



LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NUMBER 2022-03

Beyond the 13th Amendment-Captive Labor

**Andrea Armstrong,
Law Visiting Committee Distinguished
Professor of Law**

82 Ohio St. L.J. 1039 (2021)

**This paper can be freely downloaded from the
Social Science Research Network at:**

<https://ssrn.com/abstract=4061202>

Beyond the 13th Amendment – Captive Labor

ANDREA C. ARMSTRONG*

TABLE OF CONTENTS

I.	INTRODUCTION	1039
II.	INCARCERATED LABOR: OVERVIEW	1040
	A. <i>Historical Use</i>	1042
	B. <i>Sale to the Public</i>	1044
III.	HARMS OF FORCED INCARCERATED LABOR.....	1047
	A. <i>Involuntary</i>	1048
	B. <i>Uncompensated</i>	1050
	1. <i>Fair Labor Standards Act</i>	1053
	C. <i>Unprotected</i>	1056
	1. <i>Working Conditions</i>	1056
	2. <i>Organizing Rights</i>	1062
	3. <i>Remedies for Workplace Injuries</i>	1063
	D. <i>Unrelated to Re-Entry</i>	1065
IV.	FAIR LABOR FOR INCARCERATED PEOPLE.....	1066
V.	CONCLUSION.....	1068

I. INTRODUCTION

A new congressional resolution to amend the Thirteenth Amendment of the U.S. Constitution aims to expand protection from slavery and involuntary servitude to incarcerated people convicted of a crime.¹ The current Thirteenth Amendment, enacted in 1865, prohibits slavery and involuntary servitude for all “except as a punishment for crime whereof the party shall have been duly convicted.”² This exception is used to justify forced agricultural labor on former plantation sites, involuntary cleaning after oil spills and other natural disasters, and work on behalf of private corporations including answering phones, sewing clothes, and recycling electronics.³ But focusing on the Thirteenth Amendment,

* Professor of Law, Loyola University New Orleans, College of Law. Yale (J.D.); Princeton (M.P.A). Sincere thanks to Gautami Bamba, Grace Bronson, and Ashly Villa-Ortega for their research assistance on this project and to the incredible team of students at the *Ohio State Law Journal*, who organized this symposium and provided excellent editorial support for this Article.

¹ S.J. Res. 81, 116th Cong. (2020).

² U.S. CONST. amend. XIII, § 1.

³ Liz Fields, *Hard Labor: Here’s the Weird Shit Inmates Can Do for Work in US Prisons*, VICE (Sept. 9, 2015), <https://www.vice.com/en/article/bjknqv/hard-labor-heres-the-weird-shit-inmates-can-do-for-work-in-us-prisons> [https://perma.cc/AC3F-D2JS]; Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), <http://www.thenation.com/article/37828/bp-hires-prison-labor-clean-spill->

while important, fails to recognize the thicket of federal laws and judicial decisions that shape captive incarcerated labor for both government entities and private corporations.

If the Thirteenth Amendment is the legal foundation of captive labor, statutes and jurisprudence provide the architecture and structure. Incarcerated people serving a prison sentence are forced to work in an assigned job without pay, but they are also unprotected by labor laws and working jobs without regard to their post-prison employment or rehabilitation.

II. INCARCERATED LABOR: OVERVIEW

Every day, incarcerated people across the country are forced to work, but there is little public and current information about what jobs they are assigned and the conditions of their work. Modern academic research on conditions for incarcerated labor has focused on specific job areas, such as firefighting in California.⁴ However, the last national survey of the breadth of forced work behind bars is from *The Corrections Yearbook* of 2002, almost twenty years ago.⁵

Incarcerated labor takes a variety of forms in prisons in the United States. The most common and largest category of carceral labor is work to assist in the safe and secure operation of the prison itself.⁶ These work assignments include preparing and serving meals for incarcerated people, laundry for facility bedding and uniforms, and janitorial services, including cleaning prison common areas accessible to incarcerated people.⁷ In addition, incarcerated people are often also responsible for groundskeeping duties, including mowing large swaths of grass, and building maintenance, including plumbing and electrical repairs in their

while-coastal-residents-struggle (on file with the *Ohio State Law Journal*); Joe McGauley, *13 Everyday Items You Never Knew Were Made by Prisoners*, THRILLIST (May 20, 2015), <https://www.thrillist.com/gear/products-made-by-prisoners-clothing-furniture-electronics> [<https://perma.cc/4EKG-25WB>]; OVERSIGHT & REV. DIV., U.S. DEP'T OF JUST., A REVIEW OF FEDERAL PRISON INDUSTRIES' ELECTRONIC-WASTE RECYCLING PROGRAM 13 (Oct. 2010), https://oig.justice.gov/reports/BOP/o1010_appendix.pdf [<https://perma.cc/7KW3-HASB>].

⁴ See, e.g., Philip Goodman, *Race in California's Prison Fire Camps for Men: Prison Politics, Space, and the Racialization of Everyday Life*, 120 AM. J. SOCIO. 352, 362–64 (2014); Joanna M. Weill, *Prisoners on the Fireline: The Application of Ethical Principles and Guidelines to Prison Fire Camps*, 30 ETHICS & BEHAV. 112, 116–21 (2019).

⁵ CRIM. JUST. INST., INC., THE CORRECTIONS YEARBOOK: ADULT CORRECTIONS 118–27 (2002). The Corrections Yearbook provides job assignment location by state in five categories: 1) prison industry (7.8%); 2) prison farm (3.6%, but with significantly higher numbers in Arkansas, Louisiana, and Texas); 3) work details (47%); 4) full time academic or vocational work (12.4%) and 5) part time academic or vocational work (14.5%). *Id.* at 118.

⁶ See Beth Schwartzapfel, *The Great American Chain Gang*, AM. PROSPECT (May 28, 2014), <https://prospect.org/justice/great-american-chain-gang/> [<https://perma.cc/B2LC-9ALV>].

⁷ See *id.*

prison.⁸ The majority of prisons could not function as currently staffed without the labor of incarcerated people.

A second category of work assignments includes work that benefits and is for the prison, but is not essential to the operation of the prison.⁹ This type of work ranges from field labor (agricultural crops) to cattle management to working in the library or as “inmate counsel” assisting others with their research or representing them in disciplinary proceedings.¹⁰ This category also includes construction work, including electrical and plumbing, for new constructions on prison grounds, as well as some incarcerated labor outside of the prison for community organizations, such as painting a local thrift store.¹¹

A third type of work assignments are those that provide skills or education to assist in post-prison employment or broader rehabilitation goals.¹² Incarcerated students can complete their high school education, and in some facilities, can take classes for college credit.¹³ Other types of assignments include participation in specialized programs, such as automotive technician, training police canines, and welding.¹⁴

A fourth category includes work within a “correctional industry” program run by the State.¹⁵ Prisons often have manufacturing plants that produce a range

⁸ See JULIE GOODRIDGE, MARI SCHWARTZER, CHRISTINE JANTZ & LESLIE CHRISTIAN, NORTHSTAR ASSET MGMT., PRISON LABOR IN THE UNITED STATES: AN INVESTOR PERSPECTIVE 8, 18 (May 2018), https://northstarasset.com/wp-content/uploads/2018/05/revMay2018_Prison-Labor-in-the-Supply-Chain.pdf [<https://perma.cc/942Y-AQTM>].

⁹ See, e.g., Schwartzapfel, *supra* note 6.

¹⁰ See *id.*; see also *Agri-Services*, OKLA. CORR., <https://oklahoma.gov/doc/organization/agri-services.html> [<https://perma.cc/D6QM-5RBB>]; Nicholas Chrastil, ‘Your Honor, Can I Tell the Whole Story?’ Part 3 (Dec. 4, 2019), <https://thelensnola.org/2019/12/04/your-honor-can-i-tell-the-whole-story-part-3/> [<https://perma.cc/DK5Q-RQQ4>] (discussing work in prison library and as “inmate counsel”).

¹¹ *Inmate Construction Program*, N.C. DEP’T OF PUB. SAFETY, <https://www.ncdps.gov/about-dps/sections/administration/central-engineering/inmate-construction-program> [<https://perma.cc/S958-RRSY>]; *Inmates Help at Church, Thrift Shop*, LANDMARK (July 24, 2014), <https://www.thelandmark.com/article/20140724/NEWS/307249362> [<https://perma.cc/TVB3-TP4J>].

¹² See BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1 (Aug. 2018), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief_2018.pdf [<https://perma.cc/NB76-WU9X>].

¹³ FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., FEDERAL PRISON SYSTEM FY 2021 PERFORMANCE BUDGET 32 (2021), <https://www.justice.gov/doj/page/file/1246231/download> [<https://perma.cc/75T4-3BMG>] [hereinafter FEDERAL PRISON SYSTEM]; Kritika Agarwal, *Inside Higher Ed: College-In-Prison Programs Flourish, but for How Long?*, AM. HIST. ASS’N (Jan. 1, 2018), <https://www.historians.org/publications-and-directories/perspectives-on-history/january-2018/inside-higher-ed-college-in-prison-programs-flourish-but-for-how-long> [<https://perma.cc/M234-HE6M>].

¹⁴ FEDERAL PRISON SYSTEM, *supra* note 13, at 83; Christopher Zoukis, *Prisoners Help Train Future (K9) Law Enforcement Officers*, PRISON LEGAL NEWS (Aug. 7, 2018), <https://www.prisonlegalnews.org/news/2018/aug/7/prisoners-help-train-future-k9-law-enforcement-officers/> [<https://perma.cc/AG9W-UGRY>].

¹⁵ GOODRIDGE, SCHWARTZER, JANTZ & CHRISTIAN, *supra* note 8, at 24.

of products for sale to other state entities, including furniture, food preservation (canning/freezing), and broom/mop/soap factories.¹⁶ These goods may be sold to specific purchasers and produce revenue for the correctional facility or agency.

The fifth and last category includes work for private corporations.¹⁷ This can take a variety of forms, with some prisons operating factories behind bars on behalf of private corporations.¹⁸ For example, UNICOR, the federal correctional enterprises agency, runs an e-recycling program behind bars where incarcerated people break down electronics for salvage for a private corporation.¹⁹ Another variant is work-release programs, in which incarcerated people are housed at a local jail or prison but work during the day outside of the prison in a job obtained by prison authorities.²⁰

A. Historical Use

The use of incarcerated bodies is deeply entrenched in our history as a nation. Our initial prisons were modeled on the English, where people would be incarcerated and required to work to pay off private or public debts.²¹ Local jails and prisons were also an integral part of enforcing and maintaining the institution of slavery.²² In New Orleans, private slave owners would “lease” enslaved people to city jails for labor, converting their capital into liquid assets.²³ The New Orleans jail, similar to jails across the South,²⁴ also provided discipline for “recalcitrant” enslaved people, with fees paid to jailers per whipping.²⁵

Following the end of the Civil War, Southern states in particular dramatically expanded the number of people incarcerated through the use of “Black Codes” to criminalize lawful behavior by recently freed African-

¹⁶ McGauley, *supra* note 3.

¹⁷ GOODRIDGE, SCHWARTZER, JANTZ & CHRISTIAN, *supra* note 8, at 18–19.

