deduction of a certain amount of prisoners' wages, with their consent, for the purposes of reimbursing their room and board and compensating victims.[175] The ILO does not require this "voluntary" nature when prison labor is for "state use," as it is internationally recognized, for penological reasons, that a state can force prisoners to work for state purposes.[176] The United States, rather than participate in Convention No. 29, has not only expanded the use of inmates for private labor but has also expanded the privatization of prisons themselves.

The United States has the highest level of prison privatization, but at least eleven other countries also have some level of prison privatization.[177] Even countries that have ratified Convention No. 29, such as the United Kingdom and New Zealand, are increasing their use of private prisons.[178] Conversely, France does not force its prisoners to work, and prisoners who are employed by private companies enjoy expansive social rights such as "social security payments, retirement fund payments, workplace accident allowances, maternity benefits, and health benefits."[179] French prisoners, in turn, are considered the most productive in Europe.[180] Other countries have even had success with prison labor reform with drastically different policies and cultural norms than either France or the United States.[181]

***203** Unlike France, in Israel, all prisoners are required to work unless exempted medically or otherwise by the appropriate parole board.[182] Prisons Ordinance determines wages, conditions of employment, maximum working hours, days of rest, and vacations.[183] Also, in contrast to the United States,[184] no Israeli prisoner is considered an "employee" under the law even if working for a private company outside of the prison.[185] No prisoners are entitled to minimum wages, and neither the prison nor the private company are legally considered an "employer."[186] However, Israel recently became the first state to deem prison privatization unconstitutional.[187] The Israeli Supreme Court based this decision on the "symbolic harm" that incarceration in a private prison imposes on "prisoners' rights to human dignity and autonomy, regardless of the actual conditions in the private prison."[188] The Court looked to the prisoners' "human rights," rather than the more common arguments of unfair competition or unlawful delegation of authority.[189] The Court's ultimate decision, and its reasoning, may help persuade other countries, such as the United States, to legislate similar bans on the privatization of prisons.

V. A New Regime and its Justification

A. *Quasi-Employee Status*

A comprehensive reform of federal labor laws which takes into account the status of prisoners as quasi-employees is necessary--especially in light of the increased involvement of private enterprises in the PIC.[190] Courts have focused on whether prisoners are "employees" for the purposes of the FLSA and have treated the statuses of "prisoner" and "employee" as irreconcilable social conditions.[191] While the courts may be correct about this dichotomy, Congress needs to step in and address the more

complicated nature of a prison laborer as a special class of quasi-employee, especially when contracted to a private company.[192] The relationship between prisoner and manager--whether a private firm ***204** or government agency--is both pecuniary and penological.[193] Congress has the authority to provide a new statutory regime even though the Constitution--namely, the Thirteenth Amendment--does not require it.[194] A committee of key stakeholders[195] should be brought together to discuss the issues addressed in this Article.[196]

When a prisoner works full time for the PIC, the prisoner interacts with his or her administrators as a quasi-employee for a significant amount of time.[197] It follows that the prisoner's behavior will exhibit some level of market character and that, when acting in this capacity, he or she should be provided some appropriate level of protection from abuse.[198] Prisoners are currently classified by their status as either a "prisoner" or an "employee," but, instead of deciding case-by-case when to classify a prisoner as an employee, new legislation should create a special classification of quasi-employee with its own unique level of labor rights.[199] This specially tailored classification could not only help protect prisoners' human dignity but, at the same time, could recognize other legitimate concerns, such as the need to maintain order in prisons and deter crime.[200] However, disregarding the pecuniary nature of prison labor is not only harmful to the prisoner as an individual but also ignores unacceptable--even if unintended-- systemic discriminatory racial effects.[201] Additionally, the idea of quasi-employee status is already well-established in other areas of labor law.

***205** Indeed, while it has not yet been applied to American prisoners,[202] the quasi-employee concept has deep historical roots.[203] Black's Law Dictionary defines "quasi" as "[s]eemingly but not actually; in some sense or degree; resembling; nearly."[204] It defines "employee" as "[s]omeone who works in the service of another person ... [who] has the right to control the details of work performance."[205] Courts have found quasi-employee status for laborers who do not meet the statutory definition of "employee," but who nonetheless may or should qualify for certain rights or privileges under the labor laws. Early railroad law in Pennsylvania applied a quasi-employee test to determine whether non-railroad workers injured on railroad premises could recover damages similar to railroad employees.[206] These courts determined that if a person, while injured, was performing tasks normally performed by railroad employees, then the laborer could indeed qualify as a quasi-employee for recovery purposes.[207] Courts in the United States also use a quasi-employee test, focusing on functional equivalency, to determine whether certain legal privileges extend to non-employees, such as the attorney-client privilege.[208]

The quasi-employee theory also exists in foreign labor law. In a number of European countries, the courts apply a quasi-employee test to determine whether franchisees and other, debatably self-employed entrepreneurs qualify for certain statutory labor rights.[209] Qualification is normally based on the level of economic dependence the laborer has on ***206** the parent company or employer.[210] In Germany, for example, self-employed franchisees may be "considered [as] quasi-employee[s]" if the franchisee demonstrates a requisite "economic dependency on the franchisor."[211]

The quasi-employee concept from historical American and contemporary European practice analogously applies to prison laborers. Inmates act in a functionally equivalent manner to employees by performing profit-producing tasks, sometimes tasks requiring trained skills, for an employer, effectively reducing companies' hiring needs. Correspondingly, prisoners generally have no other means to generate income because they are incarcerated and, therefore, have considerable economic dependence on their employer. Because courts in the United States refuse to extend FLSA rights to inmate laborers, and these laborers satisfy both historical tests for quasi-employee status, a new statutory definition and regulatory regime specifically tailored for prison laborers is required.[212] The penological nature of inmate labor, the size of the United States prison population, and the

increased use of this labor by private companies, all combined with extremely low rates of pay and the racial disparities within the prison population, demand a permanent and well-defined quasi-employee status.

