The Health and Safety of Incarcerated Workers:
OSHA's Applicability in the Prison Context

Introduction

In the early months of the COVID-19 pandemic, as states competed for a limited supply of face masks, prison factories in California produced more than 1.4 million masks for state agencies.[1] Robbie Hall—a 58-year-old grandmother who works for the California Prison Industry Authority (CALPIA)—stitched masks for 12 hours a day, making 60 cents for every hour she worked.[2] For the first few weeks of this work, Hall and other women in the prison factory were told they would face disciplinary sanctions if they wore the masks they were making.[3] Workers in prisons and detention facilities across the country experienced similarly unsafe conditions and threats.[4]

During the COVID-19 pandemic, incarcerated workers in both prison factories and institutional work assignments have faced some of the most high-risk work scenarios: crowded, congregate environments with poor ventilation and inadequate sanitation, PPE and social distancing.[5] But many incarcerated workers with concerns about the risk of COVID-19 infection from their work conditions were reluctant to miss days of work because they feared disciplinary action that could jeopardize one's release date or result in placement in solitary confinement. [6]

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[1] Kiera Feldman, *California kept prison factories open. Inmates worked for pennies an hour as COVID-19 spread,* L.A. TIMES (Oct. 11, 2020), https://www.latimes.com/california/story/2020-10-11/california-prison-factories-inmates-covid-19.

[2] *Id.*

[3] *Id.*

[4] *See,e.g.*, Cary Aspinwall, Keri Blakinger, Joseph Neff, *Federal Prison Factories Kept Running as Coronavirus Spread,* MARSHALL PROJECT (Apr. 10, 2020), https://www.themarshallproject.org/2020/04/10/federal-prison-factories-kept-running-as-coronavirus-spread; Samantha Michaels, *New York State has Prisoners Making Hand Sanitizer. It's Unclear if Prisoners Can Use it,* MOTHER JONES (MAR. 9, 2020), https://www.motherjones.com/crime-justice/2020/03/new-york-state-has-prisoners-making-hand-sanitizer-its-unclear-if-prisoners-can-use-it/, Julia Ainsley & Jacob Soboroff, *Detained migrants say they were forced to clean COVID-infected ICE facility*, NBC NEWS (Jun. 10, 2020), https://www.nbcnews.com/politics/immigration/detained-migrants-say-they-were-forced-clean-covid-infected-ice-n1228831.

[5] *See, e.g.,* Agence France-Presse, *US Prisons Called a Coronavirus 'Tinderbox,'* COURTHOUSE NEWS SERVICE (Mar. 19, 2020), https://www.courthousenews.com/us-prisons-called-a-coronavirus-tinderbox/; *see also A State-by-State Look at Coronavirus in Prisons,* MARSHALL PROJECT (last updated Dec. 7, 2020) (documenting the disproportionately high rates of COVID infection in detention facilities).

[6] *See, e.g.*, Feldman, *supra* note 1 (workers threatened with disciplinary action that would jeopardize parole); Ainsley, *supra* note 4 (workers who refused to clean facility placed in solitary confinement).

The COVID-19 crisis highlights both the extreme vulnerability of prisoners to infectious diseases and the coercive nature of prison work, underscoring incarcerated workers' lack of control over their dangerous workplace conditions. Incarcerated workers are often reluctant to complain about poor conditions for fear of retaliation, a situation that is further exacerbated by the fact that they are functionally exempted from coverage under occupational health and safety standards.[7]

This paper attempts to document how occupational health and safety regulations and enforcement mechanisms currently fail to protect incarcerated workers, who are especially vulnerable to both unsafe working conditions and arbitrary retaliation. I examine why we should be concerned about this gap in coverage and argue that the Occupational Health and Safety Act ("OSH Act") and its state analogues should be interpreted to provide more substantial coverage to those working in prisons. Situating this argument in a larger debate about statutory labor protections for incarcerated workers, I argue that precedent excluding incarcerated laborers from coverage under other federal protective legislation should not be applied to the health and safety context.

In Part I, I explain the background and function of the Occupational Health and Safety Administration (OSHA) and its various enforcement mechanisms. I then look at the relationship between federal and state OSHA administrations and discuss which workers are considered to be "employees" covered under OSH Act's protections. In Part II, I unpack the term "employee" as it has been applied to incarcerated workers, looking at how courts have carved out a "prisoner exception" from federal protective legislation. In Part III, I provide an overview of how OSH Act and other health and safety regulations currently operate in the prison work setting, detailing how agency interpretations have excluded most incarcerated workers from health and safety

[7] *See infra* Part III.A.

protections. I then present a normative argument for why incarcerated workers should not be excluded from OSHA coverage, suggest ideas for how this coverage could be achieved, and engage with how courts might distinguish the question of who qualifies as an employee under OSH Act from more restrictive interpretations of other federal protective legislation. I conclude by discussing some of the potential ramifications of extending OSHA coverage to incarcerated workers.