¹⁸ McGauley, *supra* note 3.

¹⁹ OVERSIGHT & REV. DIV., *supra* note 3, at 18–26.

²⁰ WILLIAM D. BALES ET AL., AN ASSESSMENT OF THE EFFECTIVENESS OF PRISON WORK RELEASE PROGRAMS ON POST-RELEASE RECIDIVISM AND EMPLOYMENT 5 (Dec. 2015), <https://www.ojp.gov/pdffiles1/nij/grants/249845.pdf> [<https://perma.cc/P758-T3UV>].

²¹ Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 346 (1998).

²² Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177, 196–98 (2016); *see also* Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 885 (2012).

²³ ANDREA ARMSTRONG, THE IMPACT OF 300 YEARS OF JAIL CONDITIONS 2 (Mar. 2018), <https://s3.amazonaws.com/gnocdc/reports/TDC-prosperity-brief-andrea-armstrong-FINAL.pdf> [<https://perma.cc/7NKV-GVJQ>].

²⁴ Henderson, *supra* note 22, at 182–89 (providing examples from jails in Georgia, North Carolina and Virginia).

²⁵ ARMSTRONG, *supra* note 23, at 2–3.

Americans.²⁶ Incarcerated labor was part of a broader convict-leasing system, where private entities could “rent” incarcerated people for days, months, or years for work, sometimes on plantations.²⁷ In Louisiana, the convict-lease system was so profitable that the state legislature eliminated private lessees in 1901 to ensure the state received maximal profit from labor by incarcerated people.²⁸ Incarcerated people across the United States built railroads, felled trees, built levees or other flood protections, and paved roads, often in unsafe and dangerous conditions.²⁹

Several former slave states still use incarcerated labor on penal plantations, including Arkansas, Louisiana, Mississippi, and Texas.³⁰ In 2002, though prison farm labor constituted only 3.6% of job assignments nationally for incarcerated people, agricultural work constituted 40.4% of job assignments in Arkansas, 17.1% in Texas, and 16.3% in Louisiana.³¹ Louisiana State Penitentiary, also known as Angola, is the state’s maximum security prison on 18,000 acres of land.³² Incarcerated workers pick plantation row crops, including cotton, soybeans, and sugar cane, all under the state’s supervision.³³

Prisons didn’t just exploit incarcerated labor, they also exploited incarcerated bodies. Several southern states, including Louisiana and Arkansas, arranged for incarcerated people to sell their blood plasma to private entities for resale to hospitals.³⁴ Louisiana State Penitentiary signed a contract with Sara, Inc. (a blood plasma company) that provided for the corporation to “bleed” incarcerated people on penitentiary property for a fee to both the state and the

²⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW* 35–36 (10th Anniversary ed. 2020); see also Armstrong, *supra* note 22, at 876, 902.

²⁷ See Armstrong, *supra* note 22, at 877.

²⁸ See *id.* at 904.

²⁹ See *History of Angola*, ANGOLA MUSEUM AT THE LA. STATE PENITENTIARY, <https://www.angolamuseum.org/history-of-angola> [<https://perma.cc/6SE7-VNQE>].

³⁰ See generally Riley Kovalcheck, *The Modern Plantation: The Continuities of Convict-Leasing and an Analysis of Arkansas Prison Systems*, 7 U. CENT. ARK. COLL. LIBERAL ARTS J. 96 (2019), <https://uca.edu/cahss/files/2020/07/Kovalcheck-CLA-2019.pdf> [<https://perma.cc/997N-EH9P>] (Arkansas); Armstrong, *supra* note 22 (Louisiana); Liliana Segura, *People Keep Dying in Mississippi Prisons, but the Governor Wants to Move On*, INTERCEPT (Feb. 1, 2020), <https://theintercept.com/2020/02/01/mississippi-state-prisons-parchman-incarceration-deaths/> [<https://perma.cc/G8HT-ZHB4>] (Mississippi); Jolie McCullough, *Texas Republican Asks State to Rename Several of the State’s Prisons Honoring Slave Owners*, TEX. TRIB. (Jan. 29, 2021), <https://www.texastribune.org/2021/01/29/texas-prisons-renamed-slave-owners/> [<https://perma.cc/5BT6-4KCD>] (Texas).

³¹ CRIM. JUST INST., INC., *supra* note 5, at 118.

³² See *History of Angola*, *supra* note 29.

³³ See *id.*; LA. LEGIS. AUDITOR, PRISON ENTERPRISES – EVALUATION OF OPERATIONS 15, app. C at 4 (May 2019), [https://lla.la.gov/PublicReports.nsf/1CCC28540EC02534862583ED00749E7E/\\$FILE/0001CA1B.pdf](https://lla.la.gov/PublicReports.nsf/1CCC28540EC02534862583ED00749E7E/$FILE/0001CA1B.pdf) [<https://perma.cc/X7LQ-DKEX>] [hereinafter LA. PRISON ENTERPRISES EVALUATION].

³⁴ Sophia Chase, Note, *The Bloody Truth: Examining America’s Blood Industry and Its Tort Liability Through the Arkansas Prison Plasma Scandal*, 3 WM. & MARY BUS. L. REV. 597, 612 n.115, 614 (2012).

individual.³⁵ Lab technicians, or sometimes fellow incarcerated people, would draw blood to extract the plasma for the laboratory.³⁶ Incarcerated people, faced with rising costs at the penitentiary-owned canteen, but earning two cents an hour in the fields at the time, relied on “bleeding” as a way to earn extra money.³⁷ The program was so popular that at one point, incarcerated people were “bled” twenty-four hours a day and were woken up by guards for their shifts.³⁸ Sara, Inc. bled approximately 2,200–2,500 people per week at Angola in the late 1970s, representing 55%–62% of the total number of people incarcerated during that time period.³⁹ Incarcerated people received \$6.50 per pint of plasma, and the state \$1.25 (placed in the “Inmate Welfare Fund”).⁴⁰ The lab however paid higher rates outside the prisons, and incarcerated people organized a strike for better wages, though ultimately their demands for higher pay failed.⁴¹ The AIDS epidemic ended this long-standing practice after U.S.-based companies refused to purchase blood from incarcerated people.⁴²

B. Sale to the Public

Incarcerated labor also produces goods for sale, further masking the true cost of incarceration. Generally, federal and state laws have banned the sale of prison-made goods in interstate commerce or on the open market.⁴³ However, these laws have large exceptions that allow these goods to be sold to governments, tax-supported entities, and nonprofit organizations.⁴⁴ In the last ten years, the federal government has enacted changes to expand the market for prison-made goods and services.⁴⁵

³⁵ *Alexander v. Sara, Inc.*, 559 F. Supp. 42, 42–43 (M.D. La. 1983), *aff’d*, 721 F.2d 149 (5th Cir. 1983).

³⁶ *Alexander v. Sara, Inc.*, 721 F.2d at 149–50 (noting incarcerated people working in the plasma lab were paid three dollars a day and “worked at sanitation and clean-up, helped to prepare donors and extract blood, and performed clerical duties”).

³⁷ *For the Price of Blood*, ANGOLITE, Sept./Oct. 1979, at 14, 21 (describing worker strike and negotiations for operation of blood plasma lab).

³⁸ Ron Wikberg, *Inside Angola: The Mattress Factory*, ANGOLITE, July/Aug. 1982, at 11, 12.

³⁹ *For the Price of Blood*, *supra* note 37, at 14. Total population at Angola as of January 1979 was 3975. Report to the Court on Implementation of Court’s Order, *Williams v. McKeithen*, No. 71-98 (M.D. La. Jan. 5, 1979).

⁴⁰ *For the Price of Blood*, *supra* note 37, at 14.

⁴¹ *Id.* at 24.

⁴² Suzi Parker, *Blood Money*, SALON (Dec. 24, 1988), https://www.salon.com/1998/12/24/cov_23news/ [<https://perma.cc/QQ2L-D25N>].

⁴³ GEORGE E. SEXTON, U.S. DEP’T OF JUST., WORK IN AMERICAN PRISONS: JOINT VENTURES WITH THE PRIVATE SECTOR 3 (Nov. 1995), <https://www.ojp.gov/pdffiles/workampr.pdf> [<https://perma.cc/72AY-2WBX>].

⁴⁴ *See, e.g.*, LA. STAT. ANN. § 51:692.3 (2019).

⁴⁵ BUREAU OF JUST. ASSISTANCE, *supra* note 12, at 2.

The current federal ban on selling prison-made goods stems from the Great Depression and New Deal eras.⁴⁶ As convict-leasing was on the rise, “white paid laborers felt that they were losing valuable opportunities to the cheap labor provided largely by black [prisoners].”⁴⁷ Federal action followed. In 1905, President Roosevelt signed an “executive order preventing federal agencies from contracting with convict labor on government projects.”⁴⁸ In 1929, Congress passed the Hawes-Cooper Act, which allowed “states to ban the importation of convict-made goods from other states.”⁴⁹ In 1935, Congress expanded the ban in the Ashurst-Sumners Act, which banned the sale of prison-made goods and “made their interstate importation a federal crime.”⁵⁰ Nearly every state adopted their own versions of these bans around this time.⁵¹

The federal ban exempts sales to government entities or not-for-profit organizations and also exempts goods made under the Bureau of Justice Assistance’s Prison Industries Enhancement Certification Program (PIECP), which has forty-four participating jurisdictions as of July 2018.⁵² PIECP “was initially authorized under the Justice System Improvement Act of 1979[,] . . . expanded under the Justice Assistance Act of 1984,” and continued indefinitely under the Crime Control Act of 1990.⁵³ Congress last amended the Ashurst-Sumners Act⁵⁴ through the 2012 Appropriations bill.⁵⁵ The amendment gives Federal Prison Industries, Inc. (FPI, also known as UNICOR) “repatriation authority,” which (1) allows them to participate in PIECP and (2) authorizes “FPI to manufacture goods for the commercial market if they are currently or would have otherwise been manufactured outside the United States.”⁵⁶ The First Step Act further expanded the FPI’s ability “to sell products to public entities

⁴⁶ Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 229 (2009).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The Hawes-Cooper Act was upheld as constitutional under *Whitfield v. Ohio*, 297 U.S. 431, 441 (1936).

⁵⁰ Marion, *supra* note 46, at 229 (citing William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1162 (2004)).

⁵¹ JOHN BARKER WAITE, *THE PREVENTION OF REPEATED CRIME* 134 (Hessel E. Yntema ed., 1943).

⁵² 18 U.S.C. § 1761(b)–(c); *see also* BUREAU OF JUST. ASSISTANCE, *supra* note 12, at 1.

⁵³ BUREAU OF JUST. ASSISTANCE, *supra* note 12, at 2.

⁵⁴ *See* 18 U.S.C. §§ 1761–1762. The Ashurst-Sumners Act was upheld as constitutional under *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, 299 U.S. 334, 352 (1937).

⁵⁵ *See* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 221, 125 Stat. 552, 621 (2011).

