Brigham Young University Prelaw Review

Volume 38 Article 8

4-2024

Prison Labor: The Ethical and Economic Implications of Rethinking the Thirteenth Amendment and Fair Labor Standards Act

Peter Holland
Brigham Young University, petergrantholland@gmail.com

Prison Labor: The Ethical and Economic Implications of Rethinking the Thirteenth Amendment and Fair Labor Standards Act

Peter Holland[1]

I. Introduction

In 2018, several wildfires raged across Mendocino, California. Of the fourteen thousand firefighters involved in putting out the Mendocino fires, roughly two thousand were prison inmates. It was reported that when actively fighting the fires, inmates were only paid one dollar an hour. The California Department of Corrections and Rehabilitation estimates that inmate firefighters save the state of California around ninety million dollars each year. This exemplifies how prisoners can be exploited for economic benefits and also take jobs away from non-convicts. Clearly, non-convict firefighters would struggle to compete with wages of one dollar an hour. The lack of protections guarding prison workers creates an imbalance in the economy that could feasibly benefit employers while decreasing job opportunities for non-inmate employees.

Another issue regarding this particular work program is that it fails to teach prisoners marketable skills. One of the stated purposes of many inmate work programs is to enable prisoners to gain skills that they can use after completing their sentence. Yet, it is unlikely that any of the California inmate firefighters will be able to advertise

---

1 Peter Holland is a sophomore studying Mathematics at Brigham Young University. He plans to start law school in the fall of 2028. Peter would like to thank his editor, Jaymon Roan. Jaymon is a senior majoring in History and French Studies. He will begin at Brigham Young University Law School in the fall of 2024.

their work experience after being released since most firefighters are required to become a certified EMT. The inconsistency here is that boards that grant EMT certifications typically deny applicants with a criminal history. Thus, inmates do not have a high chance of being able to find a firefighting job after release. Many jobs fulfilled by prisoners create opportunity challenges for free workers at the benefit of large organizations while also failing to set prisoners up to obtain economic success upon their release.[2]

The wildfires in Mendocino exposed one vivid example of a widespread practice in the United States that uses different ethical systems to treat the convicted and unconvicted in regards to financial compensation and more. Among the most ethically problematic aspects of this example was the use of convicted minors in the Mendicino wildfires. Fifty-eight of the two thousand convict firefighters who worked in Mendocino were under the age of eighteen.[3] According to the State of California government website, seasonal firefighters are required to be eighteen years or older.[4] Additionally, fighting forest fires is specifically listed in the FLSA as a prohibited occupation for minors.[5] Evidently, the safety of some minors is taken more seriously than that of others. The story of the Mendicino wildfires reveals a rather unsavory ethical inconsistency in the United States that is even more unpleasant when it comes to the nation's children.

There are a variety of problems with the national and local policies on penal labor. Prisoners are not covered under the labor laws that protect unincarcerated employees. One of the biggest complications with prisoners not being protected under these laws is that the lack of coverage undermines the equity of state and national

2 Abigail Johnson Hess, *California Is Paying Inmates $1 an Hour to Fight Wildfires*, CNBC (2018), https://www.cnbc.com/2018/08/14/california-is-paying-inmates-1-an-hour-to-fight-wildfires.html (last visited Feb 9, 2024).

3 Hess, *Supra* note 2.

4 Seasonal Firefighter | CAL FIRE, https://www.fire.ca.gov/join-calfire/seasonal-firefighter#:~:text=Requirements%20and%20Training,and%20work%20on%20weekends%2Fholidays (last visited Feb 3, 2024).

5 Fair Labor Standards Act, 29 U.S.C. § 570.54 (1951)

economies. Paying prisoners less than minimum wage creates unfair competition for those outside of prison who are seeking jobs but cannot compete with prisoners who are forced to accept wages that are sometimes less than a dollar per hour.[6] Low wages also prevent prisoners from being able to save money to support their loved ones outside of prison or to support themselves once they are released.[7] In fact, many prisoners leave prison with debt. One study showed that, upon release, prisoners have an average debt of thirteen thousand dollars from legal fees alone.[8] A lack of financial stability is a major contributor to ex-inmate recidivism. With no savings to rely on and no marketable experience, many ex-convicts resort to the same illegal activities that got them into jail the first time.[9] A study by the Bureau of Justice Statistics found that 71% of prisoners released in 2012 were arrested and 46% were sent back to jail within five years.[10] Including prisoners under protections that the law affords free workers would resolve many of these issues, giving ex-convicts some savings to fall back on, thereby reducing recidivism and preventing corporations from benefitting at the cost of workers.

