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Union Organizing & Collective Bargaining for Incarcerated Workers

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UNION ORGANIZING & COLLECTIVE BARGAINING FOR INCARCERATED WORKERS

ERIC M. FINK*

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I. INTRODUCTION

Today, roughly 870,000 prison inmates nationwide work full-time,¹ out of a total prison population of 1.6 million.² Most of these are engaged in “prison housework,”³ such as food service, laundry, and maintenance.⁴ But between 75 and 80,000 work in prison industries, producing goods and performing services, primarily for government agencies, but also in some cases for the private sector.⁵ While only involving a relatively small

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1. Beth Schwartzapfel, *Modern-Day Slavery in America's Prison Workforce*, AMERICAN PROSPECT (May 28, 2014), <http://prospect.org/article/great-american-chain-gang>; Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868 (2008).

2. U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 2 (Dec. 2015) (revised on Jan. 21, 2016). Local jails hold an additional 0.74 million, many of whom also work while incarcerated. *Id.*; Zatz, *supra* note 1, at 868.

3. Zatz, *supra* note 1, at 870 n.43 (“Approximately 550,000 inmates perform this type of work.”).

4. Zatz, *supra* note 1, at 870.

5. Zatz, *supra* note 1, at 869. For an in-depth profile of one such program, see Michael J. Berens & Mike Baker, *Sell Block: Broken Prison Labor Program Fails to Keep Promises, Costs Millions*, THE SEATTLE TIMES (Dec. 13, 2014),

fraction of the inmate workforce, these programs have been “the highest-profile and most controversial form of prison labor.”⁶

In one recent high-profile example, the Whole Foods grocery chain came under fire for selling organic goat cheese and other items produced by businesses using prison labor (paid well below minimum wage⁷) under

<http://projects.seattletimes.com/2014/prison-labor/1/> (reporting on Washington Correctional Industries, “the nation’s fourth-largest prison labor program”).

6. Zatz, *supra* note 1, at 869. For a sampling of the abundant coverage and criticism of these programs in the popular media, see Tim Smith, *Outcry Leads to Changes With Pay for Prison Labor*, GREENVILLE NEWS (Sept. 25, 2015), <http://www.greenvilleonline.com/story/news/2015/09/25/prison-system-make-change-prisoner-pay/72728592/>; Liz Fields, *Hard Labor: Here’s the Weird Shit Inmates Can Do for Work in US Prisons*, VICE (Sept. 9, 2015), <https://news.vice.com/article/hard-labor-heres-the-weird-shit-inmates-can-do-for-work-in-us-prisons>; Graeme Wood, *From Our Prison to Your Dinner Table*, PACIFIC STANDARD (Mar. 3, 2015), <http://www.psmag.com/business-economics/from-our-prison-to-your-dinner-table>; Rebecca McCray, *A Disturbing Trend in Agriculture: Prisoner-Picked Vegetables*, TAKEPART (Apr. 14, 2014), <http://www.takepart.com/article/2014/04/14/prison-ag-labor>; Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery*, GLOBAL RESEARCH (Mar. 31, 2014), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>; Chris Gentilviso, *Military Turns to Prison Labor for \$100 Million in Uniforms—At \$2-Per-Hour Wages*, HUFFINGTON POST (Dec. 24, 2013), http://www.huffingtonpost.com/2013/12/24/military-prison-uniforms_n_4498867.html; M. Alex Johnson & Bill Lambdin, *Inside the Secret Industry of Inmate-Staffed Call Centers*, MSNbc NEWS (Jan. 12, 2012), <http://usnews.msnbc.com/news/2012/01/12/10140493-inside-the-secret-industry-of-inmate-staffed-call-centers>; Mike Elk & Bob Sloan, *The Hidden History of ALEC & Prison Labor*, THE NATION (Aug. 1, 2011), <http://www.thenation.com/article/hidden-history-alec-and-prison-labor/>; Rania Khalek, *21st-Century Slaves: How Corporations Exploit Prison Labor*, ALTERNET (July 21, 2011), http://www.alternet.org/story/151732/21st-century_slaves%3A_how_corporations_exploit_prison_labor; Michelle Chen, *State Budget Battles Converge on Prison Labor Force*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/michelle-chen/prison-labor_b_835014.html; Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, THE NATION (July 21, 2010), <http://www.thenation.com/article/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/>; Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should Be Concerned*, PRISON LEGAL NEWS (March 15, 2010), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/>.

Organized labor has been among the strongest critics of these programs. See James Kilgore, *Mass Incarceration & Working Class Interests: Which Side Are the Unions On?*, 37 LABOR STUDIES JOURNAL 356, 363 (2013). “The AFL-CIO opposes the widespread use of prison labor throughout the public and private sectors in the United States in unfair competition with free labor.” AFL-CIO EXEC. COMM., STATEMENT ON THE EXPLOITATION OF PRISON LABOR (May 7, 1997). Kilgore argues that “organized labor’s choice to prioritize this issue is an escape from the far more vexing process of the criminalization of the working class as embodied in mass incarceration.” Kilgore at 364. I share Kilgore’s view that “the major labor-related problem [associated with mass incarceration] is the deprivation of liberty endured by the more than two million who are behind bars and the restricted labor market opportunities of the nearly five million people on parole and probation.” *Id.* The two prison industry programs on which I focus represent only a small, and not necessarily the most troubling, part of this problem. But I believe they represent a strategically advantageous target for legal reform, for the reasons I indicate below.

7. Jennifer Alsever, *Prison Labor’s New Frontier: Artisanal Foods*, FORTUNE (June 2, 2014), <http://fortune.com/2014/06/02/prison-labor-artisanal/> (“Base pay starts at 60¢ a day, but most prisoners earn \$300 to \$400 a month with incentives.”). It is unclear how many hours

contract with Colorado Corrections Industries (“CCI”).⁸ In response to the controversy, Whole Foods announced that it would cease to carry these products by April 2016.⁹

At the heart of the controversy is the fact that incarcerated workers¹⁰ enjoy few of the legal rights and protections that apply to non-prison employment. For the most part, courts have sought to resolve this conflict by denying legal recognition of the hybrid status and role-set of incarcerated workers. Instead, they have generally insisted on a strict dichotomy between two mutually incompatible statuses—inmate and employee—reducing incarcerated workers to the former status and limiting their legal rights accordingly.¹¹ This approach may be expedient for courts, worried about a potential flood of labor and employment claims by incarcerated workers, and for prison administrators, concerned with potential threats to order and their own power within the “total institutions” they oversee.¹² But its consequence, for incarcerated workers and for workers in general, is deeply troubling.¹³

Critics have challenged the disparate treatment of incarcerated workers as both unfounded and unjust, and argued for their protection under generally applicable employment laws.¹⁴ Sharing these concerns, I argue that incarcerated workers, like others performing similar labor, should have the legally-protected right to organize, bargain collectively,

inmates work per day under this program. For a 35-hour workweek, \$400/month would equate to an hourly wage of just \$2.85.

8. Alsover, *supra* note 7; Rebecca J. Rose, *How Dairy Milked by Prisoners Ends Up on Whole Foods Shelves*, THE ATLANTIC (June 18, 2014), <http://www.theatlantic.com/business/archive/2014/06/how-dairy-milked-prisoners-ends-up-on-whole-foods-shelves/372937/>.

9. Candice Choi, *Whole Foods to Stop Selling Products Made by Colorado Inmates*, THE DENVER POST (Sept. 30, 2015), http://www.denverpost.com/business/ci_28900179/whole-foods-stop-selling-products-made-by-colorado.

10. I use the term “incarcerated worker” to identify the status of prisoners within a prison-labor system. The status of incarcerated worker comprises the role-set of “prisoner” and “worker”—nominally distinct social roles, playing out in different social relationships, carrying different behavioral expectations. See Robert K. Merton, *The Role-Set: Problems in Sociological Theory*, 8 BRITISH J. SOCIOLOGY 106, 110–12 (1957). The intersection of these roles gives rise to “conflicting role-expectations.” See *id.* at 112.

11. See Zatz, *supra* note 1, at 882, n.101–03 (collecting cases).

12. See Erving Goffman, *On the Characteristics of Total Institutions: Staff-Inmate Relations*, IN THE PRISON: STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE (Donald Cressey ed. 1961).