⁵⁶ NATHAN JAMES, CONG. RSCH. SERV., R45558, *THE FIRST STEP ACT OF 2018: AN OVERVIEW* 3 n.7 (Mar. 2019), <https://crsreports.congress.gov/product/pdf/R/R45558> [<https://perma.cc/S4JB-3R33>]; FED. PRISON INDUS., INC., *FISCAL YEAR 2019 ANNUAL MANAGEMENT REPORT* (Nov. 2019), https://www.unicor.gov/publications/reports/FY2019_AnnualMgmtReport.pdf [<https://perma.cc/7GPD-Z7JU>].

for use in correctional facilities, disaster relief, or emergency response; to the District of Columbia government; and to nonprofit organizations.”⁵⁷

In addition to federal law, most states have laws governing the sale of goods produced by incarcerated labor.⁵⁸ Similar to federal law, state bans are riddled with large exceptions for sale.⁵⁹ For example, Louisiana enacted a general ban on the sale of prison-made goods in 1936 and again in 1999, which carries a fine of \$1,000 or a year of incarceration if violated.⁶⁰ However, the general ban exempts “any institution supported in whole or in part by funds derived from public taxation and operated under the supervision of the United States, Louisiana, or any other state of the Union, or any political subdivision thereof.”⁶¹ Additionally, the Department of Public Safety and Corrections (DPSC), which operates Prison Enterprises (PE), is generally banned from selling prison-made goods on the “open market.”⁶² However, PE can sell their goods and services to “[t]ax-supported institutions and government subdivisions, including state, parish and city agencies, and school districts” as well as nonprofit groups “including churches, fraternal organizations, parochial schools or 501(c)(3) organizations.”⁶³ Additionally, products made through the federal PIECP are exempt from the state ban.⁶⁴

These exceptions to the general ban on the sale of prison-made goods allow agencies like the Department of Agriculture, the U.S. Postal Service, and the General Services Administration (among other federal agencies) to purchase goods produced through UNICOR.⁶⁵ UNICOR reported \$483.6 million in net sales in fiscal year 2017, with approximately 50% of purchases by the Department of Defense.⁶⁶ In that same year, the entire prison labor industry was estimated at \$1 billion dollars annually.⁶⁷

Much of the criticism of forced prison labor has focused on the potential profit for carceral agencies.⁶⁸ But as the taxonomy above on the types of prison

⁵⁷ JAMES, *supra* note 56, at 19. Note that FPI is not allowed to sell office furniture to nonprofit organizations. *Id.*

⁵⁸ See, e.g., LA. STAT. ANN. § 51:691 (2019).

⁵⁹ See, e.g., *id.* § 51:692.3.

⁶⁰ *Id.* §§ 51:691–:692; see also *State Labor Legislation of 1936*, 43 MONTHLY LAB. REV. 1438, 1448–49 (1936).

⁶¹ LA. STAT. ANN. § 51:691.

⁶² *Id.* § 51:692.1.

⁶³ *Frequently Asked Questions*, PRISON ENTERS., <http://www.prisonenterprises.org/faqs/> [<https://perma.cc/Z3WH-5PWC>]; see also LA. STAT. ANN. § 51:692.3 (2019).

⁶⁴ LA. STAT. ANN. § 51:692.3(3).

⁶⁵ *Program Details*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [<https://perma.cc/J7NQ-Y47D>].

⁶⁶ *Id.*

⁶⁷ *Prison Labour Is a Billion-Dollar Industry, with Uncertain Returns for Inmates*, ECONOMIST (Mar. 16, 2017), <https://www.economist.com/united-states/2017/03/16/prison-labour-is-a-billion-dollar-industry-with-uncertain-returns-for-inmates> [<https://perma.cc/6BZP-8GBZ>].

⁶⁸ *Id.*

labor demonstrate, captive labor is not uniform, and some programs are more profitable to the state or private corporations than others.⁶⁹ Some prison labor programs are actually losing money instead of creating a new revenue source. From 2016 to 2018, expenses outweighed revenue in Louisiana's Prison Enterprises programs for chair manufacturing, printing, corn and cotton farming, among others, with a total loss of \$4.7 million dollars.⁷⁰

Forced labor is woven into the fabric of incarceration in the United States. While captive incarcerated labor takes a myriad of forms, federal and state law have provided legal avenues for the sale (and potential profit) of prison-made goods. None of these laws supporting the profitability of captive labor, however, have addressed the various harms that flow from the constitutional exception for involuntary servitude for incarcerated people.

III. HARMS OF FORCED INCARCERATED LABOR

The Thirteenth Amendment prohibited slavery but allows for involuntary servitude as a punishment for a legally valid conviction.⁷¹

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.⁷²

Section 2. Congress shall have power to enforce this article by appropriate legislation.⁷³

Incarcerated labor in modern practice, however, is much more than simply involuntary. It reflects an expanded definition of involuntary to preclude choice in what types of work a person can be forced to perform. Incarcerated labor is also not fairly compensated, with "incentive wages" for incarcerated workers ranging from zero to a maximum of two dollars an hour. Third, incarcerated people perform this captive labor without legal protection for the working conditions or for the injuries they might suffer while working. Last, incarcerated labor is disconnected from programming and skills building for rehabilitation or re-entry to free employment.

⁶⁹ See LA. PRISON ENTERPRISES EVALUATION, *supra* note 33, at 15 (documenting Prison Enterprises' programs that consistently lost money between fiscal years 2016 and 2018 (Louisiana State Penitentiary Rangeherd, Chair Plant at Dixon Correctional Institute, Silk Screen productions, and cotton and farming, etc.) and identifying programs that were profitable during that same time period (Tag Plant, Canteen Distribution, Louisiana Correctional Institute for Women Garment Factory, etc.)).

⁷⁰ *Id.* at 14.

⁷¹ Armstrong, *supra* note 22, at 870 (arguing that slavery and involuntary labor are distinct terms, both historically and currently, and should be treated as such in interpreting the amendment).

⁷² U.S. CONST. amend. XIII, § 1.

⁷³ *Id.* § 2.

A. *Involuntary*

One of the most prominent features of captive labor is that people can be forced to work while serving their sentence after conviction. This is a direct consequence of the Thirteenth Amendment's convicted labor exception. However, courts have expansively interpreted the term "involuntary" to also eliminate agency or choice by incarcerated people in what types of work are performed.

Involuntary servitude is by definition forced labor. But it does not necessarily follow that incarcerated people have no right to choose which type of work they are forced to perform. Instead, the inability to choose the category of work incarcerated people are forced to perform is judicially created and is subject to state law.

Federal courts have overwhelmingly agreed that incarcerated people do not have a right to a particular job assignment.⁷⁴ To reach this conclusion, courts have relied on their interpretation of the Due Process Clause of the Fifth Amendment (for federal incarceration) and the Fourteenth Amendment (for state incarceration).⁷⁵ The Due Process Clauses prohibit the government from depriving any person of their "life, liberty, or property without due process of law."⁷⁶ In addition, courts have held that neither Title VII nor the Age Discrimination in Employment Act (ADEA) apply to captive labor, as incarcerated people are not considered "employees."⁷⁷

Incarcerated people have argued that they do have a qualifying interest in their prison work assignment.⁷⁸ There is a wide variety of work assignments and certain work assignments are more prized than others. In Louisiana, field work assignment on the 18,000-acre former plantation entails long hours in the summer heat, without ready access to restrooms or water, receiving an incentive wage of two cents an hour.⁷⁹ Alternatively, you can earn up to forty cents an

⁷⁴ *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (citing *Ingram v. Papalia*, 804 F.2d 595, 596 (10th Cir. 1986)); *Adams v. James*, 784 F.2d 1077, 1079 (11th Cir. 1986); *Gibson v. McEvers*, 631 F.2d 95, 98 (7th Cir. 1980); *Altizer v. Paderick*, 569 F.2d 812, 812–13 (4th Cir. 1978); *Bryan v. Werner*, 516 F.2d 233, 240 (3d Cir. 1975); *see also* *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572–78 (1972).

⁷⁵ *See Ingram*, 804 F.2d at 596–97.

⁷⁶ U.S. CONST. amends. V, XIV.

⁷⁷ *See Williams*, 926 F.2d at 997 ("Neither Title VII nor the ADEA provides plaintiff any substantive rights because he does not have an employment relationship with the Federal Bureau of Prisons or any of the defendants. . . . Although his relationship with defendants may contain some elements commonly present in an employment relationship, it arises 'from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendants'] correctional institution. The primary purpose of their association [is] incarceration, not employment.'" (quoting EEOC Decision No. 86-7, 40 Fair Empl. Prac. Cas. (BNA) 1892 (1986))).

⁷⁸ *See Wallace v. Robinson*, 940 F.2d 243, 247 (7th Cir. 1991).

⁷⁹ *See Armstrong, supra* note 22, at 869, 909; *see also* LA. ADMIN. CODE tit. 22, § 331 (2021).

hour developing employable skills working for one of the state's prison industrial enterprises assignments.⁸⁰

Although courts have recognized that incarcerated people may have justifiable preferences in their work assignment, based on conditions or incentive wages, this has not translated into a legally cognizable interest absent a state rule creating such an interest.⁸¹ In the Seventh Circuit, a plaintiff challenged his reassignment from tailor, earning approximately \$100 per month, to clerk, earning approximately \$30 per month.⁸² The appellate court, citing precedent from the U.S. Supreme Court, noted “[o]nly statutes or rules attaching consequences to particular circumstances give prisoners liberty or property interests.”⁸³

Various policy rationales for restricting choice of work are also unpersuasive. A state representative in Washington argued that “idle hands are the devil’s playground” to justify restarting a prison work program that sold incarcerated labor to private employers.⁸⁴ Prison managers have touted how programming and work assignments, in keeping incarcerated people occupied, reduces the likelihood of violence behind prison walls.⁸⁵ But even if true, neither argument justifies precluding an incarcerated person to choose which type of work they perform and for whom.

Another rationale invoked to justify forced work assignments is that incarcerated people need to learn the value of work by starting at the bottom and working their way up in responsibility to assignments that both pay more and are performed in increasingly better conditions.⁸⁶ First, this argument reflects particular ideas about who is incarcerated and why. While popular culture often portrays incarcerated people as “lazy” or “shiftless,” these are not new ideas. The same descriptions were widely applied to African-Americans after the Civil War and used to justify the enactment of the “Black Codes” and the resulting incarceration of the formerly enslaved.⁸⁷

⁸⁰ LA. ADMIN. CODE tit. 22, § 331 (2021).

⁸¹ See *Wallace*, 940 F.2d at 246–47.

⁸² *Id.* at 244–45.

⁸³ *Id.* at 246 (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460–63 (1989) (concerning whether a Kentucky prison rule on visitation created a liberty interest)).

⁸⁴ David Ammons, *Legislature Moving to Put Convicts to Work*, SPOKESMAN-REVIEW (Mar. 3, 2005), <https://www.spokesman.com/stories/2005/mar/03/legislature-moving-to-put-convicts-to-work/> [<https://perma.cc/9CWR-J7XW>]; see also *Laaman v. Helgemoe*, 437 F. Supp. 269, 291–97 (D.N.H. 1977) (discussing the value of work and criticizing the lack of programming and activities for incarcerated people).

