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COMMENT

# **Picking Cotton for Pennies: An Exploration into the Law's Modern Endorsement of a Free-Prison Workforce**

*Renee Elaine Henson\**

ABSTRACT

The Thirteenth Amendment made slavery unconstitutional, but also created an exception where “[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.” This carve-out opened the door for prison-dependent companies to make handsome profits from large scale prison labor. Inmates must work full time in demanding conditions, and are paid nominally in return. Inmates do not receive minimum wages because they are excluded from the protections of the Fair Labor Standards Act (“FLSA”) through judicial interpretation. Low wages harm inmates because there are costs to imprisonment; inmates are charged for personal hygiene products, health services, per diem fees, prescriptions, police booking, probation, DNA testing, police transportation, phone calls, public defender services, and visitations. Inmates and their families cannot afford the exorbitant costs of imprisonment. This article argues that courts’ holdings that inmates have no right to freely sell their labor, should change because one’s labor should always belong to his or herself. The FLSA was meant to protect against low-wage harms, and courts should reframe their analysis to better address the economic reality of prison labor.

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## I. INTRODUCTION: JACKSON'S STORY

Meet Jackson. Jackson works almost every day of his life. Jackson was recently assigned an outdoor job to work on an actual plantation field more than 150 years after the end of the Civil War.<sup>1</sup> Jackson is paid \$0.02 per hour, meaning Jackson will only receive \$.16 for a full day's work.<sup>2</sup> Jackson does not receive the usual labor protections many Americans have grown accustomed to, such as: workers' compensation, the ability to form a union, or the simple ability to quit.<sup>3</sup> Jackson is very unhappy with his job, but as a prison inmate in America's ever-increasing number of private prisons, Jackson has no legitimate way to rid himself of his unfortunate reality.<sup>4</sup>

Jackson's employers, however, appreciate Jackson's restrictions. In fact, Jackson's employers base their projected profit outcomes on there being more people like Jackson to fill his place once he leaves prison.<sup>5</sup> Jackson's employers rely on increasing prison populations to improve profit margins to make as much money as possible.<sup>6</sup> For example, a study from Mississippi found private prisons give twice the amount of time-enhancing infractions to inmates as state prisons do, which allows the average private prison to collect an additional \$3,000 in fees from people like Jackson.<sup>7</sup> Jackson's employers make tremendous profits off of a massive labor force where there are no additional expenditures for healthcare, no concern for unemployment, workers do not have to be paid, and performance is virtually guaranteed.<sup>8</sup>

There are substantial profits to be earned on the backs of prison inmates.<sup>9</sup> Part II of this article shows how the law endorses and allows private companies to capitalize on prisoners who do not have employee status. Beginning after the Civil War and during the Reconstruction Era, the Black Codes were created in the South around 1865.<sup>10</sup> The Black Codes were race-neutral on their face, but had the deleterious effect of returning recently-freed slaves into a position of subjugation in order to capitalize on cheap labor.<sup>11</sup> While the Black Codes were first introduced in Mississippi and South Carolina, virtually all other southern states followed suit and

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1. Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>.

2. *Id.*

3. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, HIST. IS WEAPON, <http://www.historyisaweapon.com/defcon1/davisprison.html> (last visited Jan. 31, 2017); *see also* Bennis, *supra* note 1.

4. Emily Jane Perkins, *Regulating Appearance In The Workplace: An Employer's Guide To Avoid Employment Discrimination Lawsuits*, NAT'L L. REV. (Mar. 18, 2014), <http://www.natlawreview.com/article/regulating-appearance-workplace-employer-s-guide-to-avoid-employment-discrimination> (this introduction style was borrowed from the above article.).

5. Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 76 (2005).

6. *Id.*

7. Gabrielle Canon, *Here's the Latest Evidence of How Private Prisons Are Exploiting Inmates for Profit*, MOTHER JONES (June 17, 2015), <http://www.mothejones.com/mojo/2015/06/private-prisons-profit>.

8. Davis, *supra* note 3; *see also* Bennis, *supra* note 1.

9. Davis, *supra* note 3.

10. Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L. J. 349, 354 (1998).

11. *Id.*

enacted their own Black Codes under President Andrew Johnson's lenient Reconstruction policies.<sup>12</sup> These Black Codes were well-supported until 1877.<sup>13</sup> This section shows how, similar to the Black Codes, there is a larger scaled exploitation that still occurs, now under the Thirteenth Amendment, which states 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."<sup>14</sup> Thus, the Thirteenth Amendment's exception to slavery and involuntary servitude opened the door for prison-dependent companies to make money off prison labor on a large scale.<sup>15</sup>

Constitutionally protected, cheap prison labor is a treasure trove for companies, but an injustice for inmate workers. Part III will explain why forced, low-wage prison labor is a problem, and the difficulties that exploited prisoners may face. Prisons commonly charge inmates for necessary personal items like toilet paper, meals, and clothes.<sup>16</sup> For example, at Attica State Correctional Facility in California, workers are paid between \$0.06 and \$0.29 per day, and struggle to afford toilet paper in the prison commissary.<sup>17</sup> Because prison fees for basic necessities abound, prisoners' family members often have to pay these costs; however, because this causes economic stress on families, many prisoners go without necessary personal hygiene products.<sup>18</sup>