13. See *infra*, part II.C.

14. See, e.g., Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 680 (2015) (arguing that minimum wage and overtime provisions of Fair Labor Standards Act “should categorically apply to all inmate laborers”); Josh Kovensky, *It’s Time to Pay Prisoners the Minimum Wage: Paying Just \$2 a Day Hurts Our Economy and Punishes Families*, THE NEW REPUBLIC (Aug. 15, 2014), <https://newrepublic.com/article/119083/prison-labor-equal-rights-wages-incarcerated-help-economy>; Beth Schwartzapfel, *Modern-Day Slavery in America’s Prison Workforce*, THE AMERICAN PROSPECT (May 2014), <http://prospect.org/article/great-american-chain-gang>; Jackson Taylor Kirkloin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048, 1088 (2011) (“[I]nmates should not be excluded from the antidiscrimination protections of Title VII”).

and engage in other concerted activity aimed at improving their terms and conditions of employment.¹⁵ Doing so would empower incarcerated workers to advance their own interests as workers, while also helping to mitigate the unfair competition that prison labor represents for non-incarcerated workers.

While I would argue for extending these rights to all inmate labor, I focus here on two programs: the Prison Industries Enhancement Certification Program (“PIE”) and Federal Prison Industries (a.k.a. UNICOR). These programs are advantageous targets for legal reform because they are governed by federal law.¹⁶ I argue that the NLRB¹⁷ (in the case of inmate contract labor under PIE) and the FLRA¹⁸ (in the case of federal inmates working for UNICOR) should recognize incarcerated workers as statutory employees with representational and bargaining rights under existing law. Alternatively, the federal statutes and regulations governing UNICOR and PIE should be amended to extend such rights to inmates working under those programs.

The relatively small scope of inmate labor under UNICOR and PIE has a further practical advantage. Starting with these two programs as a pilot, it would be possible to experiment with different models of union representation and bargaining, tailored to the distinctive circumstances of prison labor. To the extent that resistance to inmate unionization is driven by concerns about the potential adverse impact on prison operations, such a pilot would provide an opportunity for evidence-based assessment, rather than ungrounded fear.

In part 2, I briefly review the history of inmate labor in the United States, and provide an overview of PIE and UNICOR. In part 3, I argue that incarcerated workers working under PIE and UNICOR should be recognized as statutory employees under existing federal labor relations law.

15. See 29 U.S.C. § 157 (2015) (declaring rights of employees under National Labor Relations Act).

16. In contrast, most state prison inmate-workers would be regarded as state employees (assuming they were legally recognized as employees at all), and their rights to union representation and collective bargaining would be subject to state law. Consequently, any effort to establish those rights would have to be fought on a state-by-state basis. See *In re Prisoners Labor Union at Marquette*, Case No. R72, E163 (Mich. Empl. Rel. Comm., March 22, 1974) (holding inmates working under state Correctional Industries Act are not employees under state public employee collective bargaining statute); *Prisoners’ Labor Union at Green Haven Prisoners’ Labor Union at Green Haven*, 6 PERB ¶ 3033 (NY PERB 1973) (same), *aff’d sub nom. Prisoners’ Labor Union at Bedford Hills (Women’s Division) v. Helsby*, 354 N.Y.S.2d 694 (NY App. Div. 1974); Florida Stat. Ann. § 447.203(3)(f) (excluding state inmates from definition of employee under public employee collective bargaining statute); see also *Rhode Island Council 94, AFSCME, AFL-CIO v. State of Rhode Island*, 7145 A.2d 584 (R.I. 1998) (holding labor arbitrator exceeded her authority by classifying inmates as state employees under state employee collective bargaining agreement).

17. NLRA, 29 U.S.C. §§ 151-169 (2015) (governing union representation and collective bargaining in the private sector).

18. Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (2015) (governing union organizing and collective bargaining for employees of federal executive branch agencies).

II. INMATE LABOR IN STATE PRISONS

A. History: Colonial Times to the 1970s

Convict labor has existed, in some form or other, since ancient times.¹⁹ The standard account of its history in the United States traces the adoption of various systems from the early Republic through to the late nineteenth century.²⁰ In the 1790s, inmates at Philadelphia's Walnut Street Jail, the "nation's first true penitentiary," produced goods under a "piece price"²¹ system. The prison itself "supervised the production process," with "private contractors typically suppl[ying] raw materials and purchas[ing] the finished product, which they resold on the open market."²² Similarly, under the "public account"²³ or "state account"²⁴ system, adopted at New York's Auburn Prison and Pennsylvania's Eastern State Penitentiary in the early 1800s,²⁵ "the state maintains control over the production process, and prison-made goods are sold on the open market."²⁶ During the mid-nineteenth century, the "contract"²⁷ system emerged as "the dominant organizational form of prison labor throughout the North."²⁸ The state's role changed from direct producer to labor broker, "sell[ing] the labor of its prisoners to private firms," which "oversee production, supply the required raw materials, and sell the inmate-produced goods on the open market."²⁹ During the same period,

19. Henry Theodore Jackson, *Prison Labor*, 18 J. OF CRIM. LAW & CRIMINOLOGY 218, 218–21 (1927) (tracing the history from ancient Egypt, Greece, and Rome, through medieval and early-modern Europe, to colonial America).

20. For this account, I draw primarily on Jackson, *supra* note 19, and Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 345–74 (1998). *See also*, Whitney Bennis, "Free" Labor: Past & Present Forms of Prison Labor, ON LABOR (May 27, 2015), <http://onlabor.org/2015/05/27/free-labor-past-and-present-forms-of-prison-labor>; Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 683–88 (2015); Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1052–58 (2011); Zatz, *supra* note 1, at 869–71; Tracy F. Chang & Douglas E. Thompkins, *Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry*, 27 LABOR STUDIES J. 45, 54–55 (2002); Robert P. Weiss, *Humanitarianism, Labor Exploitation, or Social Control? A Critical Survey of Theory and Research on the Origin and Development of Prisons*, 12 SOCIAL HISTORY 331, 336–37, 344–50 (1987).

21. Jackson, *supra* note 19, at 229; Garvey, *supra* note 20, at 343.

22. Garvey, *supra* note 20, at 348–49; Jackson, *supra* note 19, at 229; *Wash. Water Jet Workers v. Yarbrough*, 90 P.3d 42, 46 (Wash. 2004).

23. Jackson, *supra* note 19, at 225–26.

24. Garvey, *supra* note 20, at 343.

25. Garvey, *supra* note 20, at 350; Zatz, *supra* note 1, at 869–70.

26. Garvey, *supra* note 20, at 343, 349; Jackson, *supra* note 19, at 225; *Yarbrough*, 90 P.3d at 46.

27. Jackson, *supra* note 19, at 226–27; Garvey, *supra* note 20, at 343; Zatz, *supra* note 1, at 870.

28. Garvey, *supra* note 20, at 352; *Yarbrough*, 90 P.3d at 40, 46.

29. Garvey, *supra* note 20, at 343, 352; Jackson, *supra* note 19, at 227.

Southern states embraced the “lease”³⁰ system. As with the contract system, convict leasing placed inmates under the supervision of private parties. But unlike the contract system, under which inmates remained in the custody of the prison, convict leasing turned over all responsibility for inmates to the private party.³¹

In the late nineteenth and early twentieth centuries, the contract and convict leasing systems faced growing criticism from reformers concerned about abusive practices,³² and from business and labor groups concerned about unfair competition.³³ This opposition ultimately led to the enactment of federal legislation—the Hawes-Cooper Act in 1929,³⁴ followed by the Ashurst-Sumners Act in 1935³⁵—aimed at curbing the practice by restricting the interstate sale of inmate-produced goods.³⁶

With the general market no longer a viable outlet for inmate-produced goods, the “state use”³⁷ system remained the only viable model for prison industries. As under the “state account” system, the state itself directly operates a prison industry.³⁸ The primary distinction is that, while prison industries under the state account system sold their output on the open market, state and local government entities are the exclusive market for goods and services under the state use system.³⁹

B. Contemporary Inmate Labor

1. The Prison Industries Enhancement Certification Program

In 1979, Congress paved the way for a resurgence of prison contract labor⁴⁰ by authorizing an exemption under the Ashurst-Sumners Act for certain “pilot projects designated by the Director of the Bureau of Justice

30. Jackson, *supra* note 19, at 230; Garvey, *supra* note 20, at 345; *Yarbrough*, 90 P.3d at 46.

31. Jackson, *supra* note 19, at 230; Garvey, *supra* note 20, at 345, 354–57.

32. Jackson, *supra* note 19, at 230–32; Garvey, *supra* note 20, at 363–64.

33. Jackson, *supra* note 19, at 228; Garvey, *supra* note 20, at 358–66; Fulcher, *supra* note 20, at 686; Kirklin, *supra* note 20, 1054–55.

34. 49 U.S.C. § 11507 (2015) (prohibiting sale of inmate-produced goods by one state to another).