6 Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage*, 67 TEMPLE L. REV. 295, 296 (1994). See also *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

7 Tanisha Mink Aggarwal, *Prison Labor and the Fair Labor Standards Act: Resolving the Circuit Split on Whether Incarcerated Workers Are Entitled to the Federal Minimum Wage*, 13 Columbia Journal of Race and Law 893, 917–8 (2023), https://journals.library.columbia.edu/index.php/cjrl/article/view/11912 (last visited Feb 13, 2024).

8 Andrea N. Montes et al., *An Assessment of Prisoner Reentry, Legal Financial Obligations and Family Financial Support: A Focus on Fathers*, 18 IJERPH 9625 (2021), https://www.mdpi.com/1660-4601/18/18/9625 (last visited Feb 3, 2024).

9 Aggarwal, *supra* note 7.

10 Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017) | Bureau of Justice Statistics, https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-34-states-2012-5-year-follow-period-2012-2017 (last visited Jan 3, 2024).

II. Background

The absence of a minimum wage, legal protection, and mandatory benefits for working inmates prompts a broader discussion on the topics of slavery and involuntary servitude. As this paper will focus on these topics, it is important to make clear the current definition of these terms. Slavery is defined as the practice of forced labor and restricted liberty where physical compulsion is used.[11] Involuntary servitude is defined similarly. Section 1584 of Title 18 of the United States Code stipulates that for someone to qualify as having been subjugated to involuntary servitude, that person must be held against their will by force, threats of force, or threats of legal action and required to perform labor or compulsory service.[12] In the court ruling of *Watson v. Graves*, the Fifth Circuit of the U.S. Court of Appeals ruled that for slavery or involuntary servitude to exist, there must be no choice for the coerced individual. No matter how difficult a choice may be, if there is an option to not work, slavery and involuntary servitude do not exist.[13]

A. Thirteenth Amendment (1865)

Enacted during the Civil War, the Emancipation Proclamation declared that all slaves living in a state that was in open rebellion against the United States government were free. This proclamation only guaranteed freedom to slaves who were still living in Confederate states. After the war, the Thirteenth Amendment broadened the protections of the Emancipation Proclamation to free all slaves. Ratified by the necessary number of states on December 6th, 1865, the Thirteenth Amendment abolished slavery and involuntary servitude

11 Slavery, LII / Legal Information Institute, https://www.law.cornell.edu/wex/slavery (last visited Feb 12, 2024).

12 Civil Rights Division | Involuntary Servitude, Forced Labor, And Sex Trafficking Statutes Enforced, (2015), https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced (last visited Feb 13, 2024).

13 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

"except as a punishment for crime whereof the party shall have been duly convicted."[14] The clause that allowed both slavery and involuntary servitude as a punishment for crime, commonly known as the punishment clause, created a legal basis that could be used to justify various forms of slavery within prisons. The punishment clause had complex implications for former slaves, future prison laws, and future prison-prisoner relationships.[15]

B. History of Prison Labor

Shortly after the ratification of the Thirteenth Amendment, ten former slave states passed what became known as the "Black Codes." These laws created new criminal charges such as "insolent gesture," which specifically targeted African Americans. Those accused of such minor misdemeanors would often be sentenced to jail. Once incarcerated, convicts could be bid out by the state to private companies and individuals in the "convict-lease" program. This created a new system of slavery that relied on prison populations and heavily discriminated against African Americans. As a result of the punishment exception in the Thirteenth Amendment, many states continued to profit off slave labor well after the ratification of the 13th Amendment.[16] This exposes how, historically, the application of the 13th Amendment has been used to perpetuate slavery and economic stratification. While "convict-lease" programs no longer exist in their original form, the root problems created by the punishment clause persist.[17] Extending coverage of worker protections to prisoners would bring the United States law up to par with modern ethical standards that look down upon slavery. Additionally, given the murky roots of prison labor that have strong ties to slavery and racism, granting convicts rights such as minimum wage clearly becomes the more ethical choice as opposed to denying them these

14 U.S. Const. amend. XVIII, § 1.

15 Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 875-7, (2012).