There should be a change in how courts read the Fair Labor Standards Act ("FLSA"). Part IV proposes a legal solution for inmates to receive protection under the FLSA. This section will discuss how the national economy is affected by prison labor, as well as families who have loved ones imprisoned. As Martin Luther King Jr. famously said in his *Letter From Birmingham Jail*, "there are two types of laws: there are just laws, and there are unjust laws. I would agree with St. Augustine that '[a]n unjust law is no law at all.'"<sup>19</sup> Because prisoners are not considered employees under the FLSA, they receive very few protections from what many consider to be inhumane labor standards.<sup>20</sup>

It is unjust when a prisoner is forced to work as a miner, and if not, face the extreme punishment of solitary confinement.<sup>21</sup> Solitary confinement makes prisoners more dangerous because it may cause the following: "[a] specific psychiatric syndrome, characterized by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with

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12. *Black Codes*, HIST. (Mar. 12, 2017), <http://www.history.com/topics/black-history/black-codes>.

13. *Id.*

14. U.S. CONST. amend. XIII, § 1 (emphasis added).

15. Weaver & Purcell, *supra* note 10, at 360.

16. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/analysis/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate-excessive-fines-clause>.

17. Heather Ann Thompson, *Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LAB.: STUD. WORKING-CLASS HIST. AM. 3, 22 (2011), <http://havenscenter.wisc.edu/files/Thompson.laborinmatesandguards.pdf>.

18. Eisen, *supra* note 16.

19. Martin Luther King Jr., *Martin Luther King Jr.'s 'Letter From Birmingham Jail'*, ATLANTIC (Aug. 1, 1963), <https://www.theatlantic.com/politics/archive/2013/04/martin-luther-kings-letter-from-birmingham-jail/274668/>.

20. Benns, *supra* note 1.

21. *Id.*

thinking, concentration and memory.”<sup>22</sup> Solitary confinement is a harsh consequence for taking a personal day. Also, profits from a prisoner’s toil do not usually go back to the state to help pay the exorbitant costs of keeping him or her imprisoned, but instead go towards increasing corporations’ profits.<sup>23</sup> Private prisons comprise a significant portion of combined state and federal prisons. For-profit prisons make up 7% of state prisons, and 18% of federal prisons.<sup>24</sup> Private prisons also make up 75% of federal immigrant detention facilities.<sup>25</sup> Is this a system of laws that Martin Luther King Jr. would have considered just?

## II. THE PROBLEM OF A STATE-ENDORSED PRISON SYSTEM THAT PERMITS FREE LABOR

This section will discuss how the law endorses the for-profit incarceration of Americans. The Thirteenth Amendment was intended to free black men and women in America, but the Black Codes, Jim Crow laws, and the “war on drugs” have placed more black Americans in the prison system than there were in the days of slavery.<sup>26</sup> This section will show some of the ways that for-profit prisons affect inmates’ day-to-day lives, and how the FLSA unfairly treats inmates.<sup>27</sup>

### A. *The Circularity of American Jurisprudence*

The problem of inmate profiteering cannot properly be analyzed without first discussing the overrepresentation of black men in prison, and how that connects to the post-Civil War creation of the Black Codes.<sup>28</sup> The Black Codes were facially race-neutral, but disproportionately affected blacks, mostly in the American South.<sup>29</sup> The Black Codes consisted of five major legislative categories: “(1) vagrancy laws, (2) contract-enforcement laws, (3) enticement laws, (4) criminal-surety [laws], and (5) [] convict-leasing system [laws].”<sup>30</sup> The purpose of the Black Codes was to place recently-freed slaves back into the position of providing free, forced labor.<sup>31</sup> Although they did not specifically name blacks, the Black Codes worked as a tool for ensuring the inferiority of the newly freed slaves by using facially benign statutes as “a pretext to maintain control over the freedmen.”<sup>32</sup> The

22. Jason Breslow, *What Does Solitary Confinement Do To Your Mind?*, FRONTLINE (Apr. 22, 2014), <http://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind/>.

23. Davis, *supra* note 3.

24. *Private Prisons*, ACLU, <https://www.aclu.org/issues/mass-incarceration/privatization-criminal-justice/private-prisons> (last visited Mar. 21, 2018).

25. *Id.*

26. Katie Mulvaney, *More African-American men in prison system now than were enslaved in 1850*, POLITIFACT (Dec. 7, 2014), <http://www.politifact.com/rhode-island/statements/2014/dec/07/diego-arene-morley/brown-u-student-leader-more-african-american-men-p/>; see also Max Ehrenfreund, *There’s a disturbing truth to John Legend’s Oscar statement about prisons and slavery*, WASH. POST (Feb. 23, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/02/23/theres-a-disturbing-truth-to-john-legend-oscar-statement-about-prisons-and-slavery/?utm\\_term=.a9356d1eda30](https://www.washingtonpost.com/news/wonk/wp/2015/02/23/theres-a-disturbing-truth-to-john-legend-oscar-statement-about-prisons-and-slavery/?utm_term=.a9356d1eda30).

27. 29 U.S.C. § 201 (2018).

28. Weaver & Purcell, *supra* note 10, at 351.

29. *Id.*

30. *Id.* at 354.