Any attempt to evaluate a prisoner's status based merely on the FLSA's definition of "employee" is not only ineffective but unadvisable.[213] Courts and scholars have made it clear that "coerced prisoner labor is incompatible with the principles [of contract] underlying the private sphere,"[214] and this Article takes it one step further, arguing that it is illogical to apply the same employment principles to each. The prison laborer-- as a quasi-employee--belongs to a separate class, which needs proper regulation and protection under a new legal regime. Prisoners, as quasi-employees, unmistakably engage in an economic relationship with their supervisors and produce work.[215] However, prisoners are also always subject to the penological nature of their imprisonment. Accordingly, even "when two packages share a common element, they need not be treated as analytically the same, even in that one respect."[216]

*207 B. *Suggested Intermediate Approach*

Professor Sinzheimer claims that labor law is on a mission to uphold "human dignity," and that this is the "special task of labor law."[217] And, Professor Walzer suggested in his letter to the Israeli Supreme Court that *"prisoners* should be at the center of criminal punishment rather than a means for profit making, for otherwise their right to *dignity* is compromised."[218] Prison labor involves both "the dignity of the person" and "integrity of the body," and therefore, careful attention should be given to these principles when crafting proper legislation, to a different degree than when crafting the laws governing private enterprise.[219] Furthermore, Professor Goldberg has established that there are "material" and "symbolic" gains to classifying a person as a "worker" rather than as a "welfare recipient," including higher productivity and less stigmatization.[220] The new quasi-employee legal regime should minimize policies that dehumanize prisoners or antagonize their dignity in ways that are unnecessary to their penological status.

One solution, which this Article does not recommend, would be to take the strict approach to the quasi-employee question and to ban all private profit-seeking use of prison labor, reserving this labor only for state use. However, a complete ban on the participation of private corporations in the PIC would not be advisable. There is evidence that private firm involvement has produced several positive outcomes, including "expanded work opportunities and higher wages for inmates."[221] A 2006 study by the National Institute of Justice "confirmed positive effects for PIE alumni/ae in terms of higher rates of employment and lower rates of recidivism than those of inmates whose work experience was in other prison programs."[222] Similarly, the UNICOR ***208** program, which at times provides to the open market, has also been "linked to reduced rates of recidivism."[223] The strict solution is an unrealistic approach to the quasi-employee dilemma due to the current trends both nationally and internationally of increased private firm involvement within the PIC.[224]

Instead, this Article suggests taking an intermediate approach by banning private prisons and allowing state-run prisons to contract with private industries. First, the United States should use Israel as an example and ban the use of private-run prisons. This ban would convey the proper amount of respect for the human dignity of inmates, especially because those inmates are disproportionately black males and the United States has a history of racial discrimination.[225]

Israel has taken the unprecedented step of banning private-run prisons based on "the symbolic harm on prisoners' rights to liberty and human dignity" while still allowing for state institutions to contract with private companies.[226] Like the United States, Israel mandates that all prisoners must work unless medically unfit or under another exemption.[227] Some of the work in

Israel is contracted out to private firms,[228] but even when working in these positions prisoners are refused "employee" status under the law.[229]

Next, this Article suggests that we borrow from France's libertarian principles of non-coercion and voluntary work,[230] but only in regard to prison-work for private firms or work designed for the open market. Under the suggested regime, quasi-employee prisoners could choose whether to volunteer to work for private firms in advertised opportunities, but would still be mandated to perform "prison housework" and other "state use" labor at reduced rates if they refused to take advantage of such postings.[231] All prison work for private firms would be voluntary,[232] and no coercion based on force would be permitted "except in the administration of the law."[233] Wages--when working for a private firm or providing goods and services for the open market--would be based on ***209** competitive rates, reduced for any regulatory hurdles of hiring prisoners. In turn, a new prisoner minimum wage law and other appropriate labor laws would apply as tailored by the new regime.[234]

Under the new legal regime, the law should impose reasonable wage deductions, as currently imposed by PIE, for familial dependence, victim compensation, debt collection, and tax collection, and should provide an election for charitable donations.[235] Also, "prison housework" and labor for "state use"--as recognized internationally and by the ILO--should fit within the definition of "administration of the law."[236] The law's exemption for certain forms of forced labor, especially by the State, addresses possible concerns over unnecessary leisure and increased prison violence.[237] Each prison should have a committee to approve such mandatory "state use" work via formal procedures and with periodic review and audits, so as to avoid abuse.