35. 18 U.S.C. §§ 1761–62 (2015) (criminalizing the knowing transportation of inmate-produced goods into a state that prohibits their sale). A 1940 amendment made the knowing interstate transportation of inmate-produced goods a federal crime regardless of whether state law prohibited the sale.

36. See Fulcher, *supra* note 20, at 688 (“The thought behind the [Hawes-Cooper Act] was that it would help decrease the effect of the availability of cheap prison-made goods on the open market.”); Garvey, *supra* note 20, at 366–67 (discussing adoption of Hawes-Cooper and Ashurst-Sumner Acts).

37. Jackson, *supra* note 19, at 234; Garvey, *supra* note 20, at 367.

38. Jackson, *supra* note 19, at 234; Garvey, *supra* note 20, at 343, 367. Jackson’s “public works and ways” system, under which inmates leave the prison to work on public construction and road projects, is essentially a variant of the state use system. Jackson, *supra* note 19, at 237–38.

39. *Yarbrough*, 90 P.3d at 47.

40. See Zatz, *supra* note 1, at 870 (noting that the contract system, which had “largely disappeared by the early twentieth [century], . . . now seems to be reemerging”).

Assistance.”⁴¹ Pursuant to this statutory authority, PIE permits certified programs to produce goods for sale on the open market.⁴² They may do so under an “employer” model, operating their own prison industries to produce goods for sale on the open market, or a “customer” model, contracting with private companies to employ inmates in their existing operations.⁴³

The statute imposes certain requirements for employment of inmates under certified programs:

- They must be paid at least the local prevailing wage for their work,⁴⁴ subject to deductions (capped at 80% of gross wages)⁴⁵ for taxes,⁴⁶ cost of room and board,⁴⁷ family support,⁴⁸ and victim compensation;⁴⁹

41. Federal Justice System Improvement Act, Pub. L. No. 96-157, § 827, 93 Stat. 1167 (1979), codified at 18 U.S.C. § 1761(c). See Fulcher, *supra* note 20, at 692; Zatz, *supra* note 1, at 869 n.37; Chang & Thompkins, *supra* note 20, at 55.

Outside of PIE, states continue to operate prison industries, using inmate labor to supply state and local government with a wide variety of goods and services. See, e.g., Gordon Lafer, *Captive Labor*, *The AMERICAN PROSPECT* (Dec. 19, 2001), <http://prospect.org/article/captive-labor> (citing Oregon inmates performing data entry, record keeping, and other work for state agencies; Georgia inmates working for private recycling company under contract with county waste management authority). In some states, inmates also perform service work for the private sector, which is not subject to the restrictions on the sale of prison-made goods under Hawes-Cooper and Ashurst-Sumner. See *id.* (citing California inmates taking airline reservations; Oregon inmates washing laundry for private hospital); Zatz, *supra* note 1, at 869 n.38 (citing PIE Guideline, 64 Fed. Reg. 17000, 17009 (Apr. 7, 1999)).

42. 18 U.S.C. § 1761(c) (2015).

43. PIE Guideline, 64 Fed. Reg. at 17008; Garvey, *supra* note 20, at 344; Fulcher, *supra* note 20, at 692.

44. 18 U.S.C. § 1761(c)(2) (2015) (“wages at a rate which is not less than that paid for work of similar nature in the locality in which the work is performed”). In contrast, state prison inmates working in non-PIE settings are typically paid well below the federal minimum wage. See Fulcher, *supra* note 20, at 682 n.7 (hourly pay rates of \$0.93 to \$4.73). In some cases, they are paid nothing at all. Fulcher, *supra* note 20, at 694 (Georgia state prisons); Chang & Thompkins, *supra* note, at 20 (Texas Correction Industry).

45. 18 U.S.C. § 1761(c)(2) (2015). In the 3rd quarter of 2015, deductions accounted for 60% of total gross paid to inmates under PIE. National Correctional Industries Association, PIECP Quarterly Report, Statistics for the Quarter Ending Sept. 30, 2015 (reporting total gross wages of \$11.02 million, with total deductions of \$6.58 million). Of the amounts deducted, the largest share (57.6%) went to inmate room and board (\$3.79 million, 34.9% of gross wages). Victims programs (\$1.19 million) and taxes (\$1.20 million) each accounted for about 18% of total deductions, and inmate family support (\$0.39 million) accounted for just under 6% of total deductions. Out of total net wages of \$4.44 million, about \$0.66 million (14.9% of net wages, 6% of gross) was set aside for mandatory savings.

46. 18 U.S.C. § 1761(c)(2)(A) (2015).

47. 18 U.S.C. § 1761(c)(2)(B) (2015).

48. 18 U.S.C. § 1761(c)(2)(C) (2015).

49. 18 U.S.C. § 1761(c)(2)(D) (2015). The statute requires that inmates contribute at least 5% of gross pay for victim compensation, with a maximum of 20%. *Id.*

- They must be eligible for workers' compensation and similar government-provided benefits on the same terms as other employees;⁵⁰
- Their participation must be voluntary.⁵¹

Despite the prevailing wage requirement, and even ignoring the mandatory deductions,⁵² inmates working under PIE are actually paid less than most workers performing similar work in the relevant locality. First, the Bureau of Justice Assistance has interpreted the statutory requirement to mean "that wages must be set at or above the tenth percentile"⁵³ for comparable work in the relevant locale. Even under this "generous interpretation of comparable,"⁵⁴ even forgiving interpretation, some programs have paid wages below that threshold.⁵⁵ Moreover, in several jurisdictions, incarcerated workers receive even lower wages during a "training period," ranging from two months to over a year.⁵⁶

In the most recently reported period, average gross monthly wages for inmates working under PIE were about \$754, with an average net monthly pay of about \$304.⁵⁷

50. 18 U.S.C. § 1761(c)(3) (2015). The statute specifically disqualifies participating inmates from "receiv[ing] any payments for unemployment compensation while incarcerated". *Id.*

51. 18 U.S.C. § 1761(c)(4) (2015).

52. The compulsory nature of these deductions, and the fact that inmates must pay the cost of their own incarceration out of their wages, are controversial. *See, e.g., Fulcher, supra* note 20. Yet, as a purely financial matter, incarcerated workers under PIE are not necessarily worse off than non-incarcerated workers in this regard. The wages of non-incarcerated workers are likewise subject to legally-mandated withholding for income and payroll taxes, and garnishment for court-ordered child and spousal support, and other debts. *See* 15 U.S.C. § 1673 (2015) (limiting amount of wage garnishments). Non-incarcerated workers must also pay for food, housing, and other living expenses out of their wages (or savings). *See* Key Facts, The State of the Nation's Housing 2015, JOINT CENT. FOR HOUSING STUDIES (2015), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son_2015_key_facts.pdf ("Over 80 percent of households with incomes under \$15,000 (equivalent to full-time pay at the federal minimum wage)" spend more than 30% of income on housing) .

53. BARBARA J. AUERBACH, SUMMARY FINDINGS OF THE 2009-2010 PIECP COMPLIANCE SITE ASSESSMENTS, NAT'L CORRECTIONAL INDUSTRIES ASS'N 6 (Dec. 9, 2010), <http://www.nationalcia.org/wp-content/uploads/09-10-PIE-Assessment-Report.pdf>. In other words, inmates working under PIE may be paid less than 90% of non-incarcerated workers performing the same jobs in the relevant locality.

54. *Id.*

55. *Id.* at 8.

56. *Id.* at 7.

57. Averages based on reported total quarterly wages and total inmate employment for 3rd quarter 2015. NAT'L CORR. INDUST. ASS'N, PRISONER INDUSTRY CERTIFICATION & COST ACCOUNTING CENTER LISTING, STATISTICS FOR THE QUARTER ENDING SEPT. 30, 2015 (2015), <http://www.nationalcia.org/wp-content/uploads/Second-Quarter-2015-Certification-Listing-Report-1.pdf>. Because the report does not indicate the number of hours worked, it is not possible to calculate an average hourly wage for inmates under PIE. Assuming an average 35-hour week, the reported gross wage figures work yield an average hourly wage on only \$5.39. Since this is less than the statutory minimum wage, it must be presumed that inmates employed under PIE are working less than full-time on average.