31. *Id.*

32. William M. Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 65 (2004).

Black Codes had a resoundingly greater effect on black men than on any others in society, but because the Black Codes were facially neutral, there was no legal cause of action.<sup>33</sup>

Although the Black Codes are no longer in force today, there is another law in force that, while purportedly protecting from racial discrimination, actually contributes to the modern condition of prisons — the Thirteenth Amendment.<sup>34</sup> While a fair reading of the Thirteenth Amendment would indicate that the spirit of the law was within the context of the Reconstruction Amendments' broad purpose of eliminating racial subjugation,<sup>35</sup> it is worth exploring how America's prison systems criminally supervise more black men today than were enslaved in 1850.<sup>36</sup>

The Census of 1850 showed there were 872,924 African American slaves over the age of 15 in the United States.<sup>37</sup> In 2013, there were 526,000 African Americans in State and Federal Correctional Centers; during the same year there were 877,000 African American men on probation, and 280,000 African American men on parole.<sup>38</sup> These figures total 1.68 million African American men under State and Federal criminal justice supervision.<sup>39</sup> Further, because more black men are affected by the criminal justice system now than were by slavery, more black men are disenfranchised by state laws prohibiting felons from voting than were barred from the ballot box in 1870.<sup>40</sup>

The modern criminal justice system is largely a result of President Ronald Reagan's escalation of the war on crime and drugs.<sup>41</sup> Although crime is interracial, the zero-tolerance drug policies that created mandatory minimum sentences had a disproportionately harmful effect on the black community.<sup>42</sup> Take for example the oft repeated sentencing scheme that created a punishment disparity of 100:1 from crack cocaine to powder cocaine — the former mostly affecting blacks, and the latter mostly affecting whites.<sup>43</sup> A 100:1 punishment disparity — all for different drug classifications based on substances that are molecularly identical.<sup>44</sup> This meant that a black man sentenced for a non-violent crack conviction spent about the same amount of time in prison as a white man for a *violent conviction*.<sup>45</sup> Thankfully, that shocking disparity is now almost behind us as a nation; the disparity as of 2010 was only 18:1, which, while still unpardonably high, is much lower than it was in the 1980s.<sup>46</sup>

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33. *Id.*

34. *Id.*

35. Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1156 (2014).

36. Ehrenfreund, *supra* note 26.

37. Mulvaney, *supra* note 26.

38. *Id.*

39. *Id.*

40. Michelle Alexander, *The New Jim Crow*, HUFFINGTON POST (Apr. 10, 2010), [http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow\\_b\\_454469.html](http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow_b_454469.html).

41. Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. C.R. L. J. 145, 152 (2004).

42. *Id.*

43. *Fair Sentencing Act*, ACLU, <https://www.aclu.org/feature/fair-sentencing-act> (last visited Mar. 22, 2018).

44. Elizabeth Kulze, *How Crack Vs. Coke Sentencing Unfairly Targets Poor People*, VOCATIV (Feb. 22, 2015, 2:14 PM), <http://www.vocativ.com/underworld/drugs/crack-vs-coke-sentencing/>.

45. *Fair Sentencing Act*, *supra* note 43.

46. *Id.*

Although the Thirteenth Amendment was ratified over 100 years ago, and the Black Codes and Jim Crow laws are relics of the past, the modern criminal justice system is taxing the black community in ways that are strikingly similar to pre-Thirteenth Amendment days.<sup>47</sup> Professor Otis Grant, Director of the Institute for the Study of Race, argued that “racism in the modern criminal justice system is subtle and, as such, harder to confront while being just as psychologically damaging.”<sup>48</sup> Analyzing the numbers alone shows the unfortunate circularity of the subjugation of blacks through the legal system.

### B. *The Irony of the Thirteenth Amendment*

In an ironic turn of history, the Thirteenth Amendment simultaneously made it illegal to own slaves, but made an exception for involuntary servitude where a person has been convicted of a crime: “[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.”<sup>49</sup> Because of this dramatic exception, inmates, who are disproportionately black men, are legally approved modern slaves.<sup>50</sup> Studies have shown that even though black people make up only 12% of the overall U.S. population, they make up 30% of those charged with property offenses, 38% of those charged with violent arrests, and one in three black men born in 2001 will go to prison at some point in his lifespan.<sup>51</sup> Thus, many black prisoners are forced to perform hard labor without any constitutional remedy.<sup>52</sup>

For example, Missouri statutorily mandates offenders to work, allowing for an exception only if the offender establishes an approved reason not to work.<sup>53</sup> The Chief Administrative Officer of Missouri must approve that reason, as set forth in Mo. Rev. Stat. § 217.337.<sup>54</sup> Section 217.337 says, in relevant parts, that “[a]ll general population offenders shall be expected to adhere to a schedule of activities of work and rehabilitative programs as prescribed for the offender by the department.”<sup>55</sup> Missouri courts have held that the Department of Corrections has broad discretion in deciding what type of job or program the offender will receive.<sup>56</sup> Prisoners across the nation do jobs that run the gamut: they make uniforms, bedding, shoes, and surge protectors; transcribe books into Braille format; pick oranges, plant trees, and make fiberglass canoes; are telemarketers; and even make paper targets

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47. See *supra* Part A, page 8 (*The Circularity of American Jurisprudence*).