This Article further suggests that the private firms benefitting from the use of prison labor should be required to create mandated corporate initiatives designed to hire a certain minimum level of prison laborers post-release without regard to their ex-convict status in the hiring process.[238] These initiatives would make it easier for prisoners to assimilate into society, thus reducing recidivism. This hiring requirement could ease some of the current concerns regarding racial profiling and discrimination, although consultation with the appropriate stakeholders through hearings and special committees appointed by Congress is necessary during the drafting of this legislation.[239]

***210** Finally, to address the risks involved with unionization of prisoners, special procedures could be developed specifically for prisoners in order to maintain safety while allowing them to have a voice in their pecuniary role as quasi-employees. One suggestion could be to have the inmates divided into representative subgroups of up to ten individuals, such as in a military chain-of-command.[240] Each subgroup of up to ten individuals could have a designated representative that would then embody the group's interests with nine other representatives--each representing ten prisoners. Therefore, this next higher-level subgroup would speak for a total of 100 individuals and so forth, without the dangers of having 100 prisoners congregating. Ultimately, a select group or individuals could represent the complete interests of each prison.

Furthermore, a 360-degree feedback system should be put into place to elicit concerns and recommendations from all participants, and regulatory enforcers should perform regular audits to ensure compliance and recommend amendments as deemed necessary by studies over time.[241] The 360-degree feedback system would allow prisoners to give feedback on their representatives, the representatives to give feedback on their prisoner constituents, the prisoners to give feedback on the employers and guards, and the guards and employers to evaluate prisoners performance in their labor. A comprehensive review of such feedback would provide a clearer and more accurate picture of compliance and performance with any new legislation and standards thereunder. Strict compliance with the legislation should be enforced, and heavy penalties laid down on those who attempt to abuse the system. This Article does not attempt to solve every issue that could potentially arise in the context of

the quasi-employee, but merely gives some examples of solutions that a committee of the proper stakeholders could consider when developing new legislation.

***211** Conclusion

The modern PIC, with its codependence on private firms, needs a new statutory regime recognizing a prisoner's status as a quasi-employee. This status should be based on the economic reality of the relationships involved, while respecting each prisoner's dignity as a person. Quasi-employee status for prisoners, especially when working for private companies, would allow for the provision of practical and professional skills, restoration of prisoners' dignity, the choice to exercise individual autonomy, and have a positive impact on both prisoners' physical and mental health.[242]

This new legal regime would remove the ambiguity of the FLSA and any need for courts to decide case-by-case what qualifies a prisoner for "employee" status.[243] The courts would no longer have to engage in judicial crafting and could rely on clear legislation for this distinct class of laborer that has attributes that are both penological and pecuniary.[244] This new legal regime would explicitly address the discriminatory nature of prison labor and some of its current implications for racial disparities in the prison system, specifically by ensuring certain rights for prisoners while contracted to private companies.[245]

This Article has made specific suggestions for measures that could be implemented in a legal reform that would recognize prisoners as quasi-employees and suggests that special committees, comprised of the appropriate stakeholders be included in any initiative to ensure the appropriate compromises are made for any final regime. These committees, appointed by the appropriate Congressional sub-committee, should consider the costs and benefits of each possible right and restriction applied to prisoner laborers. They should be thorough and comprehensive but leave room for flexibility and modifications as societal norms continue to shift and as the key stakeholders assess, reevaluate, and continually develop a workable system. Whatever the specific contours of this committee and its stakeholders, or Congress' ultimate proposed legislation, the definitive goal of its resultant regime should be clear--to create long overdue legal clarity and specifically tailored quasi-employee protections for America's prison laborer class, as this underrepresented class is increasingly providing profit-producing labor and services for the open market and private businesses.

Footnotes

a1 Ethan Heben is a law clerk to the Honorable Eugene E. Siler, Jr. of the United States Court of Appeals for the Sixth Circuit. He earned a bachelor's of science degree in English from the United States Naval Academy, a master's in business administration degree from the College of William & Mary Mason School of Business, and a juris doctor from the University of Virginia School of Law. He served on active duty as a naval officer in the surface warfare community for over eight years. He would like to give a special thank you to Professor Gil Siegal, M.D., S.J.D. and classmate Christian Talley for support and help during the editing and writing process of this Article. He would also like to thank his wife, Catherine, for her patience and support throughout law school. He would also like to dedicate this Article to his children, Charlie and Elijah: "You two are kind and creative, and I love you both more than I ever knew was possible."

1 *See* 29 U.S.C. § 203 (2012 & Supp. V 2017).

2 Faina Milman-Sivan, *Prisoners for Hire: Towards a Normative Justification of the ILO's Prohibition of Private Forced Prisoner Labor*, 36 Fordham Int'l L.J. 1619, 1636-37 (2013).

3 *See, e.g.*, Vanskike v. Peters, 974 F.2d 806, 807-08 (7th Cir. 1992).

4 *See* Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 Idaho L. Rev. 953, 955 (2016) (citing Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 Vand. L. Rev. 857, 882 nn.101-02 (2008)).

5 Katherine E. Leung, *Prison Labor as A Lawful Form of Race Discrimination*, 53 Harv. C.R.-C.L. L. Rev. 681, 682-83 (2018).

6 *See infra* Part I.

7 *See infra* Part II.

8 *See infra* Part III.

9 *See infra* Part IV.

10 *See infra* Part V.

11 *See infra* Conclusion.

12 *Id.* (citing 70 Cong. Rec. 656 (1928-1929)).

13 U.S. Const. amend. XIII, § 1 (emphasis added).

14 *About Our Facilities*, Fed. Bureau of Prisons, https://www.bop.gov/about/facilities/federal_prisons.jsp [https://perma.cc/GE99-N5X9] (last visited Aug. 16, 2019).