A total of 46 programs are currently certified under PIE, employing roughly 5,000 incarcerated workers.⁵⁸ PIE thus accounts for only a tiny percentage of all inmate labor. Yet the program has drawn particular attention, and been subject to particular criticism because of the involvement of private for-profit businesses.⁵⁹

2. Federal Prison Industries

For federal inmates, “a regular job assignment” is compulsory (absent a medical excuse).⁶⁰ As in state prisons, many inmates perform prison housework, while others work in prison industries.⁶¹ In the federal system, the latter operates under the auspices of Federal Prison Industries, Inc. (“FPI”), a government-owned corporation established in 1934.⁶² FPI, also known as UNICOR, supplies federal government agencies with an array of goods and services using inmate labor.⁶³

UNICOR pays incarcerated workers between \$0.23 and \$1.15 an hour.⁶⁴ As under PIE, earnings are subject to mandatory deductions of up to 50% of gross wages under the Inmate Financial Responsibility Program.⁶⁵

58. *Id.* (reporting 4870 inmates employed). The figure has fluctuated between about 4,700 and 5,500 inmates employed in recent years. See Kilgore, *supra* note 6, at 363 (4719 inmates as of 4th quarter 2011); Zatz, *supra* note 1, n.37 (5500 inmates as of 3rd quarter 2007).

59. See Alsever, *supra* note 7.

60. See U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, INMATE ADMISSION & ORIENTATION HANDBOOK 19 (2014), https://www.bop.gov/locations/institutions/gre/GRE_fpc_aohandbook.pdf.

61. *Id.*

62. Pub. L. 73-461, 48 Stat. 1211 (1934); FED. PRISON INDUS., FISCAL YEAR 2015 ANNUAL REPORT 1 (2015). Management of FPI is under the direction of the Director and Assistant Director of the Federal Bureau of Prisons, who serve as Chief Executive Officer and Chief Operating Officer respectively. *Id.*

63. FED. PRISON INDUS., INC., FISCAL YEAR 2015, ANNUAL MANAGEMENT REPORT 1–2 (2015) (identifying Departments of Defense, Homeland Security, Justice, and Veterans Affairs, and the General Services Administration, as “FPI’s largest federal government customers”); UNICOR, FACTORIES WITH FENCES, 75 YEARS OF CHANGING LIVES (2009), https://www.unicor.gov/publications/corporate/CATMC1101_C.pdf. In 2012, Congress authorized FPI to serve the commercial market under limited circumstances. Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. 112-55; FED. PRISON INDUS., INC., FISCAL YEAR 2015, ANNUAL MANAGEMENT REPORT 2 (2015). The same legislation also made FPI eligible to participate in PIE, and inmates currently work for PIE operations at two federal prisons. FED. PRISON INDUS., INC., FISCAL YEAR 2015, ANNUAL MANAGEMENT REPORT 6–7 (2015).

64. UNICOR, *Frequently Asked Questions*, http://www.unicor.gov/FAQ_General.aspx (last visited Apr. 28, 2016); FED. PRISON INDUS., INC., FISCAL YEAR 2015, ANNUAL MANAGEMENT REPORT 12 (Nov. 16, 2015) http://www.unicor.gov/publications/corporate/FY2015_AnnualReport.pdf; See Fulcher, *supra* note 20, at 682 n.7. A 1993 report, prepared at the request of Senator Harry Reid, assessed the financial and other impact of applying the federal minimum wage to prison labor. U.S. General Accounting Office, *Report to Honorable Harry Reid, U.S. Senate, Prisoner Labor: Perspectives on Paying the Federal Minimum Wage*, GAO.GOV (May 1993) <http://www.gao.gov/assets/220/217999.pdf>.

65. U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, INMATE ADMISSION & ORIENTATION HANDBOOK 19 (March 2014),

UNICOR employs roughly 13,000 inmates (7% of the eligible federal prison population).⁶⁶ This represents less than 3% of all prison labor nationwide.

C. Exploitation of Inmate Labor

Concerns about exploitation are at the heart of the controversy over prison labor.⁶⁷ The harm falls directly on incarcerated workers themselves, who serve as “cheap, in many instances free, labor” for a “Prison Industrial Complex” that is “fueled by the economic interests of federal and state correctional institutions, private corporations, and politicians.”⁶⁸ The harm also falls indirectly on non-incarcerated workers, as competition from prison labor “threatens the wages, benefits and working conditions and jobs of free labor.”⁶⁹

Exploitation has both a descriptive and a normative sense. Descriptively, “the term simply means to make use of” something.⁷⁰ As applied to social relationships and exchanges, exploitation generally connotes an element of unfairness rooted in power asymmetry.⁷¹ Power asymmetry both explains how one party is able to make advantageous use of another, and characterizes the situation as unfair.⁷² This sense of exploitation as a normative critique is commonly applied to labor practices involving unusually low wages or harsh conditions.⁷³ In this sense, to describe prison labor as exploitive is to argue that the practice is unfair, because incarcerated workers lack any bargaining power,

https://www.bop.gov/locations/institutions/gre/GRE_fpc_aohandbook.pdf (citing 18 U.S.C. § 3013) (deductions for “court ordered restitution, fines and court costs, judgments in favor of the U.S., other debts owed the Federal government, and other court-ordered obligations (e.g. child support, alimony, other judgments)”).

66. UNICOR, *Frequently Asked Questions*, http://www.unicor.gov/FAQ_General.aspx (last visited Apr. 28, 2016) (citing FY 2013 figures). The figures were higher as recently as 2009. See FED. PRISON INDUS., INC., FISCAL YEAR 2009, ANNUAL MANAGEMENT REPORT 12 (2009) (20,000 inmates, 16% of population); James Kilgore, *Mass Incarceration & Working Class Interests: Which Side Are the Unions On?*, 37 LABOR STUDIES J. 356, 363–64 (2013).

67. See Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> (“[W]hile some form of work for the incarcerated may be important, the current form is troubling. These workers are vulnerable to the kind of workplace exploitation that American has otherwise deemed inhumane.”).

68. Fulcher, *supra* note 20, at 682.

69. UE Convention, *Curb the Prison-Industrial Complex* (2000).

70. DAVID STRECKER, *ENCYCLOPEDIA OF POWER* 232 (Keith Dowding ed.) (2011).

71. *Id.*; see also John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 679, 683–84 (1994) (identifying “the taking advantage of some vulnerability” as the essence of exploitation).

72. Strecker, *supra* note 66.

73. See, e.g., Robert Mayer, *Sweatshops, Exploitation, and Moral Responsibility*, 38 J. OF SOC’Y PHILOSOPHY 605 (2007); Robert Mayer, *Guestworkers and Exploitation*, 67 REV. OF POLITICS 311 (2005); Chris Meyers, *Wrongful Beneficence: Exploitation and Third World Sweatshops*, 35 J. SOCIAL PHILOSOPHY 319 (2004).

whether in the form of exit or voice,⁷⁴ and are simply compelled to work under whatever terms and conditions the prison system imposes.

Indeed, some critics have identified prison labor, particularly when employed by private for-profit business, as a form of “superexploitation.”⁷⁵ The concept of superexploitation derives from the more general Marxist theory of exploitation,⁷⁶ describing a qualitative change in the relationship between labor-power and surplus-value appropriation.⁷⁷ But

74. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). In Hirschman’s theory, “exit” and “voice” are the two primary ways of expressing dissatisfaction with organizational performance. *Id.* at 3–4. Applying these concepts to the labor relationship, the “exit” option exists when workers are able to quit, either to seek work elsewhere, or to abstain from employment altogether; the “voice” option exists when workers have a meaningful channel for expressing grievances. *Id.* at 30 (defining “voice” as “an attempt at changing the practice, politics, and outputs of . . . the organization to which one belongs”). By definition, inmates subject to mandatory work policies have no exit option. And the voice option remains hollow when prison administrators have neither an obligation nor an incentive to listen. Indeed, the situation for incarcerated workers is akin to that which Hirschman associates with “criminal gangs,” whose leaders regard “voice as mutiny” to be “severely penalized”. *Id.* at 121.

75. See, e.g., Kilgore, *supra* note 6, at 357; MARC BOSQUET, WE WORK, IN JEFFREY WILLIAMS, THE CRITICAL PULSE: THIRTY-SIX CREDOS BY CONTEMPORARY CRITICS 64 (2012); Lawrence Albright, *Prison Proletariat: Exploiting Inmate Labor*, POLITICAL AFFAIRS (June 2007) <http://politicalaffairs.net/prison-proletariat-exploiting-inmate-labor>; Avery Gordon, *Globalism and the Prison Industrial Complex: An Interview with Angela Davis*, in AVERY GORDON, KEEPING GOOD TIME: REFLECTIONS ON KNOWLEDGE, POWER, AND PEOPLE 49 (2004);

76. In Marxist theory, exploitation refers to the capitalist appropriation of surplus-value through the labor-process. G. A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 PHIL. & PUB. AFFAIRS 338, 339–41 (1979). In that process, workers produce commodities, the value of which exceeds their wages (determined by “the value of labour-power”). The difference, which Marx calls surplus-value, is the source of the capitalist’s profit. KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, Vol. 1, 45–46 (Modern Library Ed. 1906) (defining “the value of a commodity” as a function of “the working-time necessary, under given social conditions, for its production”); 190 (defining the value of labor-power as “the value of the means of subsistence necessary for the maintenance of the labourer”), 207–220 (explaining the creation and appropriation of surplus-value through the labor-process); G. A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 PHIL. & PUB. AFFAIRS 338, 339–41 (1979). While “the Marxian concept of exploitation” may be understood as “a purely scientific one, with no moral content,” it implies a normative critique of capitalist labor relations as unjust. *Id.* at 341–42; John Roemer, *Should Marxists Be Interested in Exploitation?* 14 PHIL. & PUB. AFFAIRS 30, 36–38 (1985) (distinguishing positive and normative claims in Marxist theory of exploitation); Strecker, *supra* note 70, at 233–34 (suggesting that the Marxist theory of exploitation “is intended to identify a wrongness hidden behind the façade of free contractual relations”).