16 Armstrong, *supra* note 15.

17 Armstrong, *supra* note 15.

benefits.[18] It would represent a meaningful step toward addressing the lingering consequences of the nation's original sin.

C. Fair Labor Standards Act (1938)

The exploitative practices associated with the nineteenth-century punishment clause have an increasingly tense relationship to advances in American labor laws, especially the Fair Labor Standards Act. The Fair Labor Standards Act (FLSA) was signed by President Franklin Roosevelt in June 1938. The Act created regulations regarding minimum wage, the maximum number of hours that could be worked during a typical work week, and child labor.[19] Today, this Act continues to guide overtime, minimum pay, and restrictions for the employment of minors. It contains guidelines for determining what constitutes an employer-employee relationship. In 2024, the FLSA requires that a minimum wage of $7.50 be paid to all employees in the United States and that overtime be paid for every hour exceeding forty hours in a given work week.[20]

Exceptions to these mandates are based on the type of work being performed and the relationship between the two parties (employer-employee, contractors, etc.) and not on other identifiers regarding the parties individually.[21] Nowhere in the FLSA are prisoners explicitly mentioned as being excluded from the employee protections of the FLSA or as being covered under the FLSA.[22] By contrast, other groups, such as elementary school teachers, outdoor sales workers,

18 Armstrong, *supra* note 15.

19 Ellen Terrell, *Research Guides: This Month in Business History: Fair Labor Standards Act Signed*, https://guides.loc.gov/this-month-in-business-history/june/fair-labor-standards-act-signed (last visited Feb 13, 2024).

20 Handy Reference Guide to the Fair Labor Standards Act, DOL, http://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa (last visited Feb 10, 2024).

21 Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), DOL, http://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship (last visited Feb 13, 2024).

22 *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

and newspaper deliverers are specifically excluded from minimum wage and overtime pay protections.[23] This highlights how exceptions to FLSA coverage are defined by the job being performed and not qualities regarding individual workers, such as where they live.

Although prisoners are not explicitly exempt from coverage under the FLSA, most courts interpret them as not being protected because of the Thirteenth Amendment clause that permits slavery and involuntary servitude as punishment for a crime.[24] These rulings demonstrate a current misunderstanding of the Thirteenth Amendment, as they equate not paying prisoners' full wages to slavery. This interpretation then allows businesses to deny large groups of prisoner-workers the normal rights of an employee. As a result of the court system's current interpretation of the Thirteenth Amendment and the FLSA, prisoners are regularly denied minimum wage and other protections guaranteed under the FLSA for free workers. Therefore, the application of this Act should be broadened to include the incarcerated, reflecting the Thirteenth Amendment more accurately.

III. Proof of Claim

This paper will argue that prisoners performing work from which the greatest economic benefit is not gained by their prison should fall under the FLSA, thereby assuring that they receive minimum wage for their work. This payment should be made by the entity that does receive the greatest economic advantage from their labor. The qualifications outlined within the FLSA, the economic realities test, and both the *Watson v. Graves* and *Carter v. Dutchess* decisions will be analyzed in this paper to highlight how the proposed prescription is not only legally justified but economically advantageous and morally sound.

23 *Supra* note 20.

24 *Draper v. Rhay*, 315 F.2d 193 (9th Cir. 1963); see also *Lindsey v. Leavy*, 149 F.2d 899 (9th Cir. 1945); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991); *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994).

A. Economic Realities Test

The economic realities test is an unstandardized set of qualifications that can be used to determine if the relationship between two parties is an employee-employer relationship.[25] The protections of the FLSA apply specifically to employee-employer relationships and not to other professional and economic relationships, including those of an independent contractor.[26] Thus, the economic realities test is utilized by some courts to determine who is covered under the FLSA.[27] If the relationship is that of an employee and employer, then the employee has the right to receive minimum wage, overtime pay, and other benefits ensured by the FLSA.[28]

While the economic realities test has not been standardized, the Department of Labor (DOL) has identified factors it deems significant in determining the working relationship between entities. These factors include the necessity of the worker's contribution to the business, the permanency of the relationship, and the degree of control the alleged employer has over the alleged employee. Factors it describes as being insignificant are the location wherein the work takes place, whether there is a formal agreement between the two parties, and if the party performing the work is contracted by the government. Furthermore, the Supreme Court has ruled that the method by which payment is transferred between the two parties is an irrelevant factor.[29]

While there is no standardized method of determining if an employee-employer relationship exists, a test outlined in *Bonnette v. California* has been used in other cases to determine the nature of a work relationship. The four factors outlined by the district court involved in *Bonnette v. California* were then later used by the U.S. 9th

25 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

26 *Supra* note 21.