15 Kara Goad, *Columbia University and Incarcerated Worker Labor Unions Under the National Labor Relations Act*, 103 Cornell L. Rev. 177, 180 (2017) (citing Bureau of Int'l Narcotics & Law Enf't Affs. et al., U.S. Dep't of State, A Practical Guide to Understanding and Evaluating Prison Systems 9 (2012)).

16 E. Ann Carson, *Prisoners in 2016*, Bureau of Just. Stat., https://www.bjs.gov/content/pub/pdf/p16.pdf [https://perma.cc/6JJT-5RVT] (last updated Aug. 7, 2018) (showing a slow, steady decline in the U.S. prison population since hitting a peak in 2009). The statistics in the January 2018 Bulletin were updated in August 7, 2018 to reflect revised numbers for Oklahoma.

17 Zhen Zeng, *Jail Inmates in 2016*, Bureau of Just. Stat. (Feb. 2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf [https://perma.cc/R58L-DF2H].

18 Alfred C. Aman, Jr. & Carol J. Greenhouse, *Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate over Private Prisons*, 42 Fordham Urb. L.J. 355, 394-95 (2014) (citing Crime Control Act of 1990, Pub. L. No. 101-647, § 2905, 104 Stat. 4789, 4914).

19 *See* Zatz, *supra* note 4, at 868 n.30 (citing Criminal Justice Inst., The 2002 Corrections Yearbook: Adult Corrections 118, 124-25 (Camille Graham Camp ed., 2002); Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, NCJ 215092, Bureau of Justice Statistics Bulletin: Prisoners in 2005, at 2 (Nov. 2006), *available at* https://www.bjs.gov/content/pub/pdf/p05.pdf; Rod Miller et al., Developing a Jail Industry: A Workbook 1 (2002)).

20 *Id.* at 869.

21 *Id.* at 869; *see* 18 U.S.C. § 1761 (2012 & Supp. V 2017).

22 Zatz, *supra* note 4, at 869 (citing 18 U.S.C. § 1761(b) (Supp. II 2002)).

23 James K. Haslam, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 BYU L. Rev. 369, 369 (1994) (citing Michael Tonry, *The Ballooning Prison Population, in* The 1993 World Book Year Book 392, 394 (1993)).

24 Zatz, *supra* note 4, at 869.

25 *Id.* at 870 n.43 (stating around 550,000 inmates perform this type of work) (citing Criminal Justice Inst., *supra* note 19, at 118).

26 Aman & Greenhouse, *supra* note 18, at 394.

27 *Work Programs*, Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp [https://perma.cc/6TTD-WZL9] (last visited Aug. 16, 2019).

28 *See* Fink, *supra* note 4, at 953 (citing Zatz, *supra* note 4, at 869).

29 Zatz, *supra* note 4, at 869-70.

30 *Id.* at 870.

31 *Id.*

32 Milman-Sivan, *supra* note 2, at 1629.

33 *Id.* at 1629-30.

34 *Id.* at 1630.

35 Goad, *supra* note 15, at 182-83 (citing *UNICOR Schedule of Products and Services*, UNICOR, https://www.unicor.gov/SOPalphalist.aspx [https://perma.cc/XFN4-MZ3G] [http://perma.cc/7ZZF-CVDM]).

36 *Id.* at 185 (stating most products are sold to the government due to the Amhurst-Sumners Act) (citing *Customers and Private Sector FAQs*, UNICOR, https://www.unicor.gov/FAQ_Market_Share.aspx [http://perma.ce/7Z69-VQWL]).

37 *FPI General Overview: Frequently Asked Questions*, UNICOR, https://www.unicor.gov/FAQ_General.aspx # [https://perma.cc/276Z-P9SC] (Aug. 16, 2019).

38 Aman & Greenhouse, *supra* note 18, at 386-87.

39 *Id.* at 386-87, 396.

40 *Id.* at 396.

41 UNICOR, *supra* note 37.

42 Aman & Greenhouse, *supra* note 18, at 396 (citing Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison Real Work Programs Work?*, Nat'l Inst. of Just. (June 1, 2007), https://nij.ojp.gov/topics/articles/factories-behind-fences-do-prison-real-work-programs-work [https://perma.cc/3ZJS-8LFP]; Thomas W. Petersik et al., Identifying Beneficiaries of PIE Inmate Incomes: Who Benefits from Wage Earnings of Inmates Working in the Prison Industry Enhancement (PIE) Program 19 (2003), *available at* https://www.criminallegalnews.org/media/publications/gwu_center_for_economic_research_re_identifying_beneficiaries_of_pie_inmate_incomes_jul_31_2003.pdf.

43 *Id.*; Nathan James, Cong. Research Serv., RL32380, Federal Prison Industries 10 (2007).

44 29 U.S.C. § 206 (2012).

45 Goad, *supra* note 15, at 183, 185.

46 Aman & Greenhouse, *supra* note 18, at 387 (citing U.S. Dep't of Justice, Program Brief: Prison Industry Enhancement Certificastion Program (2004), https://www.ojp.gov/pdffiles1/bja/203483.pdf [https://perma.cc/88X4-GY7H]).

47 *See also* Barbara Auerbach, Nat'l Corr. Indus. Ass'n, *The Prison Industries Enhancement Certification Program: A Program History* 3 (2012), https://essaydocs.org/the-prison-industry-enhancement-certification-program-a-progra.html (last visited Feb. 1, 2020); Aman & Greenhouse, *supra* note 18, at 387.