48. Grant, *supra* note 41, at 186.

49. U.S. CONST. amend. XIII, § 1 (emphasis added).

50. Bennis, *supra* note 1.

51. *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System*, SENT’G PROJECT (Aug. 31, 2013), <http://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/>.

52. *Id.*

53. MO. REV. STAT. § 217.337 (2017); see also *Reynolds v. Mo. Bd. of Prob. & Parole*, 468 S.W.3d 413 (Mo. Ct. App. 2015).

54. § 217.337.

55. *Id.* (emphasis added).

56. *Olderoft v. Mo. Bd. of Prob. & Parole*, No. 4:12-CV-66-DDN, 2012 U.S. Dist. LEXIS 50796, at \*8-9 (E.D. Mo. Apr. 11, 2012).

for law enforcement officials to practice marksmanship — all for almost no pay.<sup>57</sup> For example, Missouri Vocational Enterprises Correctional Industries provides a catalogue showcasing all the products made by inmates, including: American flags; office and bedroom furniture; institutional products for prisons; police uniforms; chair swings; and all manner of the University of Missouri-themed products.<sup>58</sup>

Some states do not pay inmates any wages at all, including Texas, Arkansas, and Georgia.<sup>59</sup> The Texas Department of Criminal Justice says prisoners must either work or face extreme consequences.<sup>60</sup> Consequences may include the following: loss of privileges; forced confinement in cells for 24 hours a day with “no trips to the day room, commissary, or recreation yard”; forced solitary meals in cells; or removal of all prisoner property from cells during the time of punishment — all a very steep price to pay for not showing up to work.<sup>61</sup> Further, the jobs that prisoners are compelled to perform are not easy by most Americans’ standards; inmates in Texas begin their days at 3:30 am, eat breakfast at 4:30 am, and are ready to work at their assigned job at 6:00 am, all for no pay.<sup>62</sup>

The Thirteenth Amendment outlawed slavery, but it also created an exception which in another, subtler way, has swallowed the law. In addition to several states paying prisoners nothing at all, some require prisoners to do work that still reflects the realities of the late 1860s.<sup>63</sup> Florida, Ohio, Washington, and Massachusetts all use chain gangs in some capacity.<sup>64</sup> In Florida, prisoners are paraded around the community with chains around their ankles, in black and white striped uniforms, wearing florescent green vests — all to ensure a deterrent effect.<sup>65</sup> Newly minted Brevard County, Florida Sheriff, Wayne Ivey, is intent on sending a strong anti-crime, tough on punishment message, but the reminders of slavery bring forth an uncomfortable sense of déjà vu: “[g]iven the connotations of slavery and forced labor that a chain gang brings up, it is not ideal,” said Baylor Johnson, of the American Civil Liberties Union.<sup>66</sup>

A prison using chain gangs walks a constitutionally fine line: in *Austin v. Hopper*, the court held that it was a violation of the Eighth Amendment’s rule against cruel and unusual punishment to shackle prisoners to a “hitching post” to coerce inmates to return to work.<sup>67</sup> In *Austin*, prisoners were made to stand for hours at a time in one position.<sup>68</sup> Some inmates had their arms shackled to the hitching

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57. Lindsay Putnam, *The Seven Weirdest Jobs That Prisoners Do*, N.Y. POST (June 23, 2015, 2:33 PM), <http://nypost.com/2015/06/23/the-seven-weirdest-jobs-that-prisoners-do/>.

58. *Missouri Vocational Enterprises Correctional Industries*, <https://doc.mo.gov/mve/> (last visited Mar. 22, 2018).

59. Kanyakrit Vongkiatkajorn, *Why Prisoners Across the Country Have Gone on Strike*, MOTHER JONES (Sept. 19, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/09/prison-strike-inmate-labor-work>.

60. *Frequently Asked Questions*, TEX. DEP’T CRIM. JUST., <http://www.tdcj.texas.gov/faq/cid.html> (last visited Mar. 26, 2018).

61. *Id.*

62. *Id.*

63. Andrew Ford, *Florida sheriff reintroduces chain gang*, USA TODAY (May 2, 2013, 4:22 PM), <http://www.usatoday.com/story/news/nation/2013/05/02/brevard-county-sheriff-chain-gang/2130335/>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Austin v. Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998).

68. *Id.*



post which caused pain, discomfort, chaffing, and the heat of the shackles burned the prisoners.<sup>69</sup>

Florida's Sheriff Ivey has addressed the potential unconstitutionality of using chain gangs by shackling inmates' ankles *together*, but not to a post, or to other inmates.<sup>70</sup> Ivey emphasizes the inmates who work the chain gangs volunteer for this particular work, and "enjoy the sunshine and the fresh air."<sup>71</sup> Although some sheriffs place a positive spin on the benefits of chain gang work for eight hours a day, six days a week, this spin is belied by the use of different names such as "tandem work crews."<sup>72</sup> Calling a 130 year-old punishment by a new name may be an attempt to create distance from a practice that is not a shining example of American history — if there is nothing wrong with the practice, why attempt to rebrand it?<sup>73</sup>