77. See JOSÉ SERRA, THREE MISTAKEN THESES REGARDING THE CONNECTION BETWEEN INDUSTRIALIZATION AND AUTHORITARIAN REGIMES, in David Collier (ed.), THE NEW AUTHORITARIANISM IN LATIN AMERICA 99, 102, n.8 (1979) (quoting RUI M. MARINI, DIALÉCTICA DE LA DEPENDENCIA, 92–93 (1973)) (“[S]uperexploitation’ does not simply involve a high rate of exploitation (i.e. a high rate of surplus value). It implies more. It means a ‘greater exploitation of the physical strength of the worker, in contrast to the exploitation resulting from the increase in his productivity. This normally is reflected in the fact that the labor force is paid less than its actual value.’”); J. Craig Jenkins, *The Demand for Immigrant Workers: Labor Scarcity or Social Control?*, 12 INT’L MIGRATION REVIEW 514, 528 (1978) (“superexploitation” exists where “one body of workers performing essentially the same work receives consistently lower wages than another,” or where “that body of workers is more productive than another but receives the same wage rate”); Marlene Dixon, et al., *Chicana and*

the term is also used in a broader sense to connote a situation of particularly acute economic subordination:

Superexploitation refers to the condition whereby a group or groups become dominant over a given population by forcefully seizing that population's valuable resources and creating the conditions necessary for keeping that population in a long-term state of subordination. The dominant population is often supported in this effort by the state, and by a set of negative ideologies used to stigmatize and delegitimize the victimized population.⁷⁸

Prison labor, in its various historical and contemporary forms, exhibits the characteristic features of superexploitation. Inmates typically work under unusually intense conditions for unusually low wages.⁷⁹ Their "extreme social exclusion," established symbolically by their criminal status and physically by their incarceration, reinforces their extreme subordination.⁸⁰ The prison wall serves as "a *legal fiction* . . . manipulated by the state to define who shall have legal and civil rights and who shall not, to define the conditions of exploitation to which

Mexicanas within a Transnational Working Class: Theoretical Perspectives, 7 *Review* (Fernand Braudel Center) 109, 118 (1983) (quoting Jaime Osorio Urbina, *Superexplotación y Clase Obrera: El Caso Mexicano*, 6 *CUADERNOS POLITICOS* 6–7 (1975)) ("The forms of superexploitation that capitalist exploitation can assume are fundamentally three: increase in the intensity of work, extension of the working day, payment of labor power below its value."); MARX, *supra* note 76, at 657 ("Forcible reduction of wages below [the] value [of labor-power] . . . transforms, within certain limits, the laborer's necessary consumption fund into a fund for the accumulation of capital.").

The Marxist concept of superexploitation is particularly associated with "dependency" and "world systems" theories of economic development in the global "periphery" under colonialism and imperialism. See John Smith, *Imperialism in the Twenty-First Century*, 67 *MONTHLY REVIEW* 033 (July-Aug. 2015), <http://monthlyreview.org/2015/07/01/imperialism-in-the-twenty-first-century>; John Smith, *Outsourcing, Financialisation and the Crisis*, 6 *INT'L J. OF MGMT. CONCEPTS AND PHIL.* 19, 20 (2012) (discussing labor "outsourcing" as a strategy "to cut costs and increase profits" through "much higher rates of exploitation available in southern nations"); John Bellamy Foster, *The Theory of Monopoly Capitalism: An Elaboration of Marxian Political Economy*, 161, 179–84 (New Ed. 2014) (discussing work of Paul Baran & Paul Sweezy, Harry Magdoff, Andre Gunder Frank, and Samir Amin); Serra, *supra* note 77, at 102 (discussing significance of superexploitation in analysis of "capitalist development in Latin America").

78. Aldon Morris, *Building Blocks of Social Inequality: A Critique of Durable Inequality*, 42 *COMPARATIVE STUDIES IN SOC'Y & HIST.* 482,485 (2000).

79. PIE, which mandates payment of the "prevailing wage", is a notable exception in this regard. But in most respects, inmates working under PIE are subject to the same substandard (relative to legally-mandated standards applicable to employment outside of prison) working conditions as other incarcerated workers.

80. ANDY HIGGINBOTTOM, *SUPER-EXPLOITATION OF IMMIGRANT LABOUR IN EUROPE: THE CASE OF INTENSE AGRICULTURE IN SPAIN*, Paper to the CSE conference Global Capital and Global Struggles: Strategies, Alliances, Alternatives (London, 1–2 July, 2000). The fact that the U.S. inmate population is disproportionately African-American further contributes to this social isolation. Earl Smith & Angela J. Hattery, *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, 15 *RACE, GENDER, & CLASS* 79, 82 (2008) (62% of male inmates and 50% of female inmates are African American, and 42% of all inmates are African American men).

workers are forced to submit.”⁸¹ Workers subject to superexploitation inside the wall are seen as deserving their fate and unworthy of solidarity from those on the outside.⁸²

But the exploitive nature of prison labor does not turn solely, or even principally, on the fact that it unfairly takes advantage of inmates’ unfreedom to compel their labor on unfavorable terms. Stone walls and iron bars might a prison make,⁸³ but they do not make prison labor something separate and apart from labor in the outside world. Rather, prison labor is embedded within a broader neo-liberal regime, under which labor is subject to “a mode of domination of a new kind, based on the creation of a generalized and permanent state of insecurity aimed at forcing workers into submission, into the acceptance of exploitation.”⁸⁴

The insecurity driving the domination of labor under neo-liberalism arises from “the absolute reign of flexibility,”⁸⁵ which manifests, among other ways, in the rise of “insecure employment and the permanent threat of unemployment.”⁸⁶ This insecurity serves to discipline workers as it “isolates[], atomizes, individualizes, demobilizes and strips away solidarity.”⁸⁷

Prison labor is part of this regime of anxiety-inducing flexibility. The threat of job loss to the superexploited prison labor segment serves as a disciplinary mechanism against demands by workers in the non-prison labor market who see their own wages and working conditions eroded.⁸⁸

81. Dixon et. al, *supra* note 77, at 148. Writing just as the U.S. prison population was beginning its exponential growth, and only a few years after the enactment of the PIE program, Dixon could have been referring to mass incarceration and the resurgence of inmate contract labor when she observed that “the state is finding new, more insidious means of stripping ever-greater sectors of the working class of legal and civil rights.” *Id.*; see also Kilgore, *supra* note 6, at 363–64 (discussing mass incarceration as a “process of the criminalization of the working class”).

82. See Higginbottom, *supra* note 80, (identifying social exclusion of superexploited immigrant labor as an impediment to the mobilization of support from mainstream labor organizations); Dixon et al., *supra* note 77, at 147 (describing “racism and sexism as weapons to divide the working class, prevent it from developing unified opposition to capitalist policies, and legitimate the superexploitation of minority workers and women.”).

83. Richard Lovelace, *To Althea, from Prison* (1642).

84. PIERRE BOURDIEU, *ACTS OF RESISTANCE* 85 (1998). Bourdieu named this new mode “flexploitation.” *Id.*

85. *Id.* at 97.

86. *Id.* at 98.