48 Goad, *supra* note 15, at 185.

49 Aman & Greenhouse, *supra* note 18, at 388.

50 *PIECP: Certification & Cost Accounting Center Listing* 1, Nat'l Corr. Indus. Ass'n, https://static.wixstatic.com/ugd/435bd2_073657b108e2415b81fd86642431e312.pdf [https://perma.cc/Q88Z-DP7C] (last visited Feb. 1, 2020).

51 Aman & Greenhouse, *supra* note 18, at 388 (citing Marie Fajardo Ragghianti, Prison Industries in South Carolina 128-232 (2008), https://drum.lib.umd.edu/bitstream/handle/1903/8178/umi-umd-?sequence=1 [https://perma.cc/WQG5-P26W]).

52 18 U.S.C. § 1761(c)(2) (2012) (emphasis added) (stating deductions shall be limited to taxes, reasonable room and board, familial support, and victim compensation (the latter's being limited to 5-20% gross wages)).

53 *PIECP: Q4 2020 Statistical Data Report*, Nat'l Corr. Indus. Ass'n, *available at* https://www.nationalcia.org/statistical-reports [https://perma.cc/F3UA-R7PT] (rounded to the nearest million).

54 *PIECP: Q4 2020 Cumulative Data Report*, Nat'l Corr. Indus. Ass'n, (showing that from 1979 through December 2020 the program amassed total gross wages of $990 million, but total net wages were only $408.2 million), *available at* https://www.nationalcia.org/statistical-reports [https://perma.cc/33FL-KDX7].

55 Fink, *supra* note 4, at 960 ("Moreover, in several jurisdictions, incarcerated workers receive even lower wages during a "training period," ranging from two months to over a year.").

56 Milman-Sivan, *supra* note 2, at 1621.

57 *Id.* at 1636.

58 *Id.* at 1636-37.

59 Goad, *supra* note 15, at 181.

60 *Id.*; *see Management & Operations*, The GEO Group, Inc., https://www.geogroup.com/Management_and_Operations [https://perma.cc/HM27-CWTX] (last visited Aug. 16, 2019); *About CoreCivic*, CoreCivic, http://www.corecivic.com/about (last visited Aug. 16, 2019).

61 Goad, *supra* note 15, at 184 (citing Vicky Peláez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, Glob. Research (Mar. 10, 2008), http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289 [https://perma.cc/76C4-8GN3].

62 Leung, *supra* note 5, at 682.

63 *Id.* at 682-83.

64 *Id.* at 683-84.

65 *See supra* Part I.

66 Leung, *supra* note 5, at 694; *see* Haslam, *supra* note 23, at 371; *see also* James J. Maiwurm & Wendy S. Maiwurm, *Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms*, 7 U. Mich. J.L. Reform 193, 209-10 (1973). *See generally* 29 U.S.C. § 203(e) (2018).

67 Zatz, *supra* note 4, at 875.

68 *See infra* Parts II, III, and IV.

69 Fink, *supra* note 4, at 966.

70 Zatz, *supra* note 4, at 862.

71 *Id.*

72 *See* U.S. Const. amend. XIII, § 1; *see also supra* p. 2.

73 Zatz, *supra* note 4, at 886.

74 113 F.3d 202 (11th Cir. 1997).

75 *Id.* at 206; *see also* Maiwurm & Maiwurm, *supra* note 66, at 212 ("Perhaps more important was the conclusion that Congress had not intended the Fair Labor Standards Act to cover prisoners. This conclusion is probably correct, and, when combined with the exception clause of the thirteenth amendment, will probably prove fatal to inmate claims, even in cases where an employment relation exists in economic reality.").

76 Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992); *see* Watson v. Graves, 909 F.2d 1549, 1554 (5th Cir. 1990); *see also* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 13 (2d Cir. 1984).

77 Zatz, *supra* note 4, at 876-77; *see Vanskike*, 974 F.2d at 807-08.

78 704 F.2d 1465, 1470 (9th Cir. 1983).

79 *See, e.g., Vanskike*, 974 F.2d at 808 (citing *Bonnette*, 704 F.2d at 1470).

80 Zatz, *supra* note 4, at 867-68.

81 Leung, *supra* note 5, at 694.

82 974 F.2d 806 (7th Cir. 1992).

83 *Id.* at 808.

84 Zatz, *supra* note 419, at 861 (citing *Vanskike*, 974 F.2d at 811-12); *see id.* at 872 n.55 (stating that in Alden v. Maine, 527 U.S. 706 (1999), the Supreme Court's immunity ruling "sharply limits suits against public prisons under the FLSA and other employment statutes," although private prisons are still susceptible to lawsuits and instead rely on the unique characteristics of prison labor "to avoid liability") (citing Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005)).

85 Zatz, *supra* note 4, at 861 (citing *Vanskike*, 974 F.2d at 812).

86 *Id.* at 868.

87 *Id.* at 882-83.

88 *Id.* at 882.

89 *Id.*

90 *Id.* at 883.

91 *See generally* Zatz, *supra* note 4.

92 Leung, *supra* note 5, at 694; *see, e.g.*, Watson v. Graves, 909 F.2d 1549, 1550 (5th Cir. 1990).

93 909 F.2d 1549 (5th Cir. 1990).