### C. *Judicial Interpretation of the FLSA*

The privatization of prisons in America has created a boon for private prison companies and their investors.<sup>74</sup> There are massive benefits for companies who invest in private prisons because inmates are not legally considered employees under the FLSA.<sup>75</sup> Companies that invest in private prison industries are relieved of many concerns that go along with American free enterprise: there is no concern a mistreated worker will go on strike; profit margins stay strong because prisoner unemployment insurance is not required; work schedules always stay consistent because prisoners are not given vacation, compensation, or bereavement time off; and employers are not bound by minimum wage laws.<sup>76</sup> All of the benefits listed above are made possible by courts holding that inmates are not included under the protection of the FLSA,<sup>77</sup> even though inmates are not explicitly excluded from the Act itself.<sup>78</sup>

The FLSA's purpose, *inter alia*, is to set a minimum standard of living for workers that is "necessary for health, efficiency, and [the] general well-being of workers."<sup>79</sup> The FLSA guarantees a minimum wage for most workers, but sets out a long list of those exempted, such as: bona fide executives; employees who harvest or farm for any kind of fish; employees that do anything in connection with publishing a newspaper with fewer than four thousand subscriptions; employees that do domestic work on a casual basis; and certain types of computer analysts.<sup>80</sup> Note that prisoners are *not* included in the list of exempt workers. However, courts and legislatures have read an exemption into the FLSA for prisoners, which is in direct conflict with the Supreme Court's view that "[s]pecificity in stating exemptions

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69. *Id.* at 1256-57.

70. Ford, *supra* note 63.

71. *Id.*

72. *Id.*

73. *See generally id.*

74. Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RES. (Jan. 25, 2018), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>.

75. Vongkiatkajorn, *supra* note 59.

76. Pelaez, *supra* note 74.

77. 29 U.S.C. § 201 (2018).

78. *Hale v. Arizona*, 993 F.2d 1387, 1398 (9th Cir. 1993).

79. 29 U.S.C. § 202.

80. 29 U.S.C. § 213.

strengthens the implication that employees not thus exempted . . . remain within the Act.”<sup>81</sup>

In a Ninth Circuit FLSA interpretation case, *Hale v. Arizona*, inmates sued to be paid the minimum wage, arguing that prisoners should be considered employees under the FLSA.<sup>82</sup> The *Hale* court held that because prisoners were statutorily required to work under Arizona law, the economic benefit of their labor belonged to the institution — thus, prisoners did not deserve minimum wage because they could not be employees under the FLSA.<sup>83</sup>

Although the *Hale* court says the FLSA may not categorically exclude all inmate labor, and the Supreme Court has held that the definition of employee should be considered broadly, the Ninth Circuit made a distinction between employees who have the freedom to work and those who do not.<sup>84</sup> The court said that to determine whether there is a true employment relationship under the FLSA, the test *requires the court to focus on the economic reality* of the relationship, and not technical language like the FLSA’s definitions of “employee,” “employer,” and “employ.”<sup>85</sup> The court must make this distinction because if the test were measured by the “technical language” put forth in the Act, inmates would have to be considered employees.<sup>86</sup> The court explained the difference between a free person and a legally enslaved one is a free person’s labor is his alone to sell: “inmate labor is different from this type of situation where labor is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude.”<sup>87</sup>

Courts have concluded that because inmates must work as a part of their sentences, the essence of the relationship between prison industry and prisoner is “penological and not pecuniary.”<sup>88</sup> Courts have defended their findings that inmates are not employees on the legal fiction that prisoners are removed from the national economy when they are incarcerated, even though they substantially contribute to private prison companies’ profits, reaching \$3 billion in 2010.<sup>89</sup>

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81. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950).

82. *Hale*, 993 F.2d at 1389.

83. *Id.*

84. *Id.* at 1393–94.

85. *Id.* (“Employee” is defined as “any individual employed by an employer,” 29 U.S.C. § 203(e)(1) (2018), including “any individual employed by a State,” 29 U.S.C. § 203(e)(2)(C). “Employer” includes “a public agency,” 29 U.S.C. § 203(d). “Employ” includes “to suffer or permit to work.” 29 U.S.C. § 203(g).)

86. *See id.*

87. *Id.* at 1394.

88. *Id.* at 1395.

89. *Banking on Bondage: Private Prisons and Mass Incarceration*, ACLU, <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration> (last visited Mar. 26, 2018).

### III. THE COMPANIES THAT PROFIT, THE WORK WITH WHICH PRISONERS ARE FACED, AND THE PROBLEMS THAT ARE ENCOUNTERED

#### A. *Private Interests and the Bottom Line*

For-profit companies are capitalizing on an almost limitless, near-free work force that has virtually no protections. Leading this charge is the American Legislative Exchange Council (“ALEC”). ALEC is a conservative lobbying group that has played a large role in forming laws to bring more people into prison systems, including laws such as stand your ground, mandatory minimum sentences, and three strike laws — all of which have dramatically increased prison populations.<sup>90</sup> ALEC is backed by many powerful companies — including Coca-Cola, Kraft Foods, Procter & Gamble, and McDonalds — who take part in actually drafting and proposing major legislation.<sup>91</sup> Although ALEC hales itself as a benign, “nonpartisan public-private partnership,” its primary goal is to “increase[e] corporate profits without public scrutiny.”<sup>92</sup> ALEC creates handwritten, “model legislation,” that is later used in state legislatures nationwide.<sup>93</sup> ALEC’s influence is so far-reaching that about 200 of its bills are passed into law annually.<sup>94</sup> Wisconsin Democratic State Representative Mark Pocan, who is working to expose ALEC’s role in creating harsher laws, was quoted as saying, “ALEC is a corporate dating service for lonely legislators and corporate special interests[, and] [] eventually the relationship culminates with some special interest legislation . . . [u]nfortunately, what’s excluded from that equation is the public.”<sup>95</sup>