⁸⁵ See Anthony Pierson, Keith Price & Susan Coleman, *Prison Labor*, 4 POL. BUREAUCRACY & JUST., no. 1, 2014, at 12, 16.

⁸⁶ THE FARM: ANGOLA (Gabriel Films 1998) (interviewing Burl Cain, former warden of Angola).

⁸⁷ See, e.g., DAVID M. OSHINSKY, *WORSE THAN SLAVERY* 7–8 (1996).

Incarcerated people have also challenged their work assignment through the Eighth Amendment's ban on "cruel and unusual punishment."⁸⁸ Particularly fatal to Eighth Amendment claims is that an incarcerated person must prove that prison officials were "deliberately indifferent" to the health and safety of incarcerated people when making work assignments.⁸⁹ "In the prison work assignment context, prison officials are deliberately indifferent when they knowingly compel an inmate to perform labor that is beyond the inmate's strength, dangerous to his or her life or health, or unduly painful."⁹⁰ Deliberate indifference requires proof of an objective risk as well as subjective knowledge of the risk.⁹¹ Thus, the only limitation on work assignments for captive labor is when the work exceeds a person's known physical or mental ability, often due to a recognized disability under the Americans with Disabilities Act.⁹²

To claim protection under the Eighth Amendment, courts have dismissed claims where an incarcerated person has not been officially restricted from work by the prison's healthcare providers, even where significant physical limitations are proven.⁹³ In an unpublished opinion from the Eighth Circuit, prison officials did not dispute that the plaintiff suffered from "advanced osteoarthritis in his back[.]" but agreed with prison medical staff that his physical limitations did not conflict with his job assignment which included "clean[ing] and maintain[ing] the prison yard by mowing the grass, picking up trash, and, in the winter, shoveling snow and clearing ice from the walkways."⁹⁴

B. *Uncompensated*

Another aspect of forced labor which arises from, but is not mandated by, the Thirteenth Amendment's exclusion of involuntary servitude for people serving convictions is the failure of carceral facilities to pay fair market wages for work performed. While the Thirteenth Amendment allows for captive labor, neither the text nor the legislative history indicate that this labor must be unpaid or less than fair market wages. Courts have uniformly agreed that incarcerated

⁸⁸ U.S. CONST. amend. VIII. This is a distinct claim from an Eighth Amendment claim of inadequate workplace safety, discussed more fully in Part III.B.

⁸⁹ *Ambrose v. Young*, 474 F.3d 1070, 1076–77 (8th Cir. 2007). The standard of deliberate indifference will be discussed more fully under Part III.C on the lack of workplace protections for incarcerated workers.

⁹⁰ *Id.* at 1077 (internal quotation marks omitted) (quoting *Sanchez v. Taggart*, 144 F.3d 1154, 1156 (8th Cir. 1998)).

⁹¹ *See id.* at 1077–78.

⁹² *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). A related but different argument arises for people with disabilities who are denied all work possibilities due to their disability instead of the prison providing accommodations for the disability.

⁹³ *See, e.g., Moore v. Moore*, 111 F. App'x 436, 437–38 (8th Cir. 2004).

⁹⁴ *Id.*

people do not have a constitutional right to be compensated for forced labor.⁹⁵ The lack of fair payment for work performed by incarcerated laborers is fully the product of judicial interpretation and statutory law.

To the extent that courts have addressed claims of unpaid labor by incarcerated people, courts have relied on the exception of “involuntary servitude” in the Thirteenth Amendment text.⁹⁶ But as the U.S. Supreme Court has recognized in a different context, the essential operative element of involuntary servitude is the “use or threatened use of physical or legal coercion.”⁹⁷ One can be compelled by physical or legal force, however, and still be paid.⁹⁸

Research by the Prison Policy Initiative (PPI) indicates that the highest wage paid to incarcerated laborers in “non-industry” assignments is two dollars an hour (Minnesota and New Jersey).⁹⁹ Non-industry jobs usually include labor and maintenance that does not produce an item or service for sale, but instead supports the operation of the facility itself.¹⁰⁰ The lowest wage paid is zero in states like Florida, Mississippi, and South Carolina.¹⁰¹ Some states, like Louisiana, require work without pay during an initial period of incarceration and then subsequently allow incarcerated people to choose between earning credit

⁹⁵ “It is well settled that prisoners have no constitutional right to be paid for work performed in prison.” *Richardson v. Rees*, 618 So. 2d 636, 640 (La. Ct. App. 1993) (citing *Rochon v. La. State Penitentiary Inmate Acct.*, 880 F.2d 845 (5th Cir. 1989)); *Adams v. Neubauer*, 195 F. App’x 711, 713 (10th Cir. 2006) (“Further, there is no Constitutional right to compensation for such work; compensation for prison labor is ‘by grace of the state.’” (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992))).

⁹⁶ *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988) (“Perhaps the most commonly quoted case to follow the obvious literal intent of the Thirteenth Amendment is *Draper v. Rhay*, 315 F.2d 193 (9th Cir.), *cert. denied*, 375 U.S. 915, 84 S.Ct. 214, 11 L.Ed.2d 153 (1963). At p. 197, the Court said: ‘When a person is duly tried, convicted and sentenced in accordance with law, no issue of peonage or involuntary servitude arises.’ See also *United States v. Drefke*, 707 F.2d 978 (8th Cir.), *cert. denied sub nom.*, *Jameson v. United States*, 464 U.S. 942, 104 S.Ct. 359, 78 L.Ed.2d 321 (1983), in which the Court said at p. 983: ‘The Thirteenth Amendment . . . is inapplicable where involuntary servitude is imposed as punishment for crime.’ To the same effect are *Piatt v. MacDougall*, 773 F.2d 1032, 1035 (9th Cir. 1985); *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977); *Jobson v. Henne*, 355 F.2d 129, 131 (2d Cir. 1966).”).

⁹⁷ *United States v. Kozminski*, 487 U.S. 931, 944 (1988); see also *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990) (citing *Flood v. Kuhn*, 316 F. Supp. 271, 281 (S.D.N.Y. 1970) (noting that compulsion is a prerequisite of proof of involuntary servitude)).

⁹⁸ See, e.g., *Doe v. Siddig*, 810 F. Supp. 2d 127, 130, 136 (D.D.C. 2011) (denying in part defendant’s motion to dismiss statutory claims of involuntary servitude where plaintiff was paid \$200/month during the relevant time period).

⁹⁹ Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/MDT5-BHRD>].

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

off their sentence or “incentive pay.”¹⁰² Wages paid also appear to be decreasing over time. According to PPI:

The average of the minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents, down from 93 cents reported in 2001. The average maximum daily wage for the same prison jobs has declined more significantly, from \$4.73 in 2001 to \$3.45 today.¹⁰³

The lack of fair wages also extends to “industry” jobs, which produce goods for sale by correctional or private entities.¹⁰⁴ “Incarcerated people assigned to work for state-owned businesses earn between 33 cents and \$1.41 per hour on average – roughly twice as much as people assigned to regular prison jobs.”¹⁰⁵

To the extent that incarcerated people receive any compensation for forced labor, it is often deemed “incentive wages” and at the discretion of the state.¹⁰⁶ These wages are set either by state law or by agency regulation.¹⁰⁷ In Louisiana, for example, state law provides discretion to the secretary of the Department of Public Safety and Corrections to set wage levels for incarcerated workers subject to certain maximum wage caps.¹⁰⁸ The secretary, subject to state administrative procedure laws, then sets the allowable wage for certain work assignments, ranging from field labor to legal worker to tutor within the caps set by the legislature.¹⁰⁹ The highest wage allowable under Louisiana law is one dollar an hour, unless working under a correctional enterprises (or “industry”) program.¹¹⁰

¹⁰² LA. ADMIN. CODE tit. 22, § 331 (2021).

¹⁰³ Sawyer, *supra* note 99.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Richardson v. Rees, 618 So. 2d 636, 640 (La. Ct. App. 1993) (“Any such compensation which is paid to prisoners is by grace of the state” (citing Wendt v. Lynaugh, 841 F.2d 619 (5th Cir. 1988))).

¹⁰⁷ See, e.g., LA. STAT. ANN. § 15:873 (2015 & Supp. 2021).

¹⁰⁸ *Id.*

A. The secretary of the Department of Public Safety and Corrections may establish various rates of compensation as an incentive to inmates incarcerated in state correctional facilities. The rates shall be according to the skill, industry, and nature of the work performed by the inmate and shall be no more than twenty cents per hour, except that inmates who are assigned to Prison Enterprises’ industrial, agricultural, service, or other programs may be compensated at a rate up to forty cents per hour and inmates who are Certified Academic Tutors and Certified Vocational Tutors may be compensated at a rate of up to one dollar per hour, in accordance with rules established by the secretary of the department and adopted pursuant to the provisions of the Administrative Procedure Act.

Id.

¹⁰⁹ LA. ADMIN. CODE tit. 22, § 331 (2021).

¹¹⁰ Sawyer, *supra* note 99.

A minority of states don't pay wages at all, including Alabama, Arkansas, Georgia, and Texas.¹¹¹ But the majority do provide limited financial compensation for work, albeit far below the minimum wage that would apply for free labor.¹¹² Some states also pay the "prevailing wage" for certain jobs (transitional work programs or other "prison enterprise" jobs), but not others.¹¹³ Prisons are generally not required to pay captive labor the minimum wage¹¹⁴ due to judicial and agency interpretations of the Fair Labor Standards Act.¹¹⁵

1. *Fair Labor Standards Act*

There has been little guidance from Congress and the Supreme Court regarding whether or not the Fair Labor Standards Act (FLSA) covers people who are working while incarcerated. FLSA, as enacted in 1938, requires employers to compensate their employees at the rate of the current congressionally mandated minimum wage.¹¹⁶ "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee," while "employee" is defined as "any individual employed by an employer."¹¹⁷ The most substantial amendment was enacted in 1974 when Congress extended FLSA coverage to all state and local government employees.¹¹⁸ The purpose of the Act is to protect employees by establishing

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* In some cases, the "prevailing wage" is required by statute to avoid competition with non-incarcerated labor. *Id.* For transitional work programs in particular, that "prevailing wage" is quickly reduced by charges for protective gear, room and board, etc., which can reduce wages by up to 70% in some jurisdictions. *See, e.g.,* LA. DEP'T OF PUB. SAFETY & CORR., STANDARD OPERATING PROCEDURES FOR TRANSITIONAL WORK PROGRAMS 41 (Apr. 2014), <https://www.incarcerationtransparency.org/wp-content/uploads/2020/03/DOC-La-Transitional-SOP-April-2014.pdf> [<https://perma.cc/8MGA-PJY3>].

¹¹⁴ *See, e.g.,* *Morgan v. MacDonald*, 41 F.3d 1291, 1292–93 (9th Cir. 1994) (holding that incarcerated people working in state prison programs were not considered employees under the FLSA and thus were not entitled to minimum wage); *see also* *McMaster v. Minnesota*, 30 F.3d 976, 977, 980 (8th Cir. 1994) (holding that incarcerated people who performed work activities ranging from manufacture of auto parts, file folders and clothing to data entry and telemarketing services were not employees); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686–87 (D.C. Cir. 1994) (holding that incarcerated person who was legally required to work and whose compensation was set and paid by prison was not employee under FLSA); *Loving v. Johnson*, 455 F.3d 562, 562–63 (5th Cir. 2006) ("drying machine operator" was not entitled to FLSA minimum wage because doing work in or for the prison was not an "employee").