94 Zatz, *supra* note 4, at 874 (909 F.2d at 1554-55).

95 Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005).

96 Leung, *supra* note 5, at 695 (citing for example *Watson*, 909 F.2d at 1553-54).

97 Zatz, *supra* note 4, at 894.

98 Fink, *supra* note 4, at 966.

99 Zatz, *supra* note 4, at 893.

100 *See id.* at 912, 915.

101 *Id.* at 912.

102 *Id.* at 923-24.

103 *See* 29 U.S.C. § 203 (2012 & Supp. V 2017); *see also* Steven A. Weiler, *A Time for Recognition: Extending Workmen's Compensation Coverage to Inmates*, 61 N.D. L. Rev. 403, 415-16 (1985); Maiwurm & Maiwurm, *supra* note 66, at 200-01 (discussing rights to minimum wage and to unionize, among others).

104 Zatz, *supra* note 4, at 912.

105 *Id.* at 893.

106 *Id.* at 895.

107 *Id.*

108 *Id.* at 894.

109 *Id.* at 865.

110 UNICOR, Inbound/Outbound Call Center Solutions, https://www.unicor.gov/Category.aspx?idCategory=1429 [https://perma.cc/9UJV-88JU] (last visited Aug. 16, 2019).

111 Aman & Greenhouse, *supra* note 18, at 386-87.

112 *See id* at 387; 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/4MDP-FN3W].

113 *See* Aman & Greenhouse, *supra* note 18, at 388-89; *see also* Leung *supra* note 5, at 702.

114 *See* Leung, *supra* note 5, at 698.

115 Maiwurm & Maiwurm, *supra* note 66, at 199-200.

116 Milman-Sivan, *supra* note 2, at 1674.

117 *See id.* (emphasis added).

118 367 F. Supp. 808 (D.D.C. 1973).

119 *Souder* 367 F. Supp. At 813; *see also* Zatz, *supra* note 4, at 880 (citing *Souder*, 367 F. Supp. at 813).

120 *Zatz, supra* note 4, at 936.

121 *Id.* at 881.

122 *Id.* at 861.

123 Milman-Sivan, *supra* note 2, at 1679.

124 Convention Concerning Forced or Compulsory Labour, 1930, No. 29, *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) [hereinafter Convention No. 29].

125 Milman-Sivan, *supra* note 2, at 1630.

126 Convention No. 29, *supra* note 124 (emphasis added).

127 Milman-Sivan, *supra* note 2, at 1630-31.

128 *Id.* at 1630.

129 *Id.* at 1639 ("The ILO has noted this with regard to the United Kingdom, Austria, and Australia, and other states, such as New Zealand, Germany, and Israel, demonstrate a similar approach.").

130 *Id.*

131 *Id.*

132 *See supra* Part I.

133 Leung, *supra* note 5, at 699.

134 *Id.*

135 Zatz, *supra* note 4, at 923-24.

136 *Id.* at 924.

137 *Id.* at 948; *see also* Haslam, *supra* note 23, at 390.

138 *See* Haslam, *supra* note 23, at 395 (claiming that prison may not have the same deterrent effect on crime if the inmate knows they can sue the state, for example, for workers compensation, among other reasons).

139 *Id.* at 394.

140 *Id.* at 395.

141 *Id.* at 398.

142 Aman & Greenhouse, *supra* note 18, at 404.

143 *See supra* Parts I & II.

144 *See supra* Part III.

145 *See* Zatz, *supra* note 4, at 878-79; Leung, *supra* note 5, at 696.

146 *See supra* Part III.B.

147 *See, e.g.*, Leung, *supra* note 5, at 685 (arguing that "the use of prison labor functionally creates a second-class labor market, largely made up of people of color").

148 *See* Leung, *supra* note 5, at 707-08.

149 Carson, *supra* note 16, at 13.

150 *See supra* Part I.

151 Leung, *supra* note 5, at 682.

152 *See id.* at 682-83.

153 Zatz, *supra* note 4, at 933.

154 Carson, *supra* note 16, at 13; *see* Leung, *supra* note 5, at 684.

155 Goad, *supra* note 15, at 179.

156 Leung, *supra* note 5, at 690.

157 *Id.* at 682-83.

158 *Id.* at 683.

159 *Id.* at 703.

160 *Id.*

161 *Id.* at 702.

162 *Id.* at 704.

163 *See* Carson, *supra* note 16, at 13; *see also* Leung, *supra* note 5, at 682.

164 Milman-Sivan, *supra* note 2, at 1660 (quoting HCJ 2605/05 Acad. Ctr. of L. & Bus. v. Minister of Fin., 9(33) P.D. 483 ¶ 29 (2009) (Isr.)).

165 *Id.* at 1661 (quoting HCJ 2605/05 *Acad. Ctr. of L. & Bus.*, 9(33) P.D. 483 ¶ 36).

166 Goad, *supra* note 15, at 177.

167 *Id.* at 178.

168 *Id.*

169 *Id.*

170 *See id.* at 178-79

171 *See* Convention No. 29, *supra* note 124.

172 *Ratifications of C029 - Forced Labour Convention, 1930 (No. 29)*, Int'l Lab. Org., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312174 (last visited Mar. 25, 2021).

173 Convention No. 29, *supra* note 124.

174 Milman-Sivan, *supra* note 2, at 1632.

175 *Id.* at 1634.