ALEC has been instrumental in the expansion and entrenchment of private industry in the prison system by creating laws that promote privatization, intensified punishment, and longer prison sentences.<sup>96</sup> Corrections Corporation of America (“CCA”), a large private prison corporation, had such a close affiliation with ALEC that CCA was present at the time ALEC member-corporations voted for S.B. 1070, an Arizona law that increased the undocumented immigrant population in detention centers and jails.<sup>97</sup> The presence of prison representatives in the room while ALEC corporations vote for a law that will increase the number of future prison inmates, which will lead to more corporate profits, highlights a serious conflict of interests. Notably, CCA left ALEC when it was exposed that CCA was in the room while the voting of S.B. 1070 occurred.<sup>98</sup>

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90. Lewis Beale, *The 13th: Ava DuVernay’s Damning Netflix Doc Finds the Truth About Mass Incarceration*, DAILY BEAST (Oct. 3, 2016, 1:00 AM), <http://www.thedailybeast.com/articles/2016/10/03/the-13th-ava-duvernay-s-damning-netflix-doc-finds-the-truth-about-mass-incarceration.html>.

91. *The United States of ALEC: Bill Moyers on the Secretive Corporate-Legislative Body Writing Our Laws*, DEMOCRACY NOW! (Sept. 27, 2012), [https://www.democracynow.org/2012/9/27/the\\_united\\_states\\_of\\_alec\\_bill](https://www.democracynow.org/2012/9/27/the_united_states_of_alec_bill).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *How ALEC & the Kochs Publicly Back Criminal Justice Reform & Privately Expand Mass Incarceration*, DEMOCRACY NOW! (Oct. 3, 2016), [https://www.democracynow.org/2016/10/3/how\\_alec\\_the\\_kochs\\_publicly\\_back](https://www.democracynow.org/2016/10/3/how_alec_the_kochs_publicly_back).

97. *Id.*

98. *Id.*

A report entitled *Unholy Alliance: How the Private Prison Industry is Corrupting Our Democracy and Promoting Mass Incarceration*, by the Public Campaign and PICO National Network, said that prison population growth “[is] an intentional effort by the private prison industry to shape public policy to push more people into prison and keep them there longer. The industry has achieved this through the classic three-pronged strategy of contributing to political campaigns, lobbying, and gaining access to policymakers through close relationships.”<sup>99</sup>

It is a misnomer to call what ALEC does “lobbying,” because ALEC essentially allows individuals who represent ALEC-affiliated-corporations to have the same voting power as elected legislators.<sup>100</sup> Both legislators and lobbyists vote on proposed bills written by corporate lobbyists and are later introduced in the legislature by those same representatives.<sup>101</sup> It is common for lobbyists to assist the drafting of legislation, but there is a sharp distinction between (1) merely assisting in the drafting process, and (2) writing the bills, and then gathering support from key legislators and affiliated corporate representatives before pushing the bill to the state legislature for a final vote.<sup>102</sup> This distinction begs the following question: is this how most Americans think their state representatives consider legislation?

### *B. What is the Harm Done to Prisoners?*

Not only do inmates work long hours for nominal wages, they also have to pay for their own imprisonment.<sup>103</sup> There are several methods of “pay-to-stay” schemes that states have developed.<sup>104</sup> The first is a per-diem fee, where inmates are charged each day for their stay.<sup>105</sup> Forty-three states have authorized a per-diem fee.<sup>106</sup> Some per-diem fees are steeper than others; for example, in Riverside, California, inmates are charged \$142.42 per day, while in Franklin County, Ohio, the fee is \$40 per day.<sup>107</sup> A second fee scheme is charging inmates a la carte for necessary items and services.<sup>108</sup> Items charged may include toilet paper, meals, medical and dental services, prescriptions, police booking, probation, DNA testing, police transportation, phone call fees, public defender services, and visitation fees.<sup>109</sup>

If an inmate receives only \$.16 per day from his hard labor, but his daily fees are, even on the low end, \$40.00 per day, he has no possibility of paying his com-

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99. David Donnelly, *Private Prisons Industry: Increasing Incarcerations, Maximizing Profits and Corrupting Our Democracy*, HUFFINGTON POST (Dec. 6, 2012), [http://www.huffingtonpost.com/david-donnelly/private-prisons\\_b\\_1097667.html](http://www.huffingtonpost.com/david-donnelly/private-prisons_b_1097667.html).

100. *How ALEC & the Kochs Publicly Back Criminal Justice Reform & Privately Expand Mass Incarceration*, *supra* note 96.

101. *Id.*

102. Tim Cansler, *What Does a Lobbyist Do?*, CANSLER CONSULTING (Nov. 30, 2011), <http://canslerconsulting.com/news/lobbyist/>.