27 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) and *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

28 *Supra* note 21.

29 *Supra* note 21.

Circuit Court of Appeals to establish whether an employee-employer relationship existed. The four factors used by the district and 9th Circuit courts were:

> Whether the alleged employer
>
> (1) had the power to hire and fire the employees,
>
> (2) supervised and controlled employee work schedules or conditions of employment,
>
> (3) determined the rate and method of payment, and
>
> (4) maintained employment records.[30]

While the Department of Labor has stated that the method of payment is not relevant, this test looks at who *determines* the method of payment to better classify the relationship between two parties. Since this test does not consider where the work is performed or if other relationships exist between the two parties, there is no reason that prisoners working within a prison or jail should be automatically excluded from qualifying for the FLSA when this test is applied.[31]

One of the major problems inherent in the economic realities test is that its language can inconsistently exclude prisoners working within a prison from qualifying for coverage under the FLSA. The economic realities test proposed in *Bonnette v. California* places a strong emphasis on the control of the alleged employer over its employees. In situations where the work is performed within a prison, the prison maintains more control over the prisoners than any company, private or public. The test in *Bonnette v. California* can be used to block prisoners working within a prison from qualifying for FLSA coverage because of the control that a prison has over any prisoner-workers. For example, In *Hale v. State of Arizona*, the U.S. 9th District Court declined to use the test because it believed the test did not apply to jobs that prisoners perform while inside of a

30 *Bonnette v. California Health and Welfare Agency*, 414 F. Supp. 212 (N.D. Cal. 1976).

31 *Bonnette v. California Health and Welfare Agency*, 414 F. Supp. 212 (N.D. Cal. 1976).

"prison-structured" program, even if external entities were benefitting from the labor.[32] This case referenced *Vanskike v. Peters* in stating that since a prison has almost complete control over prisoners, the control over a prisoner's work is under the prison and not an outside company.[33] This reasoning creates a gap in which prisoners who perform work within a prison are left without an employer. This gap then allows corporations to receive unfair economic advantages and undermines the protections that the FLSA ensures merely because prisons act as mediators.

Another issue with the economic realities test outlined in *Bonnette v. California* is that it has not been standardized. As a result, many courts have strayed from applying the test proposed in *Bonnette* to the prison labor cases presented to them.[34] In *Henthorn v. Department of Navy,* the Court of Appeals for the District of Columbia stated that when prisoners are required to work as a part of their sentence or by their correctional facility, they are an "involuntary servant to whom no compensation is actually allowed."[35] This is an example of when courts and prisons may be inaccurately applying the Thirteenth Amendment. As previously established, the legal definition of involuntary servitude includes being forced to perform labor. This definition does not address payment. Receiving payment for work does not exclude the work from qualifying as involuntary servitude.[36] The Thirteenth Amendment makes no mention of lack

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

33 *Id.*

34 *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994), *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

35 *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994).

36 Being subjected to involuntary servitude is not mutually exclusive with receiving payment for work. This is shown by the definition of involuntary servitude, which makes no mention of payments, as defined by the Trafficking Victims Protection Act which provided supplements to the 18 U.S.C. 1584. Civil Rights Division | Involuntary Servitude, Forced Labor, And Sex Trafficking Statutes Enforced, (2015), https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced (last visited Feb 7, 2024).

of pay for prisoners and only explicitly allows for forced labor as a punishment for crime.[37] Thus, there is no legal basis to deny prisoners coverage under the FLSA simply because they are being forced to work.