87. *Id.*

88. John Bellamy et al., *The Global Reserve Army of Labor and the New Imperialism*, 63 MONTHLY REV. 6 (2011) (“If the new imperialism has its basis in the superexploitation of workers in the global South, it is a phase of imperialism that in no way can be said to benefit the workers of the global North, whose conditions are also being dragged down—both by the disastrous global wage competition introduced by multinationals, and, more fundamentally, by the overaccumulation tendencies in the capitalist core, enhancing stagnation, and unemployment.”); Fred Magdoff & Harry Magdoff, *Disposable Workers Today’s Reserve Army of Labor*, 55 MONTHLY REVIEW 11 (2004); but see Smith, note 6 at 39 (arguing that wage stagnation resulting from global outsourcing has been offset by increased purchasing power resulting from cheaper consumer goods, “attenuating class antagonisms within the imperialist

III. INCARCERATED WORKERS AS STATUTORY EMPLOYEES UNDER EXISTING LABOR LAW

Coverage of incarcerated workers under existing labor relations law depends, as a threshold matter, on whether they fall within the statutory definition of employees.⁸⁹ Perhaps surprisingly, it does not appear that the issue has been directly addressed under federal labor law.⁹⁰

The most relevant cases under the NLRA have involved inmates working for private employers under work-release programs.⁹¹ Those cases have not directly addressed the question of whether such incarcerated workers are statutory employees.⁹² Rather, the issue has been whether incarcerated workers were properly included in a bargaining unit together with non-inmate employees.⁹³ The NLRB's long-standing "test as to whether an employee shares a community of interest with his fellows so as to be included in a unit with them depends on his status while in the employment relationship and not what ultimate control he may be subjected to at other times."⁹⁴ Applying this test, the NLRB and the courts have repeatedly held that work-release inmates were properly included in bargaining units together with other

nations while reinforcing the international disunity that paralyzes working class agency at both a national and global level").

In a sense, the argument here is the flip side of Western & Beckett's analysis of "the penal system as a labor market institution" that "lowers conventional measure of unemployment in the short run by concealing joblessness." Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. OF SOC. 1030, 1031 (1999). Western & Beckett further argue that incarceration "raises unemployment in the long run by damaging the job prospects of ex-convicts after release." *Id.* They do not address prison labor, and thus do not consider the effect that the employment of inmates may have on unemployment among non-incarcerated workers.

89. 29 U.S.C. § 152(3) (2012) (defining "employee" to "include any employee"); 5 U.S.C. § 7103(a)(2) (2012) (defining "employee" as "an individual—employed in an agency").

90. Administrative agencies and courts in at least two states have held that state prison inmates working for the prison itself (either performing prison housework or in a state-run prison industry) were not employees under state public sector collective bargaining law. *In re Prisoners Labor Union at Marquette*, Case No. R72, E163 (Mich. Empl. Rel. Comm., Mar. 22, 1974); *Prisoners' Labor Union at Green Haven*, 6 P.E.R.B. ¶ 3033 (NY PERB 1973), *aff'd*, *Prisoners' Labor Union at Bedford Hills (Women's Div.) v. Helsby*, 354 N.Y.S.2d 694 (NY App. Div. 1974); *see also* Florida Stat. Ann. § 447.203(3)(f) (West 2016) (excluding state inmates from definition of employee under public employee collective bargaining statute).

91. *Speedrack Products Group, Ltd. v. NLRB*, 114 F.3d 1276 (D.C. Cir. 1997); *Roslyn Concrete Constr. Co. v. NLRB*, 713 F.2d 61 (4th Cir. 1983); *Georgia-Pacific Corp.*, 201 N.L.R.B. 760 (1973); *Winsett-Simmonds Eng'rs, Inc.*, 164 N.L.R.B. 611 (1967); *Nat'l Welders Supply Co.*, 145 N.L.R.B. 948 (1964).

92. *See Roslyn Concrete*, 713 F.2d at 63 (declining to address issue on petition for review of NLRB decision where employer did not raise it before the NLRB).

93. Under the NLRA, a "bargaining unit" (i.e. the group of employees represented by a union for collective bargaining) is "appropriate" only if the employees included in the unit share a "community of interest" regarding their terms and conditions of employment. 29 U.S.C. § 159(a), (b) (2012); *Speedrack*, 114 F.3d at 1278.

94. *Speedrack*, 114 F.3d at 1279 (citing, with approval, *Winsett-Simmonds Eng'rs, Inc.*, 164 N.L.R.B. 611, 612 (1967)).

employees.⁹⁵ At a minimum, these cases establish that inmate status is not incompatible with statutory employee status under the NLRA, and that inmates working for private-sector employers may indeed have the same statutory rights as other employees.

The issue of statutory employee status also confronts incarcerated workers asserting rights or seeking protection under other employment laws.⁹⁶ Courts have generally been hostile to such claims,⁹⁷ concluding that the legal status of employee is somehow incompatible with the legal status of prisoner.⁹⁸ A common rationale in such decisions is the ostensibly non-economic nature of inmate labor, i.e. the notion that the work inmates perform is “essentially penological” rather than part of a “bargained-for exchange of labor for consideration” that characterizes an employment relationship.⁹⁹

In some cases, however, courts have acknowledged the possibility that incarcerated workers might be statutory employees notwithstanding their incarceration.¹⁰⁰ These courts have focused on “the recognizably productive character of inmates’ work,” particularly where that work entails the production of goods or performance of services for the “free” market.¹⁰¹

The argument for recognizing inmates as statutory employees is particularly strong when they are working for private, for-profit, employers.¹⁰² Businesses that opt to employ inmate labor presumably do

95. *Speedrack*, 114 F.3d at 1276 (reversing *Speedrack Products Group, Ltd.*, 320 N.L.R.B. 627 (1995)); *Rossllyn Concrete*, 713 F.2d 61 (4th Cir. 1983) (enforcing *Rossllyn Concrete Constr. Co.*, 261 N.L.R.B. 732 (1982)); *Georgia-Pacific Corp.*, 201 N.L.R.B. 760 (1973); *Winsett-Simmonds Eng’rs, Inc.*, 164 N.L.R.B. 611 (1967). In *National Welders Supply Co.*, 145 N.L.R.B. 948 (1964), the NLRB excluded work-release inmates from the bargaining unit on the grounds that substantial differences in wages and other conditions of employment meant that inmate-employees did not share a community of interest with other employees.

96. See Zatz, *supra* note 1, at 867–79; Whitney Bennis, “Free” Labor: The Law of Prison Labor, ON LABOR (May 28, 2015), <http://onlabor.org/2015/05/28/free-labor-the-law-of-prison-labor/>.

97. See Zatz, *supra* note 1, at 882–83, nn.101–03 (collecting and reviewing cases in which courts have dismissed claims by inmates under various federal and state employment laws).

98. *Id.*

99. Zatz, *supra* note 1, at 884–85 (quoting *George v. SC Data Ctr., Inc.* 884 F. Supp. 329 (W.D. Wis. 1995)).

100. See Zatz, *supra* note 1, at 892 n.155 (collecting cases). Indeed, in a leading case rejecting incarcerated workers’ minimum wage and overtime claims on the grounds that they were not statutory employees, the court nonetheless took pains to note, “[W]e do not believe that prisoners are categorically excluded from the FLSA.” *Hale v. Arizona*, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc).

101. Zatz, *supra* note 1, at 892–93.

102. Which is not to concede that there is a clear-cut distinction between work for private industry and government agencies. Particularly where a prison industry fulfills the ordinary material needs of government operations, it is “a proprietary enterprise” indistinguishable from its private-sector counterparts, and should be treated as such under the law. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418–26 (1978) (Berger, C.J., concurring); Charles M. Haar, *Shopping Center Location Decisions: National Competitive Policies and Local Zoning Regulations*, in GEORGE STERNLIEB & JAMES W.

so because it is economically advantageous. They should not be able to evade labor law (nor other worker-protection laws) by the expedient of moving their operations behind prison walls.

Permitting private employers to escape [the] costs [of employment law compliance] while profiting from the use of prison labor markets undermines the enforcement of the statutory requirements generally, by creating incentives for competing employers to shirk compliance with regard to non-prison labor—and thereby economically disadvantaging competitors of those employers using prison labor.¹⁰³

The argument against recognizing prison labor as employment frequently rests on the premise that the work that inmates perform serves penological goals. Yet, while “[m]andatory labor may be ‘penological, not pecuniary,’ for prisoners and their jailers[. . .] it is assuredly a matter of dollars and cents to firms seeking profit in a competitive market and law-abiding citizens vying to work for them.”¹⁰⁴ In determining the status of workers under labor law, “the focus . . . is on the interests of employees *as employees*, not their interests more generally.”¹⁰⁵

In the case of PIE, the authorizing statute itself sets out the requirements for the program in terms that denote employment. Not only does the statute require payment for inmates’ work, it expressly identifies that payment as “wages,” a term specifically associated with an employment relationship.¹⁰⁶ Moreover, wage rates are expressly tied to

HUGHES, EDS, SHOPPING CENTERS: U.S.A. 106 (2012) (“When government acts as an entrepreneur—again we are down to this marvelous, thin line of what decisionmaking belongs to the private sector or to the public sector—then it is not excused from the antitrust cases on the ground that it is mandated by the state.”). For a robust critique of the “public-private distinction” as a legal organizing principle, see Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. 37, 56-71 (2007). While the NLRA excludes “any State or political subdivision thereof” from the statutory definition of “employer”, 29 U.S.C. § 152(2) (2012), that exclusion is neither constitutionally required nor appropriate in the case of those employed by state-owned proprietary enterprises. See *Louisiana Power & Light*, 435 U.S. at 409–13 (holding that the Constitution does not require, and public policy does not support, exemption of government-owned enterprises from coverage under federal antitrust law). I would argue that Congress should amend the NLRA, limiting the “State or political subdivision” exclusion to activities of state and local government in its sovereign capacity.