103. Eisen, *supra* note 16.

104. *Id.*

105. *Id.*

106. Tanzina Vega, *Costly prison fees are putting inmates deep in debt*, CNN MONEY (Sept. 18, 2015, 2:51 PM), <http://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/>.

107. *Id.*

108. *Id.*

109. *Id.*

pounding debt. Charging fees is a problem not only for the inmate, but for the community as well because family members often end up paying the daily fees.<sup>110</sup> Further, inmates will choose to go without necessary hygiene products and medical procedures to avoid asking their families to pay the costs.<sup>111</sup> Families of inmates spend approximately \$13,607 per sentence to help the inmate with conviction-related costs.<sup>112</sup> Almost half of these families cannot afford to pay these costs.<sup>113</sup> Thus, families of inmates end up bearing much of the burden of the per-diem and a' la carte fees directed at inmates, to their own detriment.

On a macro scale, debt-saddling an inmate only adds to the difficulty of them successfully reintegrating and becoming productive members of society.<sup>114</sup> Some of the challenges faced by inmates re-entering the community are finding employment and housing due to criminal convictions; imagine facing this reality while also leaving prison tens of thousands of dollars poorer.<sup>115</sup> Dee Taylor, an inmate who served three years in a Florida state prison, left the state Department of Corrections with a \$55,000 bill.<sup>116</sup> Taylor's debt resulted from a statutorily approved \$50 per day fee.<sup>117</sup> Taylor is 69 years old and his only income is from Social Security.<sup>118</sup> Taylor has no hope of paying the debt off and said, "I don't have the means to fight it."<sup>119</sup> Taylor is right to recognize that he cannot afford the prison debt because Social Security only provides \$733 in monthly income.<sup>120</sup> Taylor lives \$3,264 below the poverty line and, thus, has no hope of paying a \$55,000 debt.<sup>121</sup> And, the debt will never disappear until paid; the state may even lay a claim to the ex-convict's estate.<sup>122</sup>

If the debt is not paid, other problems arise. Additional ramifications include prevention of access to housing, revocation of one's driver's license, and the risk of not ever receiving Social Security benefits.<sup>123</sup> Further, if inmates become delinquent on fees, the court may issue warrants for their arrests, which, with the imposition of additional per-diem fees, would put them even deeper in debt.<sup>124</sup> As a result of fees, and the almost certain inability to pay the fees from one's prison job wages, the inmate will be financially buried in ways that seem impossible to fully escape.

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Supplemental Security Income (SSI)*, EMPLOY FLA., <https://www.employflorida.com/gsipub/index.asp?docid=50> (last visited Mar. 26, 2018).

121. Kimberly Amadeo, *Federal Poverty Level Guidelines and Chart*, BALANCE (Jan. 29, 2018), <https://www.thebalance.com/federal-poverty-level-definition-guidelines-chart-3305843>.

122. Vega, *supra* note 106.

123. *Id.*

124. *Id.*

## IV. WHAT IS THE LEGAL SOLUTION?

A. *Inmates Add to the National Economy*

In *Hale v. Arizona*, the court said inmate employment does not fall under the umbrella of the FLSA employee-employer relationship because it is not a free labor situation.<sup>125</sup> The *Hale* court said that inmates are not “employed” in the normal sense of the word because “the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner.”<sup>126</sup> “It is penological, not pecuniary.”<sup>127</sup> The court reasoned that inmates are removed from the national economy when incarcerated.<sup>128</sup> However, in reality inmates are not removed from the national economy — they add to it.<sup>129</sup>

Not only are private prison companies gaining billions in profits,<sup>130</sup> their investors are also seeing large returns on investment — strengthening the national economy.<sup>131</sup> Scopia Capital is a hedge fund company that is one of the largest shareholders in GEO Group, a large private prison company.<sup>132</sup> Scopia owns \$300 million in shares of GEO Group — representing 12% of Scopia’s total investment portfolio.<sup>133</sup> Scopia also manages New Jersey’s state pensions, amounting to \$150 million, which represents a sizeable portion of the national economy.<sup>134</sup> Further, the Vanguard Group and Fidelity Investments, both large 401(k) providers who, combined, own 20% stock in CCA and the GEO Group.<sup>135</sup> Meaning anyone in our nation looking to receive, or currently receiving, retirement funds is likely receiving a direct benefit from private prisons and the money they generate.<sup>136</sup> Given that all federal inmates are required to work, and many states have the same mandate, inmates’ work contributes to a greater profit, which leads to more investors and, thus, affects the national economy in substantial ways.<sup>137</sup>

The Supreme Court, in *Nationwide Mutual Insurance Company v. Darden*<sup>138</sup> has instructed lower courts to interpret the word “employ” in the FLSA broadly, and to look at the “economic reality rather than ‘technical concepts.’”<sup>139</sup> The economic reality of inmate work is substantial because companies profit from a near-

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125. James K. Haslam, Comment, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 B.Y.U. L. REV. 369, 386 (1994).

126. *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993).

127. *Id.*

128. *Id.*

129. Ray Downs, *Who's Getting Rich off the Prison-Industrial Complex?*, VICE (May 17, 2013, 6:00 AM), [https://www.vice.com/en\\_us/article/whos-getting-rich-off-the-prison-industrial-complex](https://www.vice.com/en_us/article/whos-getting-rich-off-the-prison-industrial-complex).