Despite its many flaws, the economic realities test proposed in *Bonnette v. California* was also a key stepping stone in establishing workers' rights for prisoners as demonstrated in *Carter v. Dutchess* and *Watson v. Graves*. In both cases, courts applied this test to argue in favor of paying prisoners minimum wage.[38] Up until these two cases, there was very little legal precedent for including prisoners under the FLSA in any context. Thus, *Bonnette's* proposed economic realities test paved the way for the creation of a legal basis on which prisoners could be covered by the FLSA.

B. Carter v. Dutchess 1984

Louis Carter was an inmate at the Fishkill Correctional Facility in New York in 1981. While an inmate at Fishkill, Carter participated in a work program with Dutchess Community College (DCC). As a part of this program, Carter worked as a teaching assistant. Despite the minimum wage being $3.10 at the time, Carter was only paid $1.20 per hour. When Carter discovered the discrepancy in pay between prisoners and other teaching assistants, he filed a lawsuit against DCC. His case was originally dismissed on the basis that prison officials had more control over Carter than the college, and thus the college was not his employer. However, the 2nd Circuit Court of Appeals stated they did not believe an employer had to have total control over a worker for the relationship to be that of an employee and an employer. Furthermore, they disagreed with the district court that stated the FLSA was not intended to be applied to prisoners. The 2nd Circuit Court stated that it "would be an encroachment upon the legislative prerogative for a court to hold that a class of

37 U.S. Const. amend. XVIII, § 1.

38 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) and *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

unlisted workers is excluded from the Act."[39] Since Congress had not included prisoners in the list of people excluded from coverage under the FLSA, the 2nd Circuit Court believed that courts had no right to exclude prisoners.

On the basis that courts could not exclude prisoners from FLSA coverage, the 2nd Circuit Court proceeded to apply the economic realities test defined in *Bonnette v. California* to the case. It was revealed to the court that only prisoners who had graduated from a four-year university were eligible to participate in this program. Additionally, DCC conducted screening interviews to determine which inmates they wanted to select for the program. The prison did not have to supply DCC with the prisoners they requested. On the other hand, DCC did not have to accept every prisoner the prison offered to them. Thus, it was determined that DCC did have a fair amount of power in the hiring and firing process. Next, the court analyzed how the payment process was decided. The program was initiated through a letter by an employee of the DCC to a member of the New York State Department of Correctional Services. In this letter, said employee proposed the prisoners' wages to be between three and four dollars a day, which ended up being around the wages they made. Additionally, Dutchess Community College would send money directly to the prisoners' bank accounts showing they controlled the payment method. Furthermore, the 2nd Circuit Court decided that the DCC would determine how long and for how many classes a prisoner would work. While the 2nd Circuit court did not ultimately decide whether Carter was an employee, they sent the case back to the district court to be re-decided under the new evidence they had proposed in Carter's favor.[40]

While the case ended up being dropped before a decision was ever made by the district court, this case still has significant implications. First, this case establishes legal precedence for the inclusion of the incarcerated under the FLSA. Second, this case shows that even though a prison or jail will have more control over its inmates than any other entity, other parties can still be considered

39 *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

40 *Id.*

employers of convicts. The control of a prison facility over prisoners and the control of an employer over a prisoner employee are not mutually exclusive. Thus, prisoners can still be covered under the FLSA even if they remain under the control of a correctional facility while working.[41]

C. Watson v. Graves (1990)

Kevin Watson and Raymond Thrash were both sentenced to serve time at Livingston Parish Jail, Louisiana, for non-violent crimes. Neither were required to perform hard labor as a part of their sentencing. While in jail, both Watson and Thrash chose to participate in a work program set up by Odom Graves, the Sheriff of Livingston Parish and keeper of the jail. The work program created by Graves required the prisoners to perform labor for his son-in-law for a flat fee of twenty dollars a day without fluctuations depending on hours worked. Darryl Jarreau, Graves' son-in-law, would sometimes have the prisoners work from six in the morning to as late as six in the evening.[42] The federal minimum wage at this time would have been three dollars and thirty-seven cents.[43] A twelve-hour workday would have entitled the men to receive double the amount that they were actually being paid. After being released from jail, both Watson and Thrush charged the defendants, including Jarreau and Graves, with infringing on their Thirteenth Amendment rights and their rights under the Fair Labor Standards Act.[44]

The United States Fifth Circuit District Court of Appeals ruled against Watson and Thrush's Thirteenth Amendment claims. This court cited the 2nd Circuit United States Court of Appeals decision in *United States v. Shackney*, which defined involuntary servitude as a condition in which someone believes they have "no way to avoid"

41 *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

42 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

43 History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 - 2009, DOL, http://www.dol.gov/agencies/whd/minimum-wage/history/chart (last visited Jan 3, 2024).