¹¹⁵ *See generally* 29 U.S.C. §§ 201–219.

¹¹⁶ *Id.* § 206.

¹¹⁷ *Id.* § 203(d)–(e)(1).

¹¹⁸ *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 59–60 (codified at 29 U.S.C. § 203). *But see* *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that states who have not waived sovereign immunity for FLSA claims cannot be sued for damages by state employees for FLSA violations in state court or in federal court, pursuant to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)).

“minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.”¹¹⁹ Additionally, Congress established certain exceptions for those who are not to be considered employees under the Act.¹²⁰ “Prisoner” is not mentioned either by exclusion or inclusion in the Act.¹²¹ This has allowed lower courts to interpret the intent and purpose of the Act as applied to incarcerated people without any guidance from Congress.

Courts primarily look to the purpose of FLSA, as the text itself does not provide extensive guidance on who is considered an “employee.”¹²² Congress intended FLSA to enable workers to maintain a “minimum standard of living necessary for health, efficiency, and general well-being.”¹²³ Creating a minimum wage was thought to help ensure employees were able to support their families economically. However, courts have argued that people who are incarcerated are distinct from traditional free workers.¹²⁴ “The primary purpose of the FLSA—providing minimum standards of living for workers—has no application in the prison context. Food, clothing and shelter are provided to the prisoners by the state, regardless of their ability to pay.”¹²⁵ Similarly, in *Bennett v. Frank*, the Seventh Circuit affirmed a lower court decision that held incarcerated people are not entitled to minimum wage provisions of the FLSA.¹²⁶ The court reasoned that “[p]eople are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep.”¹²⁷ Other circuits have determined that an incarcerated person is not an employee for purposes of the FLSA since the work assignment is for the benefit of the incarcerated person themselves.¹²⁸

Although the U.S. Supreme Court and Congress have not established a standard that includes or excludes incarcerated people as “employees,” the case

¹¹⁹ *Wages and the Fair Labor Standards Act*, U.S. DEP’T LAB.: WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/DGE9-LKQT>].

¹²⁰ 29 U.S.C. § 203(e)(4)–(5).

¹²¹ *Id.*

¹²² *See, e.g., Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021) (turning to the FLSA’s “legislative purpose” in holding that detainees in a voluntary work program were not “employees” under the FLSA).

¹²³ 29 U.S.C. § 202(a).

¹²⁴ *See Morgan v. MacDonald*, 41 F.3d 1291, 1292 (9th Cir. 1994); *Ndambi*, 990 F.3d at 372.

¹²⁵ *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994).

¹²⁶ *Bennett v. Frank*, 395 F.3d 409, 409 (7th Cir. 2005).

¹²⁷ *Id.* at 410. *But see* Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/ZH8X-A2X4>] (discussing the economic impact on families of supporting their incarcerated loved ones behind bars); Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/6MKV-TBRV>] (noting data indicating the majority of purchases by incarcerated people are for food and basic necessities).

¹²⁸ *See, e.g., Reimonenq v. Foti*, 72 F.3d 472, 476 (5th Cir. 1996).

law appears to be in agreement that “all inside prison work is not covered by the FLSA and thus inmate workers may be paid less than the minimum wage.”¹²⁹ Some courts have allowed for incarcerated workers to claim FLSA protection where the work is performed for a private entity.¹³⁰ However, even in these cases, where the status of employer and employee is uncertain because the employee is incarcerated, it is the economic reality of the relationship, and not technical concepts of employment, that control.¹³¹

In a different context, the U.S. Supreme Court held that coverage by the FLSA hinges on the “economic reality” of the employment situation.¹³² Courts have indicated that this test should be applied with the totality of the circumstances of the economic reality in mind.¹³³ Applying this test to prison labor, the Fifth Circuit explained in *Watson v. Graves* that determination of “employee” status for purposes of the FLSA “focuses on economic reality and economic dependence.”¹³⁴ The “economic reality” test includes inquiry into “whether the alleged employer (1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”¹³⁵

The economic reality test has led some courts to conclude that incarcerated people working for private entities can be entitled to FLSA protection.¹³⁶ However, the courts have distinguished between people who are sentenced to labor as part of their sentences, and those who are not, to determine whether “[the prisoner’s] labor belongs to the prison and is at the disposal of the prison officials” and accordingly would not be covered under the FLSA, or whether “the prisoner’s work belongs to him and not to the prison.”¹³⁷

Last, courts have excluded incarcerated workers from FLSA protection because of concerns it would undermine the free labor market.¹³⁸ In *Vanskike v. Peters*, the Seventh Circuit indicated that if the Act applied to incarcerated workers, then every service performed, whether sweeping floors, cleaning bathrooms, or washing dishes, would need to be compensated under FLSA because the incarcerated workers would presumably be taking the jobs of others

¹²⁹ Matthew J. Lang, Comment, *The Search for a Workable Standard for when Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 204 (2002).

¹³⁰ See, e.g., *Watson v. Graves*, 909 F.2d 1549, 1556 (5th Cir. 1990). *But see Bennett*, 395 F.3d at 409–10 (holding people incarcerated in a privately managed prison and forced to work were not considered “employees” for FLSA purposes).

¹³¹ See *Bennett*, 395 F.3d at 410.

¹³² *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).

¹³³ See *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012).

¹³⁴ *Watson*, 909 F.2d at 1553.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1556.

¹³⁷ *Lyle v. Magnolia State Enter., Inc.*, No. 96-60317, 1996 WL 762823, at *2 (5th Cir. Dec. 12, 1996) (unpublished opinion) (quoting *Watson*, 909 F.2d at 1553 n.7).

¹³⁸ *Vanskike v. Peters*, 974 F.2d 806, 811 (7th Cir. 1992).

in the “outside world who could be hired to do the job.”¹³⁹ Thus, the court rejected the notion that Congress would have approved of paying the minimum wage for anything done in the prison that could be considered “work.”¹⁴⁰

C. *Unprotected*

Incarcerated workers are also not protected by laws that protect free workers.¹⁴¹ This includes safe working conditions for forced labor and labor organizing rights.¹⁴² In addition, incarcerated people are excluded from standard occupational tort regimes and, in some cases, may only seek redress through alternative administrative remedies.¹⁴³ All of these rights which are provided for free workers are denied to incarcerated workers through statute and judicial interpretation. None are a direct consequence of the Thirteenth Amendment exception.

1. *Working Conditions*

The conditions in which the incarcerated work can be dangerous and deadly.¹⁴⁴ In some cases, incarcerated workers are not provided with essential safety equipment to perform forced labor.¹⁴⁵ In others, incarcerated workers are not given sufficient training on safety precautions for performing the forced labor.¹⁴⁶

¹³⁹ *Id.* (emphasis removed).

¹⁴⁰ *Id.*

¹⁴¹ Whitney Benns, “Free” Labor: *The Law of Prison Labor*, ONLABOR (May 28, 2015), <https://onlabor.org/free-labor-the-law-of-prison-labor/> [<https://perma.cc/DVT3-CDPU>].

¹⁴² Sandra Susan Smith & Jonathan Simon, *Exclusion and Extraction: Criminal Justice Contact and the Reallocation of Labor*, RUSSELL SAGE FOUND. J. SOC. SCIS., Mar. 2020, at 1, 18.

¹⁴³ See, e.g., Inmate Accident Compensation, 28 C.F.R. § 301.319 (2020) (“Inmates who are subject to the provisions of these . . . regulations are barred from recovery under the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*”). The Act is discussed in greater depth below. See *infra* pp. 1063–65.

¹⁴⁴ See, e.g., Warren v. Town of Booneville, 118 So. 290, 291 (Miss. 1928); Associated Press, *2 Inmates on Work Release Fall from Pickup Bed; 1 Dies*, WRBZ 2 (Oct. 19, 2018), <http://www1.wbrz.com/news/2-inmates-on-work-release-fall-from-pickup-bed-1-dies> [<https://perma.cc/HA4F-XL4V>].

¹⁴⁵ See, e.g., Stephens v. Johnson, 83 F.3d 198, 200–01 (8th Cir. 1996) (holding that failure to provide “safety equipment such as hard hats, protective eyewear, back braces, and steel-toed boots” only constituted negligence and not “deliberate indifference”).

¹⁴⁶ See, e.g., Rhodes v. Michigan, 10 F.4th 665, 670–71 (6th Cir. 2021) (noting incarcerated plaintiff only received “limited, on-the-job training to be a laundry porter” prior to her work-related injury); Buckley v. Barbour County, 624 F. Supp. 2d 1335, 1341 (M.D. Ala. 2008) (noting claim that failure to train the incarcerated plaintiff in use of equipment to clear trees contributed to his broken back and him becoming a paraplegic).

Incarcerated labor has long been considered disposable.¹⁴⁷ From the days of convict-leasing, if “one dies, get another.”¹⁴⁸ Mississippi’s Supreme Court in 1928 held the municipality immune after an incarcerated worker lost use of one of his legs while being forced to repair roads while shackled.¹⁴⁹ That court, in justifying its decision, also cited cases including an incarcerated worker being forced to lift heavy rocks without supportive equipment, such as ramps, and a man felled by coal he was forced to load and unload.¹⁵⁰

Incarcerated workers are often at the forefront of disaster mitigation efforts.¹⁵¹ Thirty of forty-seven states studied explicitly authorize the use of incarcerated labor for disaster management efforts.¹⁵² A study of incarcerated labor in emergency management found that incarcerated workers are primarily used for manual unskilled labor post-disaster.¹⁵³ But the range of forced labor post-disaster can range from “making sandbags” and “clearing debris” to more potentially dangerous jobs, including “fighting fires, collecting and disposing contaminated animal carcasses and cleaning up hazardous materials.”¹⁵⁴ Following the BP oil spill, incarcerated workers were reportedly tasked with cleaning the beach of oil.¹⁵⁵ One reporter observed, “Men were returning from a long day of shoveling oil-soaked sand into black trash bags in the sweltering heat. Wearing BP shirts, jeans and rubber boots (nothing identifying them as inmates), they arrived back at the jail in unmarked white vans, looking dog tired.”¹⁵⁶ A 2018 longitudinal study tracked the health of oil spill cleanup workers and found persistent and continuing adverse health impacts even seven years after the work concluded.¹⁵⁷ In South Dakota, incarcerated workers are

¹⁴⁷ See, e.g., MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928*, at 3 (1996).

¹⁴⁸ See *id.*

¹⁴⁹ *Warren*, 118 So. at 290–92; see also Leroy D. Clark & Gwendolyn M. Parker, *The Labor Law Problems of the Prisoner*, 28 RUTGERS L. REV. 840, 846 (1975).

¹⁵⁰ *Warren*, 118 So. at 292.

¹⁵¹ J. Carlee Purdum & Michelle A. Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, 11 RISK HAZARDS & CRISIS PUB. POL’Y 296, 308 (2020).