130. *The United States of ALEC: Bill Moyers on the Secretive Corporate-Legislative Body Writing Our Laws*, *supra* note 91.

131. *Id.*

132. Downs, *supra* note 129.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Peter Wagner, *Section III: The Prison Economy*, PRISON POL'Y INITIATIVE (Apr. 2003), <https://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

138. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

139. *Id.*

free work force.<sup>140</sup> The *Hale* court counters the economic reality standard by arguing that, because inmates must work, the real economic reality is that their labor belongs to the prison and can be “disposed of legitimately within the discretion of the correction facility or agency.”<sup>141</sup> Thus, if the economic reality test were applied literally, as in *Darden*, almost all inmates would be protected under the FLSA.

The economic reality test should mean just that. If inmates are contributing greatly to the larger economy, and private companies contracting with the state are making money, inmates should be compensated because, although they have no choice to work, a person’s labor is still his or her own. John Locke, a philosopher who had great impact on American jurisprudence, said that every man has a property in his own person and that the right to enjoy the fruit of one’s labor is a fundamental right.<sup>142</sup> Can a property interest in one’s own labor be soundly denied simply because he or she is forced to engage in it?

*B. By Excluding Inmates from the FLSA, Harm is Done to Families in the Community*

One primary concern the FLSA was meant to address was employees’ substandard living conditions, and a minimum wage would protect against this.<sup>143</sup> The *Hale* court said that because inmates are under the control and protection of an institution, they are protected from the ravages of poverty because food, shelter, and clothing are provided.<sup>144</sup> But by excluding inmates from the FLSA’s protections, it is inmates’ families — who must pay for an inmate’s clothing, shelter, and food during incarceration, because those necessities are not freely provided by the prison — who suffer the harm of decreased protections.<sup>145</sup>

One 14-state report found that 58% of families living in poverty could not afford costs associated with a loved one’s imprisonment.<sup>146</sup> Of families that have a loved one in prison, 48% struggle to meet their basic family needs due to the financial costs associated with paying a loved one’s prison fees.<sup>147</sup> Almost 20% cannot afford housing due to the loss of income resulting from a family member’s imprisonment.<sup>148</sup> However, if prisoners were protected by the FLSA, family members would benefit from no longer having to pay the costs and fees associated with imprisonment. Inmates are in the exact position where wage protections are needed because, in some cases, it is more expensive to be imprisoned than to be living in the community.<sup>149</sup>

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140. Pelaez, *supra* note 74.

141. *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993).

142. George H. Smith, *John Locke: The Justification of Private Property*, LIBERTARIANISM.ORG (Oct. 19, 2015), <https://www.libertarianism.org/columns/john-locke-justification-private-property>.

143. *Hale*, 993 F.2d at 1396.

144. *Id.*

145. Vega, *supra* note 106.

146. Key Findings, WHO PAYS? TRUE COST INCARCERATION ON FAMILIES, <http://whopaysreport.org/key-findings/> (last visited Mar. 26, 2018).

147. *Id.*

148. *Id.*

149. See Vega, *supra* note 106; see also Amadeo, *supra* note 121.

## V. CONCLUSION

It has been demonstrated above that the Jacksons of the world work incredibly hard jobs in prison.<sup>150</sup> The Jacksons of the world may work six days a week, start their days at 3:30 a.m., pay for their own imprisonment, and receive nothing in return.<sup>151</sup> The law has condoned re-enslavement of millions of Americans under the Thirteenth Amendment via prison employment, some of whom are actually picking cotton.<sup>152</sup> And when the legal interpretation is challenged, courts have continued to condone free inmate work by reading out of the FLSA the protection of inmates.<sup>153</sup>

Inmates contribute to the national economy, so much so that there are lobbying groups, like ALEC, working hard to ensure that laws are strict enough to keep prison beds full.<sup>154</sup> The *Hale* court said inmates should not be protected under the FLSA because the FLSA was, in part, created to alleviate the pains of poverty due to low wages.<sup>155</sup> However, inmates — despite having food, shelter, and clothing provided by the prison — still feel the pains of poverty because their families must step in to fill the gap of prison-associated costs.<sup>156</sup> Although inmates have certain basic needs met, their families struggle to pay their fees, and when inmates leave prison, they are debt-saddled. The FLSA was meant to address the collateral harms of low-wages. Courts should look at these collateral harms and retool its interpretation of the economic reality of prison workers. If the law requires the Jacksons of the world to work, it should at least give them the same rights that many other workers receive.

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150. Benhn, *supra* note 1.

151. Davis, *supra* note 3; *see also* Bennis, *supra* note 1.

152. *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993); *see also* Andrew Cohen, *At Louisiana's Most Notorious Prison, a Clash of Testament*, ATLANTIC (Oct. 11, 2013), <https://www.theatlantic.com/national/archive/2013/10/at-louisianas-most-notorious-prison-a-clash-of-testament/280414/>.

153. *Hale*, 993 F.2d at 1395.

154. Beale, *supra* note 90.

155. *Hale*, 993 F.2d at 1396.

156. Vega, *supra* note 106.