103. *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 912 (9th Cir. 2013) (Berzon, J., concurring).

104. *Id.*

105. *Speedrack*, 114 F.3d at 1280. The court in *Speedrack* cited this principle specifically in relation to the “community of interests test” for bargaining unit determination. But the principle also applies to the threshold question of employee status. So long as “a worker goes about his or her ordinary tasks during the working day,” the worker’s other interests or obligations do not negate statutory employee status. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 95 (1995) (affirming NLRB’s determination that union “salts” are statutory employees notwithstanding the fact that they are also paid by the union to organize the employer’s employees); *Boston Med. Ctr.*, 330 N.L.R.B. 152 (1999) (holding medical interns, residents, and fellows are statutory employees notwithstanding the fact that their work is also part of an educational program required for professional license or specialist certification).

106. 18 U.S.C. § 1761(c)(2) (2012).

those in the “free” labor market.¹⁰⁷ The statute further mandates that participating inmates’ “status as offenders” may not be a basis for “depriv[ing them] of the right to participate in benefits made available by the Federal or State Government to other individuals *on the basis of their employment*.”¹⁰⁸

If the “wages” and “benefits” provisions imply employee status, the final statutory provision makes it explicit: Inmates must “participate[] in such *employment* voluntarily.”¹⁰⁹ The significance of this provision is twofold. First, the express characterization of inmates’ work as “employment”—especially coupled with the requirements that inmates receive “wages” and be eligible for employment-based “benefits”—provides strong statutory support for the proposition that inmates working under PIE are indeed employees in both a real and legal sense.¹¹⁰ Second, the requirement of voluntary participation distinguishes inmate labor under PIE from situations where inmates are required to work as part of their incarceration.¹¹¹ The voluntary nature of inmate participation in PIE, coupled with the payment of wages at rates substantially higher than what inmates otherwise typically receive for their work, casts inmate work under PIE as a “bargained-for exchange of labor for consideration,” characteristic of an employment relationship.¹¹²

IV. CONCLUSION

The notion of unions for incarcerated workers may seem far-fetched. Yet the idea has a long history. A century ago, the American Federation of Labor embraced a plan for New York’s Sing Sing Penitentiary, under which unions would assist with vocational training for inmates producing goods under the state use system.¹¹³ Federation leaders saw the plan as an opportunity to prepare inmates for free labor, and labor union membership, upon their release.¹¹⁴

107. *Id.* (requiring payment of wages not less than locally prevailing rates).

108. *Id.* at § 1761(c)(3) (emphasis added). The term “benefits” in this subsection appears to mean payments to employees under social insurance programs. *See id.* (identifying “workmen’s compensation” as an example, and specifically excluding “unemployment compensation”). It would be a stretch to assert that it includes the exercise of employee rights under the NLRA and analogous public-employee labor relations laws. The significance of this provision is its implicit recognition that incarcerated workers under PIE are analogous to other employees.

109. *Id.* at § 1761(c)(4) (emphasis added).

110. Surely Congress was familiar with the common legal meaning and consequences of the term “employment” and the long-standing issue of whether inmate labor should be treated as such.

111. *See Zatz, supra* note 1, 884–88 (discussing courts’ emphasis on involuntary nature of prison work as a rationale for denying employee status to inmates).

112. *See id.* at 885 (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)).

113. *A Worthy Prison Reform Experiment*, AMERICAN FEDERATIONIST, vol. XXII, No. 11, Oct. 1915, at 850; *Labor Men Approve Sing Sing Reforms*, N.Y. TIMES, Aug. 2, 1915, at 5.

114. *A Worthy Prison Reform Experiment, supra* note 113, at 850-51; *Labor Men Approve Sing Sing Reforms, supra* note 113, at 5.

In the early 1970s, inmates in prisons across the country formed unions to assert grievances and advance and demand improvement in both working conditions and conditions of incarceration more generally.¹¹⁵ In some cases, these unions sought, but were denied, formal legal recognition and rights under state public employee relations law.¹¹⁶

During the same period, the idea of inmate unions gained support among prison reform advocates, who suggested that allowing prisoners to organize and bargain with prison administrators could be a viable means of addressing grievances and promoting rehabilitative goals.¹¹⁷ In 1977, The American Bar Association's Tentative Draft of Standards Relating to the Legal Status of Prisoners¹¹⁸ specifically proposed that incarcerated workers should "not be exempted from" labor and employment laws, including "The National Labor Relations Act and other legal provisions

115. See Frank Browning, *Organizing Behind Bars*, RAMPARTS, Feb. 1972, at 40–45 (discussing California United Prisoners Union); C. Ronald Huff, *Unionization Behind the Walls*, 12 CRIMINOLOGY 175, 178–85 (1974) (discussing the emergence and goals of prisoners' unions in California, New York, Massachusetts, North Carolina, Michigan, Maine, Vermont, Rhode Island, New Hampshire, Georgia, Washington, DC, Kansas, Minnesota, and Washington); Sarah M. Singleton, *Unionizing America's Prisons—Arbitration and State-Use*, 48 IND. L. J. 493, 501–02 (citing inmate union organizing in California, New York, Michigan, Delaware, Ohio, and Pennsylvania). The prisoners' union movement of the 1970s emerged out of and was closely associated with the Black Power movement. See generally, Donald F. Tibbs, *From Black Power to Prison Power: The Making of Jones v. North Carolina Prisoners' Labor Union* (2012).

116. Prisoners' Labor Union at Marquette v. Michigan, 61 Mich. App. 328 (Mich. App. 1975) (holding incarcerated workers not statutory employees under Michigan Public Employees Relations Act); Matter of State of New York (Dept. of Correctional Services) and Prisoners' Labor Union at Green Haven, 6 PERB ¶ 3033 (NY PERB May 24, 1973) (holding incarcerated workers not statutory employees under Taylor Law), *aff'd sub nom.* Prisoners' Labor Union at Bedford Hills (Women's Division) v. Helsby, 44 A.D.2d 707 (N.Y.A.D. 1974).

117. See, e.g., Bradley B. Falkof, *Prisoner Representative Organizations, Prison Reform, and Jones v. North Carolina Prisoners' Labor Union: An Argument for Increased Court Intervention in Prison Administration*, 70 J. CRIM. L. & CRIMINOLOGY 42 (1979) ("More and more commentators are recognizing the benefits, both to the rehabilitative process and the maintenance of internal prison security, offered by such prisoner grievance organizations as prisoner unions and inmate advisory councils."); Comment, *The Future of Prisoners' Unions: Jones v. North Carolina Prisoners' Labor Union*, 13 HARV. C.R.-C.L. L. REV. 799, 80–09 (1978) (discussing role of prisoners' unions as means of channeling inmate grievances, "publicizing prison conditions", and "facilitat[ing] rehabilitation"); Sidney Zonn, *Inmate Unions: An Appraisal of Prisoner Rights and Labor Implications*, 32 MIAMI L. REV. 613 (1978); Note, *The First Amendment Behind Bars: Prisoners' Right to Form a "Union"*, 8 PAC. L. J. 121 (1977); Ronald C. Huff, *Unionization Behind the Walls*, 12 CRIMINOLOGY 175 (1974); Sarah M. Singleton, *Unionizing America's Prisons--Arbitration and State-Use*, 48 IND. L. J. 493 (1973); Warren E. Burger, *Our Options Are Limited*, 18 VILLANOVA L. REV. 165, 170, 171 (1972) (citing ABA Commission on Correctional Facilities & Services proposal for "the creation of grievance procedures for prisoner complaints"); Comment, *Labor Unions for Prison Inmates: An Analysis of A Recent Proposal for the Organization of Inmate Labor*, 21 BUFF. L. REV. 963 (1971–72); Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 YALE L. J. 726, 745–46, 748–49 (1971–72) (discussing "democratic union model" of "formal bargaining" between prison administration and inmates); Stanley Bass, *Correcting the Correctional System: A Responsibility of the Legal Profession*, 5 CLEARINGHOUSE REV. 125, 149 (1971) ("Since prisoners have the right to petition for redress of grievances, it would seem that they are also entitled to associate with each other and with others, within allowable prison limitations, for the purpose of bettering their condition.");