¹⁵² *Id.*

¹⁵³ Jordan Carlee Purdum, *Inmate Populations in a Disaster: A Labor Force, a Vulnerable Population, and a Hazard* 37 (Dec. 2016) (M.A. Thesis, Louisiana State University) (on file with the *Ohio State Law Journal*).

¹⁵⁴ J. Carlee Purdum, *Disaster Work Is Often Carried Out by Prisoners—Who Get Paid as Little as 14 Cents an Hour Despite Dangers*, CORR. MANAGERS’ REP., Oct.–Nov. 2020, at 37, 37.

¹⁵⁵ Young, *supra* note 3.

¹⁵⁶ *Id.*

¹⁵⁷ Mark A. D’Andrea & G. Kesava Reddy, *The Development of Long-Term Adverse Health Effects in Oil Spill Cleanup Workers of the Deepwater Horizon Offshore Drilling Rig Disaster*, FRONTIERS PUB. HEALTH 2, 7 (Apr. 26, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5932154/pdf/fpubh-06-00117.pdf> [<https://perma.cc/ZA7K-B69E>].

part of post-storm disaster relief teams, including clearing trees and downed electrical lines.¹⁵⁸

Beyond being forced to work in unsafe conditions, incarcerated people may be forced to work without proper training or safety equipment. For example, an incarcerated worker in California was assigned to a factory where they manufacture soap.¹⁵⁹ In 2021, the incarcerated worker was forced to recover a drill bit from a vat of chemicals with his bare hands and later developed extensive bleeding sores.¹⁶⁰ According to the injured man, guards refused to let him use the protective gear that was present and available on site.¹⁶¹

Federal workplace safety laws do not generally apply to prisons operated by state governments.¹⁶² The federal Occupational Safety and Health Act (OSHA), which ensures federal and private workplaces meet federal safety standards, also does not recognize incarcerated people as “employees.”¹⁶³ OSHA provides minimum workplace standards including protection from falls on construction sites,¹⁶⁴ eye protection,¹⁶⁵ handling hazardous materials,¹⁶⁶ and handheld tools,¹⁶⁷ among others. Nevertheless, at least for federal prisons, OSHA requirements have been integrated into policies and regulations for the Federal Bureau of Prisons, including “the right [for incarcerated workers] to file a report of hazards with appropriate safety and health officials.”¹⁶⁸ Even where OSHA has clear authority, such as federal employees at prisons managed by the U.S. Bureau of Prisons, enforcement is the exception, not the norm. In 2019, OSHA issued a citation for an unsafe environment at a Florida prison, based on reports of assaults on prison staff.¹⁶⁹ OSHA has also issued citations at two federal

¹⁵⁸ *Ambrose v. Young*, No. Civ. 04-4068, 2005 WL 3370555, at *1 (D.S.D. Dec. 12, 2005), *aff’d in part, rev’d in part*, 474 F.3d 1070, 1081 (8th Cir. 2007).

¹⁵⁹ Email from confidential source to author (on file with author).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 29 U.S.C. § 652(5) (defining an “employer” as “a person engaged in a business affecting commerce who has employees, but does not include . . . any State or political subdivision of a State”).

¹⁶³ U.S. DEP’T OF LAB., OSHA INSTRUCTION FAP 01-00-002 (Apr. 1995), <https://www.osha.gov/enforcement/directives/fap-01-00-002> [<https://perma.cc/U8AZ-9ZUQ>] [hereinafter OSHA INSTRUCTION].

¹⁶⁴ See OSHA Duty to Have Fall Protection, 29 C.F.R. § 1926.501 (2020).

¹⁶⁵ See OSHA Eye and Face Protection, 29 C.F.R. § 1926.102 (2020).

¹⁶⁶ See OSHA Hazardous Materials, 29 C.F.R. § 1910.102 (2020).

¹⁶⁷ OSHA Hand and Portable Powered Tools and Equipment, General, 29 C.F.R. § 1910.242 (2020).

¹⁶⁸ OSHA INSTRUCTION, *supra* note 163.

¹⁶⁹ Courtney Bublé, *OSHA Cites Bureau of Prisons Facility for Unsafe Working Conditions*, GOV’T EXEC. (Jan. 3, 2020), <https://www.govexec.com/oversight/2020/01/osha-cites-bureau-prisons-facility-unsafe-working-conditions/162203/> [<https://perma.cc/WK6Y-KHBK>]; see also Notice of Unsafe or Unhealthful Working Conditions, Inspection No. 1335777, at 5 (Nov. 26, 2019).

prisons in West Virginia for failing to issue protective gloves for staff conducting cell and property searches.¹⁷⁰

Some state courts have found that correctional agencies owe a “duty of safe equipment” for incarcerated workers. In a series of cases in Louisiana, appellate courts have recognized that the prison had a duty to “provid[e] equipment and machinery which is safe for whatever tasks inmates may be required to perform.”¹⁷¹ This duty arises not from statute, but rather from the common law duty of “reasonable care” for the safety of the incarcerated.¹⁷² These state negligence claims, however, are not cognizable in federal court as traditional civil rights claims under 42 U.S.C. § 1983.¹⁷³

Claims for federal civil rights violations under the Eighth Amendment for lack of workplace safety have largely been unavailing. Similar to other conditions-related claims asserted by incarcerated people, claims of unsafe working conditions must meet the more onerous deliberate indifference standard.¹⁷⁴ “In the prison work assignment context, prison officials are deliberately indifferent when they knowingly compel ‘an inmate to perform labor that is beyond the inmate’s strength, dangerous to his or her life or health, or unduly painful.’”¹⁷⁵ Deliberate indifference requires proof of an objective risk as well as subjective knowledge of the risk.¹⁷⁶ In case after case, including cases with significant work-related injuries, courts have held that prison officials were not deliberately indifferent.¹⁷⁷ For example, Darris Lee was forced to work in the prison’s “hog barn” where hogs, weighing anywhere between 250–450 pounds, were bred and raised.¹⁷⁸ Though he was not experienced in hog farming, was not trained in hog farming, and was unsupervised at the time of the attack and injury, and even though hogs had in fact escaped their pens in the past, the district court still found that prison officials were not deliberately indifferent to his safety at the workplace.¹⁷⁹ In another case, an incarcerated

¹⁷⁰ Derek Gilna, *California Prison Officials Shift Responsibility for Work Injuries to Prisoners*, PRISON LEGAL NEWS (Aug. 30, 2017), <https://www.prisonlegalnews.org/news/2017/aug/30/california-prison-officials-shift-responsibility-work-injuries-prisoners/> [<https://perma.cc/FX29-QU9T>].

¹⁷¹ *Bridgewater v. State ex rel. Dep’t of Corr.*, 434 So. 2d 383, 384 (La. 1983) (citing *Reed v. State ex rel. Dep’t of Corr.*, 351 So. 2d 788, 790 (La. Ct. App. 1977)); *see also* *Dawson v. State ex rel. Dep’t of Corr.*, 452 So. 2d 357, 358 (La. Ct. App. 1984); *Moore v. Murphy*, 119 N.W.2d 759, 761 (Iowa 1963).

¹⁷² *Gaither v. District of Columbia*, 333 A.2d 57, 60 (D.C. 1975).

¹⁷³ *Isom v. Geo Grp. Inc.*, 335 F. App’x 362, 362–63 (5th Cir. 2009) (dismissing claim from incarcerated worker of chemical burns to his back from a defective “backpack spray gun” (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986))).

¹⁷⁴ *Ambrose v. Young*, 474 F.3d 1070, 1075–77 (8th Cir. 2007).

¹⁷⁵ *Id.* at 1077 (quoting *Sanchez v. Taggart*, 144 F.3d 1154, 1156 (8th Cir. 1998)).

¹⁷⁶ *Id.* at 1076–77.

¹⁷⁷ *See, e.g., Lee v. Sikes*, 870 F. Supp 1096, 1100 (S.D. Ga. 1994); *Bibbs v. Armontrout*, 943 F.2d 26, 27 (8th Cir. 1991).

¹⁷⁸ *Lee*, 870 F. Supp. at 1100.

¹⁷⁹ *See id.* at 1098–1101.

person assigned to the license plate plant lost portions of two of his fingers.¹⁸⁰ The Eighth Circuit held that there was “no evidence showing that the prison officials knew that guards were not covering the gears of the inker or that they willfully overlooked the condition of the equipment.”¹⁸¹ In another Eighth Circuit case, the court of appeals reversed a jury verdict in favor of incarcerated plaintiffs who suffered back and knee injuries working in the prison warehouse.¹⁸² At best, the court concluded, the incarcerated workers had shown negligence, which was insufficient to prove a constitutional violation of their rights.¹⁸³

According to at least one federal circuit, providing protective gear is also not required by the Constitution.¹⁸⁴ “Simply failing to provide inmates who move furniture with steel-toed boots, protective eyewear, and hard hats, for example, does not establish a constitutional violation any more than failing to install a safety device on a saw despite knowledge of prior injuries.”¹⁸⁵ One incarcerated worker lost three fingers and partially severed a fourth operating a saw at his prison work assignment.¹⁸⁶ The court assumed facts alleged by plaintiff were true, but nevertheless found that under prior precedent, “the absence of certain safety equipment or training, the awareness of similar injuries, and a failure to take certain measures are not enough to show deliberate indifference.”¹⁸⁷ In a case where an incarcerated person was provided minimal training and where prison staff knew of a downed power line, the Eighth Circuit held the prison was “deliberately indifferent.”¹⁸⁸ But that case appears to be the exception to the rule.

In the same circuit, an incarcerated person fell off of a roof while on work assignment.¹⁸⁹ The appellate court reversed the trial court’s judgment and damages award, holding that prison officials were not deliberately indifferent.¹⁹⁰ First, the court found that the specific guards on duty that day did not have an obligation to know the medical status and restrictions for the incarcerated plaintiff, who had an artificial knee cap.¹⁹¹ Second, the court found that the lack of certain safety precautions and one complaint about the slickness

¹⁸⁰ *Bibbs*, 943 F.2d at 26.

¹⁸¹ *Id.* at 27.

¹⁸² *Stephens v. Johnson*, 83 F.3d 198, 199–201 (8th Cir. 1996).

¹⁸³ *Id.* at 201.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Kulkay v. Roy*, No. 15-CV-34, 2016 WL 9022442, at *1–2 (D. Minn. Jan. 25, 2016), *report and recommendation adopted*, No. 15-34, 2016 WL 9022467 (D. Minn. Feb. 29, 2016), *aff’d*, 847 F.3d 637 (8th Cir. 2017).

¹⁸⁷ *Id.* at *7.

¹⁸⁸ *See, e.g., Ambrose v. Young*, 474 F.3d 1070, 1074, 1078–79 (8th Cir. 2007).

¹⁸⁹ *Choate v. Lockhart*, 7 F.3d 1370, 1373 (8th Cir. 1993).

¹⁹⁰ *Id.* at 1372.