44 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

performing labor.[45] While Watson and Thrush were receiving illegal wages, they both testified that they requested to work outside of the jail. The men had a choice to work. Although the option of staying in jail all day without making any money is not a pleasant one, both men still made their own decision to work and were not forced to participate in the program. Thus, the convicts could not qualify as being subjected to involuntary servitude or slavery. Although this court decided that prisoners who are not subjected to hard labor do retain their Thirteenth Amendment rights, Watson's and Thrush's Thirteenth Amendment rights were never infringed because their labor was never compelled. However, the fact that Watson and Thrush did not qualify as involuntary servants or slaves might have actually enabled them to have claims for FLSA protections.[46] Courts have historically ruled that prisoners subjected to slavery or involuntary servitude are not covered under the FLSA because they are not employees.[47]

On the Fair Labor Standards Act claims, the Fifth District Court cited *Carter v Dutchess* in stating that prisoners are not exempted from coverage under the FLSA. To determine whether Watson and Thrush were employees of Jarreau, the court applied the economic realities test defined in *Bonnette v. California*. The court decided that since Jarreau had the ability to request certain prisoners from his father-in-law, he in effect had hiring and firing power. Additionally, the prisoners worked for him outside of the jail with no supervision from jail officials, making him the only supervisor of them during work. Eventually, the court ruled that Watson and Thrush were employees of Jarreau under the economic realities test. Thus, they were entitled to the full wages for the time they had worked for Jarreau including overtime.[48]

45 *Id.*

46 *Id.*

47 *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994), *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

48 *Supra* note 42.

While *Carter v. Dutchess* established that prisoners could potentially be employees, the Fifth District Court in *Watson v. Graves* ruled in favor of prisoners being covered under FLSA and considered the prisoners involved as employees due to them passing the economic realities test. One of the key factors the court used in determining that the FLSA would apply in this situation was the intention behind the FLSA. They believed the FLSA was meant to end "grossly unfair competition among employers and employees."[49] Jarreau did not have to pay minimum wage, overtime, unemployment insurance, social security or any other employee benefit plans because he was hiring out prisoners. Instead, he only paid them meager wages, well below the minimum wage. The court hypothesized that other construction contractors in the area would have been unable to compete with the prices Jarreau offered to customers because he was using his easy access to prison labor to cut costs. This would have unfairly affected the jobs and businesses in the surrounding area.[50]

D. Prescriptions

A new amendment to the FLSA that added coverage to prisoners for all work done within or outside of the prison for private and public companies would fix many issues and logical fallacies resulting from the current application of the FLSA and the Thirteenth Amendment. The work covered under the FLSA would have to be work that produces a surplus or a profit for the companies. Thus, work done within a prison that helps maintain the prison would not be covered. However, work done for the prison or an external company that produces external revenue would earn the prisoner's payment. The proposed amendment would require that the entity with the largest economic benefit from the prisoner's labor be required to pay their wages. This would mean that, in many cases, external companies would be the ones paying the wages of prisoners even if the work is performed within a prison. This amendment would resolve the inconsistency

49 *Id.*

50 *Id.*

between cases due to the current lack of guidance provided by Congress to courts regarding prisoner coverage under the FLSA.

Many disagree with paying prisoners minimum wage because they believe that the purpose of the FLSA was to provide regulations by which workers could support a reasonable standard of living for themselves. Since prisons provide basic necessities for prisoners, many argue that convicts should not be paid minimum wage. Yet, another reason behind the creation of the FLSA was to ensure that there was equal competition amongst all employers and employees.[51] Denying prisoners minimum wage creates unfair competition in local economies.[52] As shown in *Watson v. Graves,* employers and companies that have access to cheap prison labor have an unfair advantage over other local companies.[53] Additionally, having a group of people who are forced to work for well below minimum wage affects the job opportunities of people outside of prison.[54] Even if they relinquish some level of control by employing convicts, companies still have major incentives to outsource work to prisons because of the minimal wages they would have to pay. Furthermore, companies that have convicts performing their work within a prison today do not have to pay for insurance, social security, or other taxes that employers usually pay because they technically have no employees.[55] Not paying prisoners minimum wage thus helps major corporations while taking away jobs from workers outside of prison.