176 *Id.* at 1621, 1645-46 (observing "Convention No. 29's exception to its general prohibition on forced labor is reserved solely for the state").

177 Stacey Jacovetti, *The Constitutionality of Prison Privatization: An Analysis of Prison Privatization in the United States and Israel*, 6 Glob. Bus. L. Rev. 61, 63, 63 n.232 (2016) ("Australia, Scotland, England and Wales, and New Zealand hold a larger proportion of their prisoners in private facilities [than the United States]. The highest percentage, at 19%, is found in Australia.").

178 Milman-Sivan, *supra* note 2, at 1637-38 (stating that the United Kingdom is second only to the United States in its number of private prisons with 12.9% of all prisoners in private prisons and there are "no signs of this trend waning" and New Zealand terminated all agreements with privately managed prisons in 2005, but since 2009 the government has once again allowed for private prisons to conduct business in New Zealand).

179 *Id.* at 1640 (citing International Labor Organization [ILO], *A Global Alliance Against Forced Labour, Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 28, Report I(B), International Labor Conference 93d Session (2005)).

180 *Id.* at 1639-40 (citing ILO, *supra* note 179).

181 *See id.* at 1647-48.

182 *Id.* at 1647.

183 *Id.* at 1647-48.

184 *See supra* Part II.

185 Milman-Sivan, *supra* note 2, at 1648.

186 *Id.*

187 *Id.* at 1624 (citing HCJ 2605/05 Acad. Ctr. of L. & Bus. v. Minister of Fin., 9(33) P.D. 483 (2009) (Isr.)).

188 *Id.*

189 *Id.* at 1658.

190 Leung, *supra* note 5, at 708; *see supra* Part IV.

191 Zatz, *supra* note 4, at 885.

192 *See* Leung, *supra* note 5, at 708.

193 Zatz, *supra* note 4, at 896 (citing Hale v. Arizona, 993 F.2d 1387, 1403 (9th Cir. 1993) (Norris, J., dissenting)).

194 *Id.* at 886.

195 *See supra* Part IV.B (referring to "key stakeholders" as "including prisoners, prisoners' families, prison administrators, correctional officers, victims, victims' families, the government, and the public").

196 *See supra* Part III.

197 Leung, *supra* note 5, at 696.

198 *See* Zatz, *supra* note 4, at 913.

199 *See id.* ("Instead, we might consider a proliferation of employments. A categorical divide between employees and nonemployees is not the only plausible way to manage tensions between employment protections and other valuable features of work relationships.").

200 *See* Maiwurm & Maiwurm, *supra* note 66, at 201-02.

201 *See generally* Leung, *supra* note 5.

202 For a brief look at how quasi-employment interacts with franchises under German law, see Karsten Metzlaff & Tom Billing, *Germany, in* Getting the Deal Through: Franchise 3 (Philip F. Zeidman ed., 2019); for a discussion of how the law of various European countries might address quasi-employment, see A.Ph.C.M. Jaspers, Quasi-Employee, Quasi-Self-Employed: More than Just a Name, Introduction to Utrecht University Conference for Comparative Law (1999), *in* Utrecht Publishing & Archiving Services, https://dspace.library.uu.nl/bitstream/handle/1874/7207/article_print2.html;jsessionid=C0511CDACC063D2A80B0F5D7AFD83A0E?sequence=1#text20 [https://perma.cc/3WBZ-5FFY].

203 *See* Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for More Precise, Fundamental Analysis*, 48 Hous. L. Rev. 265, 285 (2011); *see, e.g.*, McClure v. Pa. R.R. Co., 53 Pa. Super. 638, 646-47 (1913) (evincing the existence of the concept since the early 1900s).

204 *Quasi*, Black's Law Dictionary (11th ed. 2019).

205 *Employee*, Black's Law Dictionary (11th ed. 2019).

206 *See McClure*, 53 Pa. Super. at 646-47; Hayman v. Phila. & Reading Ry. Co., 214 Pa. 436, 439 (1906); Keck v. Phila. & Reading Ry. Co., 206 Pa. 501, 501 (1903).

207 *See McClure*, 53 Pa. Super. at 638; *Hayman*, 214 Pa. at 436; *Keck*, 206 Pa. at 501.

208 Imwinkelried & Amoroso, *supra* note 203, at 285 (citing Michele Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. Rev. 727, 748 (2009)).

209 Metzlaff & Billing, *supra* note 202, at 3; Jaspers, *supra* note 202 (noting "the issue [of determining quasi-employment] hinges on the extent of dependency of the workers concerned and the similarity of these quasi-workers to employees under an employment contract").

210 Metzlaff & Billing, *supra* note 202, at 3; Jaspers, *supra* note 202.

211 Metzlaff & Billing, *supra* note 202, at 3.

212 *See* Haslam, *supra* note 23, at 371.

213 *See supra* Part III.B & IV.A.

214 Milman-Sivan, *supra* note 2, at 1670.

215 Zatz, *supra* note 4, at 926.

216 *Id.* at 927.

217 Milman-Sivan, *supra* note 2, at 1671-72 (noting that Professor Sinzheimer was one of the first scholars to specialize in labor law); *see, e.g.*, Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law*, 34 Comp. Lab. L. & Pol'y J. 605, 617 (2013).