¹⁹¹ *Id.* at 1375.

of the roof did not create a sufficiently culpable state of mind for the supervising prison guards.¹⁹²

Even if an incarcerated person can prove prison officials acted with deliberate indifference regarding working conditions, injured incarcerated workers may nevertheless be denied monetary damages due to qualified immunity.¹⁹³ Qualified immunity is a legal doctrine that protects government actors from monetary liability for harms that occur during performance of their official duties.¹⁹⁴ Courts examining whether a right is clearly established compare “the factual circumstances of prior cases to determine whether the decisions in the earlier cases would have made clear to the defendant that his conduct violated the law.”¹⁹⁵ Thus, even where a prison’s acts are “arguably reckless,” the acts may not have violated a right “clearly established” by law.¹⁹⁶ In a 2020 case, an incarcerated plaintiff failed to prove a “clearly established constitutional violation” when she “suffered [a] traumatic brain injury, a fractured skull, internal cranial bleeding, fractured nasal bones, and lacerations to her face and scalp”¹⁹⁷ after a 400-pound laundry cart fell on her.¹⁹⁸ Plaintiff had been assigned to laundry duty, which included the loading and unloading of carts using a hydraulic lift.¹⁹⁹ She alleged that prison officials failed to train her on usage of the lift or other dangers in working as a “laundry porter,” in addition to failing to supervise her and warn her before her injury on the job.²⁰⁰

Courts also apply qualified immunity to claims where prisons provided some, but not sufficient, protective gear.²⁰¹ An incarcerated plaintiff was regularly exposed to blood and fecal matter as part of his forced work as an “orderly.”²⁰² The prison provided him with rubber gloves and boots, but rejected his requests for protective clothing and a facial mask, as well as infectious disease testing.²⁰³ The Court applied qualified immunity, but also noted that if

¹⁹² *Id.* at 1375–76.

¹⁹³ *Wilson v. Cain*, No. 10-114-JVP-CN, 2010 WL 3717306, at *1 (M.D. La. Sept. 13, 2010) (“There are numerous reported decisions which reflect that, absent a showing that prison officials have intentionally exposed an inmate to work conditions which create a substantial risk of serious harm, prison officials are not liable for a failure to provide safety equipment.”).

¹⁹⁴ *See Ambrose v. Young*, 474 F.3d 1070, 1077 (8th Cir. 2007).

¹⁹⁵ *Sandoval v. County of San Diego*, 985 F.3d 657, 674 (9th Cir. 2021). *But see Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (noting that an exact factual match in a prior case is not required to prove “clearly established”).

¹⁹⁶ *See, e.g., Rhodes v. Michigan*, No. 2:17-CV-12416-TGB, 2020 WL 978296, at *1 (E.D. Mich. Feb. 28, 2020).

¹⁹⁷ *Id.* at *2.

¹⁹⁸ *Id.* at *1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at *8.

²⁰¹ *See Wilson v. Cain*, No. 10-114-JVP-CN, 2010 WL 3717306, at *1 (M.D. La. Sept. 13, 2010).

²⁰² *Id.*

²⁰³ *Id.*

the plaintiff were to receive additional protective equipment, arguably every person incarcerated on that tier would be able to make the same request.²⁰⁴

By treating workplace safety the same as other conditions of confinement cases, federal courts have provided de facto immunity for employer negligence for incarcerated workers. Captive labor forces are also uniquely vulnerable due to their lack of choice in work assignments. In addition, courts have eliminated incentives for prisons to ensure that their workplaces are safe by prohibiting organizing, protests, and strikes by incarcerated workers.

2. Organizing Rights

Incarcerated laborers do not have the right to organize, to protest, or to strike.²⁰⁵ When these same laborers attempt to assert these rights, they can face disciplinary consequences (loss of privileges, assignment to solitary housing) and even new criminal charges.²⁰⁶ When thirty-seven incarcerated welders refused to build a new lethal injection gurney for Angola, they were sent to solitary.²⁰⁷ When hundreds of other incarcerated workers went on strike to protest the punishment of the welders, they were punished as well.²⁰⁸ Under *Jones v. North Carolina Labor Union, Inc.*, incarcerated people are not allowed to circulate petitions to prison authorities.²⁰⁹ Courts have expanded the applicability of *Adderley v. Florida* to hold that incarcerated people do not have a right to protest.²¹⁰

Beyond the lack of constitutional protection for labor organizing in prisons, incarcerated workers may also not be protected by statutory law, like the federal National Labor Relations Act (NLRA). The NLRA provides statutory protection for labor organizing and bargaining.²¹¹ While courts have not directly addressed whether incarcerated workers may be considered “employees” and therefore protected by the NLRA, it is likely courts would draw on FLSA jurisprudence generally concluding that “employees” do not include incarcerated people. However, as Eric Fink notes, there may be additional opportunities to include incarcerated workers, based on the few cases that have examined the inclusion

²⁰⁴ *Id.* at *1–2.

²⁰⁵ See Eric M. Fink, *Union Organizing & Collaborative Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 955–56 (2016).

²⁰⁶ Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 232–35 (2016).

²⁰⁷ *Id.* at 222, 224.

²⁰⁸ *Id.* at 222.

²⁰⁹ *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 129–32 (1977) (finding that incarcerated people do not have a right under the First Amendment to circulate union petition or join a union).

²¹⁰ See *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (finding that because a jail facility is not a public forum and a state may regulate the use of its property, the First Amendment rights of the protesters were not violated); see also Armstrong, *supra* note 206, at 236–47 (analyzing *Adderley*).

²¹¹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

of incarcerated workers in broader bargaining units that also included non-incarcerated people.²¹²

Incarcerated people can also be disciplined for work-related violations.²¹³ If the person is incarcerated in a federal prison, they can be disciplined for “refusal to work or accept program assignment,” “unexcused absence from work or a program,” and “failure to perform work as directed.”²¹⁴ These violations are considered to be of “moderate severity” and punishments range from monetary fines and loss of job to loss of earned “good time” (extending your incarceration) or disciplinary segregation/solitary confinement for up to three months.²¹⁵ In addition, if a person in a federal prison “encourag[es] others to refuse to work, or to participate in a work stoppage,” more severe sanctions, including up to six months of disciplinary segregation/solitary confinement, are possible.²¹⁶ Disciplinary codes in state prisons contain similar provisions and sanctions.²¹⁷

3. Remedies for Workplace Injuries

This lack of legal protection for captive labor rights and their work conditions is further compounded by the lack of remedies for injuries or death due to work. If a non-incarcerated worker experiences an injury proximately caused by their employment, they can receive financial compensation through federal or state tort laws and workers’ compensation. These same remedies, with a few limited exceptions, are not available to incarcerated workers.

The largest exception to this general pattern is for injuries sustained by incarcerated workers in federal prisons. By statute, incarcerated workers can receive compensation under the Inmate Accident Compensation Act (IACA), which is authorized under 18 U.S.C. § 4126.²¹⁸ The Act provides “payment of accident compensation, [that] necessitated as a result of work-related injuries, to federal prison inmates or their dependents.”²¹⁹ The Supreme Court in *United States v. Demko* ordered that recovery under the IACA was the exclusive remedy for work-related injuries for people held in federal facilities.²²⁰ Additionally, case law indicates that people detained pretrial under federal custody are also eligible to recover under IACA.²²¹ However, people held in

²¹² Fink, *supra* note 205, at 966–67.

²¹³ See BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., DATA COLLECTED UNDER THE FIRST STEP ACT, 2019, at 11–12 (Mar. 2020), <https://bjs.ojp.gov/content/pub/pdf/dcfsa19.pdf> [<https://perma.cc/G9EU-B4AL>].

²¹⁴ *Id.* at 12.

²¹⁵ 28 C.F.R. § 541.3 (2020).

²¹⁶ *Id.*

²¹⁷ See N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2(B)(5)(iii) (2020); GA. COMP. R. & REGS. 125-3-2.04(c) (2021); WASH. ADMIN. CODE § 137-25-30 (2019).

²¹⁸ 18 U.S.C. § 4126(c)(4); 28 C.F.R. § 301.101 (2020).

²¹⁹ 28 C.F.R. § 301.101.

²²⁰ *United States v. Demko*, 385 U.S. 149, 152, 154 (1966).

²²¹ *Paschal v. United States*, 302 F.3d 768, 769 (7th Cir. 2002).

federal prisons, who are subject to IACA, are barred from any additional recovery under the Federal Tort Claims Act (28 U.S.C. § 2671–2180).²²²

Under the IACA, workers' compensation is awarded through two separate programs either to people incarcerated in federal prisons or their dependents, if the injury results in physical impairment or death, or to those people housed in Federal Bureau of Prisons institutions, for lost-time wages, if the injury resulted in lost time from their work assignment.²²³ In following traditional tort principles, incarcerated workers may seek compensation only if the qualifying work-related injury was "proximately caused by the actual performance of the inmate's work assignment," during their course of employment in Federal Prison Industries, Inc. or institutional work assignments involving "the operation or maintenance of a federal correctional facility."²²⁴ Compensation paid is narrowly limited to those injuries that occur only during the performance of their regular work assignment and is not paid for any injuries that may occur away from the work location, such as going to or leaving from work.²²⁵ The statute further narrows the scope of compensation for injuries which are work-related, by denying any injury sustained as a result of a willful violation of rules and regulations.²²⁶

Compensation awards paid under IACA are calculated based on the permanency and severity of the injury to the person's functional impairment and are based on the minimum wage specific to body parts and organs as prescribed by the Fair Labor Standards Act.²²⁷ Additionally, any compensation awarded for a work-related injury that results in physical impairment is paid to the incarcerated worker, only *after* they are released.²²⁸ The amount awarded is then limited to the "degree of physical impairment existent at the time of . . . release," regardless of when the injury occurred during the period of incarceration.²²⁹ If a person requires any medical treatment after their period of incarceration, those expenses are not payable by Federal Prison Industries, Inc., unless previously authorized by the Claims Examiner.²³⁰ Moreover, there is an absolute bar to recovery of compensation if the incarcerated worker fully recovered while in custody and there is no longer any impairment at their time of release.²³¹ Last, if a compensation award is disbursed on a monthly basis, but the person becomes incarcerated at any federal, state, or local correctional facility, the payments are then suspended until the person is released.²³²

²²² 28 C.F.R. § 301.319.

²²³ *Id.* §§ 301.101, 301.202(a).

²²⁴ *Id.* §§ 301.101(a), 301.102(a).

²²⁵ *Id.* § 301.301(c)–(d).

²²⁶ *Id.* § 301.301(d).

²²⁷ *Id.* § 301.314(b)–(c).

²²⁸ 28 C.F.R. § 301.301(a).

²²⁹ *Id.* § 301.314(a).

²³⁰ *Id.* § 301.317.

²³¹ *Id.* § 301.314(a).

²³² *Id.* § 301.316.