118. 14 AM. CRIM. L. REV. 377 (1977).

regulating labor-management relations in private employment”.¹¹⁹ Joint Committee of the American Bar Association’s Criminal Justice Section issued a The American Bar Association’s Reformers frequently cited the experience of prisoners’ unions in European countries as evidence that such organizations could have salutary effects.¹²⁰

Nevertheless, prison authorities generally objected to, and refused to permit, inmate unionization, contending that prisoner organizing and collective bargaining posed a threat to institutional security and other penological objectives.¹²¹ That argument prevailed, and the prisoners’ union movement suffered a legal setback, in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*¹²²

In 1974, Wayne Brooks, an inmate at North Carolina’s Central Prison, formally established the North Carolina Prisoners’ Labor Union (“NCPLU”) as a by filing articles of incorporation.¹²³ The stated purposes of NCPLU included “seek[ing] through collective bargaining . . . to improve . . . working . . . conditions.”¹²⁴ Consistent with that purpose, NCPLU affiliated with the North Carolina AFL-CIO.¹²⁵ State prison officials at least tacitly permitted individual membership in the union.¹²⁶ But, in an effort to prevent union organizing and activity, prison authorities adopted regulations “to prohibit inmate solicitation of other inmates, meetings between members of the Union, and bulk mailings concerning the Union from outside sources.”¹²⁷ NCPLU sued, contending that the regulations infringed on the constitutional rights of the union and its members to free speech, association, and assembly.¹²⁸ Relying on

119. *Id.* at 393–94 (Standard 4.3 Conditions of Employment). As ultimately approved by the ABA House of Delegates, the standard on Conditions of Employment declares to the contrary: “These standards are not intended to extend to prisoners the right to strike or take other concerted action to affect the wages, hours, benefits, terms, or other conditions of their employment within correctional institutions.” ABA, Legal Status of Prisoners, Standard 23-4.2 Conditions of Employment. http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standard_s_prisoners_status.html#23-4.2.

120. *See, e.g.*, Comment, 13 HARV. C.R.-C.L. L. REV. at 820–23 (discussing Swedish inmate unions); Comment, 21 BUFF. L. REV. at 964; 8 PAC. L. J. at 121 n. 4.; Note, 81 YALE L. J. at 749 (citing Swedish inmate councils as example of “democratic union model” for inmate representation and bargaining); Bass, 5 CLEARINGHOUSE REV. at 149 (“Prison unions exist in some European countries, and there is no reason why such a valuable rehabilitative tool could not also be utilized productively in the United States.”); Huff, *supra* note 117, at 185–86 (discussing inmate unions in Sweden and Denmark).

121. *See* Huff, *supra* note 117, at 186–88, n.13 (discussing reaction of prison administrators to inmate unionization); Comment, 21 BUFF. L. REV. at 966–68 (quoting spokesperson for New York Department of Correctional Services and citing results of survey of state corrections departments).

122. 433 U.S. 119 (1977)

123. Tibbs, *supra* note 115, at 137.

124. *Jones*, 433 U.S. at 122.

125. Tibbs, *supra* note 115, at 140.

126. *Jones*, 433 U.S. at 122.

127. *Id.*

128. *Id.* The union also asserted, and the Court similarly rejected, an equal protection challenge to the regulations. *Id.* at 133–36.

prison administrators' assertions that union activity would promote conflict, threaten institutional security, and undermine penological objectives, a majority of the Court held that "the regulations are drafted no more broadly than they need be to meet the perceived threat which stems directly from group meetings and group organizational activities of the Union."¹²⁹

The majority opinion in *Jones* has been subject to ample criticism, particularly for deferring too much to prison administrators' bare assertions of security concerns, without requiring any evidentiary support of actual threats.¹³⁰ Yet, as concerns the argument here for extending union organizing and bargaining rights to incarcerated workers under PIECP, UNICOR, and similar programs, the significance of *Jones* lies more in what the Court did not decide. The majority did not hold that NCPLU's members were not statutory employees. Indeed, that question did not arise in *Jones* at all. As the Court noted,¹³¹ North Carolina law expressly forbids collective bargaining agreements for all state employees.¹³² Consequently, on the basic question of whether incarcerated workers may be regarded as statutory employees under statutes like the NLRA,¹³³ *Jones* has nothing to say.

Despite the setback that *Jones* represented, inmates have continued to organize unions. Notable examples include the formation of a prisoners' union at the Southern Ohio Correctional Facility (Lucasville) in 1987,¹³⁴ and more recently the Free Alabama Movement and similar organizing efforts in other states.¹³⁵ Like the prisoners' unions of the 1970s, the new

129. *Id.* at 133.

130. In dissent, Justices Marshall and Brennan extensively criticized the majority on this ground, and warned, "If the mode of analysis adopted in today's decision were to be generally followed, prisoners eventually would be stripped of all constitutional rights, and would retain only those privileges that prison officials, in their 'informed discretion,' deigned to recognize." *Jones*, 433 U.S. at 146 (Marshall, J. dissenting); see also, Falkof, *supra* note 117, at 43 ("By relegating a prison reform such as inmate unions to the absolute control of security-minded prison officials, the Court has sacrificed a prisoner's fundamental rights of free speech and association to the mere allegation of a custodial concern for order and discipline."); Comment, 13 HARV. C.R.-C.L. L. REV. at 814-15 (1978) ("The Court showed itself to be too ready to accept the conclusions of others that a prisoners' union is inherently disruptive.").

131. *Jones*, 433 U.S. at 122, n.1.

132. N.C. Gen. State. Sec. 95-98 (1975).

133. See Part III, *supra*.

134. *Ohio Prisoners Want Union*, N.Y. TIMES, Aug. 4, 1987, <http://www.nytimes.com/1987/08/05/us/ohio-prisoners-want-union.html>.

135. See George Lavender, *Is Prison Labor a Union Issues?*, IN THESE TIMES (Apr. 28, 2014), http://inthesetimes.com/prison-complex/entry/16618/why_the_wobblies_support_alabama_prisoners_work_strike; Devon Douglas-Bowers, *Challenging Prisons: An Interview With the Free Alabama Movement*, TRUTHOUT (Dec. 12, 2015), <http://www.truth-out.org/news/item/33974-challenging-the-prisons-an-interview-with-the-free-alabama-movement>. Like the Lucasville union, these recent efforts have been supported by the Industrial Workers of the World ("IWW"), which has formed an Incarcerated Workers Organizing Committee for this purpose. See George Lavender, *Alabama Prison Work Strike 'Stalls' But Wins Support from Wobblies*, IN THESE TIMES (Apr. 25, 2014), http://inthesetimes.com/prison-complex/entry/16607/alabama_prisoners_about_us, IWW INCARCERATED WORKERS ORGANIZING COMMITTEE, <https://iwoc.noblogs.org/about/> (last visited June 24, 2016).

wave of inmate organizing does not limit its focus to labor matters, but seeks changes in prison conditions more generally.¹³⁶

The lesson of this history is that, with or without legal support, incarcerated workers, like workers on the outside, have persisted in organizing and acting through unions as a means of improving the conditions under which they labor and live.

The wholesale denial of union organizing and collective bargaining rights is justified neither by hair-splitting efforts to define incarcerated workers as non-employees, nor by bald assertions that recognizing such rights would imperil prison order and security. Rather, a rational approach would recognize prison labor for what it is: part-and-parcel of the contemporary economy. An experiment involving the relatively small number of incarcerated workers under PIECP and UNICOR will provide an opportunity to fine-tune existing labor relations law to deal with the special issues associated with the peculiar setting on prison labor.

136. See Melvin Ray, *Free Alabama Movement*, at 23–64 (undated), <http://freealabamamovement.com/FREE%20ALABAMA%20MOVEMENT.pdf> (discussing grievances and demands); *Alabama Prison Strike Organizer Speaks from Behind Bars: We Are Engaged in a Struggle for Our Lives*, DEMOCRACY NOW (May 13, 2016), http://www.democracynow.org/2016/5/13/alabama_prison_strike_organizer_speaks_from (discussing proposed legislation to address prison overcrowding); Devon Douglas-Bowers, *Challenging Prisons: An Interview With the Free Alabama Movement*, TRUTHOUT (Dec. 12, 2015), <http://www.truth-out.org/news/item/33974-challenging-the-prisons-an-interview-with-the-free-alabama-movement> (discussing demands).