218 Milman-Sivan, *supra* note 2, at 1674 (emphasis added) (citing Michael Walzer, *At McPrison and Burglar King, It's ... Hold the Justice*, New Republic, Apr. 8, 1985, at 11). Professor Walzer is a famous American intellectual and political theorist. *See, e.g.*, Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining* Jus Post Bellum, 186 Mil. L. Rev. 116, 118 (2005).

219 Aman & Greenhouse, *supra* note 18, at 359.

220 Zatz, *supra* note 4, at 949 (citing Chad Alan Goldberg, *Contesting the Status of Relief Workers During the New Deal: The Workers Alliance of America and the Works Progress Administration, 1935-1941*, 29 Soc. Sci. Hist. 337, 355 (2005)). Professor Goldberg is a prominent professor of sociology at the University of Wisconsin-Madison. *See, e.g., About the Author*, Univ. of Chi. Press Books, https://press.uchicago.edu/ucp/books/author/G/C/au5509187.html [https://perma.cc/AX6F-WAK3] (last visited Mar. 22, 2021).

221 Milman-Sivan, *supra* note 2, at 1646.

222 Aman & Greenhouse, *supra* note 18, at 392 (citing Moses & Smith, *supra* note 36).

223 Leung, *supra* note 5, at 690.

224 *See supra* Part I.

225 *See* Leung, *supra* note 5, at 684; Goad, *supra* note 15, at 179; *see also supra* Part IV.B.

226 Milman-Sivan, *supra* note 2, at 1662.

227 *See supra* Part V.A.

228 *Id.*

229 *Id.*

230 *Id.*

231 Milman-Sivan, *supra* note 2, at 1669 (contrasting the voluntary labor of a hypothetical "libertarian prison" with the forced labor of the United States federal prison system) (citing J. Roger Lee & Laurin A. Wollan, *The Libertarian Prison: Principles of Laissez-Faire Incarceration*, 65 Prison J. 108, 108 (1985)).

232 *See supra* Part V.A. (discussing the French approach).

233 Milman-Sivan, *supra* note 2, at 1669 (citing Lee & Wollan, *supra* note 231, at 111).

234 *Id.*; *see supra* Part V.A (demonstrating the difference in France's current voluntary work policies for prisoners versus this Note's suggested approach, which applies only to work for private companies or when providing products to the open market).

235 *See supra* Part I (borrowing this concept from PIE and other programs but encouraging reasonable compromise with regard to the maximum percentages deductible from inmate pay).

236 *See* Milman-Sivan, *supra* note 2, at 1669 (citing Lee & Wollan, *supra* note 231, at 111).

237 *See* Haslam, *supra* note 23, at 387, 390 (citing Hale v. Arizona, 993 F.2d 1387, 1401 n.1 (9th Cir. 1993) (Norris, J., dissenting)).

238 *See* Leung, *supra* note 5, at 683, 704 (citing Victoria's Secret and Whole Foods as examples of private firms that consider ex-convict status in the hiring process) (citing Alex Henderson, *9 surprising industries getting filthy rich from mass incarceration*, Salon (Feb. 22, 2015, 6:00 PM), https://www.salon.com/2015/02/22/9_surprising_industries_getting_filthy_rich_from_mass_incarceration_partner/ [https://perma.cc/GEG6-YHKQ]; Claire Zilman, *Why Whole Foods, Dollar General, and Panera have all been sued over a tiny hiring technicality*, Fortune (Jan. 16, 2015, 5:00 AM), http://fortune.com/2015/01/16/whole-foods-dollar-general-panera-hiring-lawsuit/ [https://perma.cc/85BN-CSMU]).

239 *See id.* at 704 (noting that "[s]ome studies show that hiring rates of Black workers for low-skill jobs in states that have 'banned the box' have actually declined, a result that many activists and organizers suggest is the result of stereotypes about Black men, and to some degree women, as criminals") (citing Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 39 (Univ. of Mich. Law & Econ., Research Paper No. 16-012, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795 [https://perma.cc/Q9PC-JNBA]; Jennifer L. Doleac & Benjamin Hansen, The Unintended Consequences Of "Ban The Box": Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden

5-6 (Oct. 2017) (unpublished manuscript), http://jenniferdoleac.com/wp-content/uploads/2015/03/DoleacHansenBanTheBox.pdf [https://perma.cc/3LYR-ZCKR]); *see also supra* p. 19 (referring to "key stakeholders" as "including prisoners, prisoners' families, prison administrators, correctional officers, victims, victims' families, the government, and the public").

240 *See* Jacob Morgan, *The 5 Types of Organizational Structures: Part 1, The Hierarchy*, Forbes (July 6, 2015, 3:05 AM), https://www.forbes.com/sites/jacobmorgan/2015/07/06/the-5-types-of-organizational-structures-part-1-the-hierarchy/#561f3b185252 [https://perma.cc/8WJ9-4YND] (discussing the basic breakdown of a hierarchical organization).

241 *See* Lynda Silsbee, *Everyday Leadership Acts of Courage: To Lead, You Must be Vulnerable*, Forbes (Feb. 12, 2019, 9:00 AM), https://www.forbes.com/sites/forbescoachescouncil/2019/02/12/everyday-leadership-acts-of-courage-to-lead-you-must-be-vulnerable/#35a11aa567d6 [https://perma.cc/SRV8-YHJE] (discussing the benefits of feedback).

242 Milman-Sivan, *supra* note 2, at 1648-49.

243 *See supra* Parts I--II.

244 *See supra* Part III.

245 *See supra* Part IV.

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