In state prisons, whether an incarcerated worker can seek redress for work-related injuries is a function of state law. In Arkansas,²³³ Texas,²³⁴ and Vermont,²³⁵ incarcerated people are expressly excluded from eligibility for state workers' compensation programs. Other states limit eligibility for workers' compensation to work performed for private entities by incarcerated laborers.²³⁶

D. *Unrelated to Re-Entry*

The labor that is forced on incarcerated people often bears little resemblance to the skills or training they would need after serving their sentence. Prisons, faced with shrinking budgets and larger populations, often rely on captive labor for the facility to function or to create additional revenue, regardless of whether that work prepares them for employment post-release.²³⁷

Many of the jobs people are forced to work do not provide skills, training, or experience for employment post-prison. In some cases, incarcerated people may be trained for jobs that they are statutorily excluded from performing once free.²³⁸ In several states, for example, incarcerated people may not be certified barbers under state licensing laws, but completed barber training programs while incarcerated.²³⁹ Incarcerated people may also be trained in jobs in areas where jobs are projected to shrink.²⁴⁰ For example, a Louisiana Legislative Auditor report found that 32.5% of incarcerated people employed by the state's prison enterprises division are assigned jobs that "the Louisiana Workforce Commission (LWC) has projected to have a decrease in future employment."²⁴¹

One of the primary justifications for prison labor programs is that participating in these programs reduces recidivism by teaching participants

²³³ ARK. CODE ANN. § 11-9-102(9)(B)(iii) (Supp. 2019). Under Arkansas law, workers' compensation coverage is not extended to employees defined as "[a]n individual who is required to perform work for a municipality, county, state, or the United States Government upon having been convicted of a criminal offense or while incarcerated." *Id.*

²³⁴ TEX. LAB. CODE ANN. § 501.024(3) (West 2015). Under Texas' labor code, incarcerated people are excluded from workers' compensation insurance coverage, unless they are a participant in a work program under a Texas Correctional Industries contract. *Id.*

²³⁵ VT. STAT. ANN. tit. 21, §§ 601(12)(O)(iii), 616(a) (2016). In Vermont, workers' compensation is available to those injuries arising out of public employment, however, "prisoners or wards of the State" are not statutorily recognized under public employment. *Id.*

²³⁶ *See, e.g.*, DEL. CODE ANN. tit. 19, § 2301(10) (Supp. 2018).

²³⁷ *Cf.* Katherine Stevenson, *Profiting Off of Prison Labor*, BUS. REV. AT BERKELEY (July 6, 2020), <https://businessreview.berkeley.edu/profitting-off-of-prison-labor/> [<https://perma.cc/BK98-P5MK>].

²³⁸ JOHN G. MALCOLM & JOHN-MICHAEL SEIBLER, HERITAGE FOUNDATION, COLLATERAL CONSEQUENCES: PROTECTING PUBLIC SAFETY OR ENCOURAGING RECIDIVISM? 4 (Mar. 2017), <https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf> [<https://perma.cc/75E7-4ZJR>].

²³⁹ *See id.*

²⁴⁰ LA. PRISON ENTERPRISES EVALUATION, *supra* note 33, at 3, 10.

²⁴¹ *Id.* at 3.

employable skills.²⁴² Yet, it appears that few prison authorities actually review data on recidivism in connection with incarcerated labor programs. For example, the Government Accountability Office for the U.S. government found that “the Bureau of Prisons—which manages [Federal Prison Industries]—had not reviewed its impact on recidivism (a person’s relapse into criminal behavior) in over 2 decades.”²⁴³ If reduction of recidivism is one of the main stated goals of the program, this seems like a significant oversight.

Work that is targeted towards post-incarceration employment is a unique opportunity to disrupt linkages between poverty, race, and incarceration. A 2018 study by Brookings Institution found that only 49% of “prime aged men” incarcerated were employed in the three years prior to their conviction.²⁴⁴ Upon release, only 55% of incarcerated men reported income within a year of their release.²⁴⁵ Even for those 55%, the median income was \$10,090 and only 20% of formerly incarcerated men reported income above \$15,000 for the year.²⁴⁶ Making prison labor more “fair” may also lead to reductions in recidivism and future incarceration.

IV. FAIR LABOR FOR INCARCERATED PEOPLE

This Article has focused on the absence of “fair labor” because captive incarcerated labor is (1) involuntary, (2) uncompensated, (3) unprotected, and (4) unrelated to re-entry or rehabilitation. These different aspects of captive labor are individually problematic, but they also collectively reinforce one another. We, as a society, allow uncompensated labor, in part, because the labor is involuntary. If we can force incarcerated people to work under the Thirteenth Amendment, then many would question why captive labor should be paid. Because we do not require prison labor to be related to re-entry or education, a lack of choice in work assignments becomes less potent or meaningful for non-incarcerated people. Similarly, because captive labor is uncompensated, it is also deemed to be less worthy of protection. These independent, yet interrelated, harms of captive labor, however, do not mean that we should eliminate labor programs behind bars.

²⁴² See Andre Montoya-Barthelemy, *The Occupational Health of Prison Inmates: An Ignored Population and an Opportunity*, J. OCCUPATIONAL & ENV’T MED. (Feb. 2019), https://journals.lww.com/joem/Fulltext/2019/02000/The_Occupational_Health_of_Prison_Inmates__An.24.aspx (on file with the *Ohio State Law Journal*).

²⁴³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-505, FEDERAL PRISON INDUSTRIES: ACTIONS NEEDED TO EVALUATE PROGRAM EFFECTIVENESS (2020), <https://www.gao.gov/products/GAO-20-505> [<https://perma.cc/F27E-YDR2>].

²⁴⁴ ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INSTITUTION, WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1 (Mar. 2018), <https://www.brookings.edu/research/work-and-opportunity-before-and-after-incarceration/> [<https://perma.cc/9Z37-UL95>].

²⁴⁵ *Id.*

²⁴⁶ *Id.*

Prison labor can also be a lifeline for people incarcerated.²⁴⁷ A daily job can mean escaping unsafe or dehumanizing conditions for eight hours a day. “When a prisoner is working, she is the closest to free she can be, until she gets out.”²⁴⁸ It can reaffirm a person’s sense of worth—that the person has the motivation and tools to contribute. Particularly for those who work in helping others, whether tutoring people for their high school equivalency exam or assisting people with their appeals, incarcerated people can positively impact the lives of others through their prison job. A prison job that puts you in contact with policy officials, such as working at the governor’s mansion, can be a prized assignment and a potential vehicle for institutional support for an incarcerated person’s parole application.²⁴⁹ At the same time, it is important to delineate when prison labor can meet these aspirational goals and when it is simply exploitation by other means.

This Article provides a starting point for deeper discussions about captive labor and identifies four elements that would be essential in articulating a vision for “fair labor” for incarcerated people, namely the work should be voluntary (or at least as applied to a particular work assignment), compensated, protected, and part of a broader program related to individual development and re-entry.

One strategy for moving towards fair labor for incarcerated people may be closer connections with existing labor and union movements. Unions, as advocacy organizations for workers, emerged in part due to similar power disparities between workers and management.²⁵⁰ Through their membership and organization, unions are able to identify common concerns and propose worker-led solutions. While incarcerated workers do not have the constitutional or statutory right to unionize, prison administrators can partner with unions and through those partnerships, apply the same level of protection to incarcerated workers. For example, the Minnesota Department of Corrections worked “with a local labor union to train” incarcerated people as welders.²⁵¹ Incarcerated workers earned their certificates and the union reserved 10% of positions for formerly incarcerated people.²⁵²

A second strategy for reimagining incarcerated labor is to follow guidance from non-correctional professional organizations or agencies, like the American Bar Association (ABA) and the National Institute for Occupational Safety and

²⁴⁷ Chandra Bozelko, Opinion, *Think Prison Labor Is a Form of Slavery? Think Again*, L.A. TIMES (Oct. 20, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-bozelko-prison-labor-20171020-story.html> (on file with the *Ohio State Law Journal*).

²⁴⁸ *Id.*

²⁴⁹ See, e.g., Huma Khan, *Pardon Me: Is Southern Custom Behind Haley Barbour’s Clemencies?*, ABC NEWS, <https://abcnews.go.com/blogs/politics/2012/01/pardon-me-is-southern-custom-behind-haley-barbours-clemencies/> [<https://perma.cc/5CK9-JR8S>].

²⁵⁰ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (noting that the “union was essential to give laborers opportunity to deal on an equality with their employer”).

²⁵¹ Montoya-Barthelemy, *supra* note 242.

²⁵² *Id.*

Health (NIOSH). In some cases, these organizations may already have guidelines or recommendations for carceral settings. For example, the ABA standards on the treatment of incarcerated people recommend that prison work assignments should “teach vocational skills,” “instill a work ethic,” and “respect . . . human dignity.”²⁵³ Fair labor for incarcerated people would ensure that all three elements are met. NIOSH does not have carceral specific guidance, but the research, recommendations, and guidance for certain types of workplaces (agricultural, office, firefighting, etc.) could also apply behind bars.

Most importantly, incarcerated and formerly incarcerated workers should be at the center of identifying and developing fair labor practices in carceral settings. The Incarcerated Workers Organizing Committee, and other groups led by incarcerated people, have demanded equal access to rehabilitative programming, regardless of the crime of conviction and an end to modern day slavery.²⁵⁴ Incarcerated people have organized simultaneous worker strikes in multiple states in 2016 and 2018 and are best positioned to know what laws and standards would fairly compensate, protect, and teach incarcerated workers.²⁵⁵

V. CONCLUSION

Amending the U.S. Constitution to remove the convicted labor exception is hard. Article V of the U.S. Constitution provides that constitutional amendments may be proposed by either a joint resolution from Congress with a two-thirds vote by both houses or by convention called by Congress in response to requests by two-thirds of state legislatures.²⁵⁶ For an amendment to be adopted, it must then be ratified by three-fourths of the states.²⁵⁷ Despite over 11,000 proposed amendments, the Constitution has only been amended twenty-seven times.²⁵⁸ In contrast, to enact, amend, or repeal a law, only a majority vote is usually required.²⁵⁹ This is true even when the law is specifically enacted to legislatively overrule a judicial decision or interpretation.²⁶⁰

The current operation of our carceral spaces, including their orientation to labor that benefits the facility, the state, or the private contractor, is not purely a

²⁵³ STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-8.4 (AM. B. ASS'N 3d ed. 2011).

²⁵⁴ *Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., <https://incarceratedworkers.org/campaigns/prison-strike-2018> [<https://perma.cc/F6CX-9DG4>].

²⁵⁵ Armstrong, *supra* note 206, at 226; Nicole Lewis, *What's Really Happening with the National Prison Strike?*, MARSHALL PROJECT (Aug. 24, 2018), <https://www.themarshallproject.org/2018/08/24/what-s-really-happening-with-the-national-prison-strike> [<https://perma.cc/367K-UFS5>].

²⁵⁶ U.S. CONST. art. V.

²⁵⁷ *Id.*

²⁵⁸ Emily M. Padgett, Comment, *Constitutional Conventions: Power to the People or Pandora's Box?*, 65 LOY. L. REV. 195, 202 (2019).

²⁵⁹ *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> [<https://perma.cc/P3KC-TL9E>].

²⁶⁰ *Id.*

function of the Thirteenth Amendment. The text of the Thirteenth Amendment does not specify which type of work, who should benefit, nor that the work must be legally unprotected. These elements of captive labor are the product of judicial decision and statutory law and as such, are amenable to new interpretation and law at the local, state, and federal levels of lawmaking.