Additionally, many think that paying convicts minimum wage for their jobs will raise taxes. These people presuppose that the prisons would be paying convicts for their labor. Under the proposed system wherein external companies are likely paying prisoners, the tax burden may actually decrease. Since many convicts are deducted up to eighty percent of their wages for fees like room and board, victim reparations, and familial support, paying convicts minimum

51 *Supra* note 42.

52 Terrell, *supra* note 19.

53 *Supra* note 42.

54 Aggarwal, s*upra* note 7.

55 *Supra* note 42.

wage may actually decrease the toll that prisons take on the taxpayer.[56] If the corporations using convict labor are required to pay prisoners minimum wage, convicts would have more money to pay back to prisons, victims, and their family members. This would decrease the cost of prisons and even the cost of government aid programs that those with family members in prison sometimes rely on.[57] Additionally, having some money saved for when they get out of prison, would likely reduce the rates of recidivism. Many convicts end up back in jail because they rely on the same criminal behaviors to make money as they did before they went to jail.[58] By decreasing rates of recidivism, fewer people would be in prison and therefore the burden that our prison system puts on taxpayers would very likely diminish.

One potential flaw in paying all convicts minimum wage for their work is that it could result in fewer jobs being available to convicts.[59] However, it is still likely that employers would have an incentive to use convict labor, thus preserving some jobs for prisoners. Since prisons provide food, shelter, and medical care to prisoners, it is hard to say whether companies using convict labor would have to pay for benefits like insurance even if prisoners are included under the FLSA. New laws would have to be established or existing laws would have to be amended to decide issues like these that do not fit within the scope of this paper. However, depending on the future construction of these laws, employers could still have a major financial incentive to employ convicts. Even if companies were required to pay health insurance and other benefits to convicts, they would still be able to cut down costs on working space, health programs,

56 ACLU, *Captive Labor: Exploitation of Incarcerated Workers | ACLU*, American Civil Liberties Union (Jun. 15, 2022), https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers (last visited Mar 1, 2024).

57 Aggarwal, s*upra* note 7.

58 Aggarwal, s*upra* note 7.

59 Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage*, 67 TEMPLE L. REV. 334, (1994). See also *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

company events, managerial staff (since much of that work would likely be performed by prison officials) and other aspects of a job that are not required by law but are common within companies.

There are also many ethical reasons to extend FLSA coverage to prisoners. The FLSA continues to set regulations regarding the employment of persons under the age of eighteen.[60] Without the protections from labor laws, convicted children can find themselves fighting wildfires for less than a dollar an hour.[61] All children, whether they have committed a crime or not, should be protected from child labor under the same laws. Additionally, convict labor has strong ties to the continuation of African American slavery even after the Civil War.[62] Thus, paying prisoners minimum wage would help end problems that the Thirteenth Amendment and FLSA intended to solve.

IV. Conclusion

As a result of the court system's current interpretation of the Thirteenth Amendment and the FLSA, prisoners are regularly denied minimum wage and other protections guaranteed under the FLSA for free workers; therefore, the application of this Act should be broadened to include the incarcerated to more accurately reflect the Thirteenth Amendment. The Thirteenth Amendment allows for those who have been convicted of a crime to be forced to work. It does not deny them the rights given to other employees. Thus, prisoners who work for any entity besides the prison that they reside in should be paid minimum wage and should be protected under the FLSA. If companies that use prison labor had to pay the prisoners minimum wage, prisoners would have more money to pay victim reparations and dues for room and board. This could actually decrease the financial burden that running prisons puts on taxpayers. Paying the minimum wage to prisoner-employees would also decrease rates of recidivism and open up job opportunities for those

60 *Supra* note 20.

61 Hess, *Supra* note 2.

62 Armstrong, *supra* note 15.

outside of prison.[63] Lastly, covering prisoners under the FLSA would help solve remaining immoralities in our country around child labor and slavery.

63 Aggarwal, s*upra* note 7.