I. The Occupational Safety and Health Act

A. The statute & its enforcement

The preamble of the Occupational Safety and Health Act ("the OSH Act" or "the Act"), passed in 1970, declares the statute's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[8] The OSH Act authorizes the Department of Labor to effectuate this goal by both implementing explicit statutory protections and promulgating complementary regulations and standards.[9] The Supreme Court has held that the OSH Act, along with other health and safety legislation, should be "liberally construed to effectuate the congressional purpose" of providing safe working conditions and protecting public health.[10] In line with this principle, the Court has upheld interpretive regulations that create additional rights for workers when those regulations "conform to the fundamental objective of the Act" and are not contradicted by the Act's language or legislative history.[11]

[8] Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-12 (1980) (citing the OSH Act's preamble at 29 U.S.C. § 651(b)).
[9] *Id.* at 11-13.
[10] *Id.* at 13 (citing United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969)).
[11] *Id.* at 13.

The Occupational Health and Safety Administration (OSHA) sets workplace safety standards and provides education and training to ensure that those standards are met.[12] In addition to standard-setting, OSHA has enforcement powers to receive worker complaints, conduct inspections, and issue citations to employers for safety violations. Importantly, the Act's remedial orientation is "prophylactic in nature:" it does not require that an injury occur before the agency is authorized to promulgate health and safety standards and issue citations.[13] The Secretary of Labor has broad enforcement discretion to decline to promulgate standards,[14] conduct inspections,[15] and issue citations.[16]

OSHA provides no private right of action for workers to bring suit against their employers in court.[17] The OSH Act allows employees to file complaints with the agency when they believe that their workplace is in violation of a health or safety standard, or that working conditions present an imminent danger.[18] If OSHA determines that there are reasonable grounds to believe that a violation or danger exists, the agency "must initiate an inspection 'as soon as practicable, to determine if such violation or danger exists.'"[19] If the agency believes that the employer has violated OSHA requirements, she will issue a citation, which is reviewable by the Occupational

[12] Palmer v. Amazon.com, Inc., -- F.Supp.3d ---, at *5 (E.D.N.Y. 2020).
[13] *Whirlpool Corp.*, 445 U.S at 13.
[14] *See, e.g.,* In re: American Federation of Labor and Congress of Industrial Organizations*,* 2020 WL 3125324 (D.C. Cir. 2020) (OSHA's decision not to issue an emergency temporary standard for COVID-19 workplace standards was entitled to deference).
[15] *See* 29 U.S.C.§ 658; *see also Federal OSHA Complaint Handling Process,* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (last visited Nov. 22, 2020), https://www.osha.gov/as/opa/worker/handling.html.
[16] *See, e.g*, Patrick Kapust and Scott Ketcham, *Memorandum for Regional Administrators State Plan Designees,* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Apr. 16, 2020), https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during. *But see* 29 U.S.C. § 659 (if the Secretary believes an employment has violated the OSH Act, he "shall" issue a citation to the employer).
[17] *See* Michael C. Duff et al., *OSHA's Next 50 Years: Legislating a Private Right of Action to Empower Workers,* CENTER FOR PROGRESSIVE REFORM 5 (July 2020), https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf.
[18] *Palmer*, at *5.
[19] *Id.*

Safety and Health Review Commission ("OSHRC").[20] OSHRC's decisions are then reviewable by a federal court of appeals via petition for review.[21] If the agency is concerned that an employer is engaged in dangerous practices that could "reasonably be expected to cause death or serious physical harm" before the danger can be eliminated through the OSHA enforcement procedures outlined above, the agency can petition a federal district court requesting an temporary restraining order or injunction against the employer.[22] If the agency "arbitrary or capriciously" fails to seek injunctive relief against an imminent danger, a worker can file a writ of mandamus to compel the agency to seek such an order.[23] This mandamus procedure is the only explicit statutory mechanism for an individual to invoke the protections of OSHA in court without first exhausting the administrative enforcement process.

The failure by OSHA to promulgate standards or robustly enforce existent standards has significant implications for workers' ability to seek any judicial remedy for workplace safety violations. In the COVID-19 context, where OSHA repeatedly refused to issue binding health and safety standards,[24] workers sought to remedy workplace safety issues by bringing common law breach of duty and public nuisance claims against their employers in court, asking the courts to order employers to comply with public health guidance.[25] In several of these cases, federal district courts dismissed worker's claims in part based on the doctrine of primary jurisdiction, alleging that OSHA's expertise on workplace safety issues and an interest in uniform decisions requires that the agency make the primary determination on these issues before a plaintiff is able to bring

[20] *Id.*
[21] *Id.*
[22] *Rural Community Workers Alliance v. Smithfield Foods,* 459 F.Supp.3d 1228, 1241 (W.D. Miss. 2020) (citing 29 U.S.C. § 662).
[23] *Id.* (citing 29 U.S.C. § 662(d)).
[24] *See, e.g.*, Kate Gibson, *OSHA has failed to protect workers from COVID-19, unions say,* CBS NEWS (Oct. 9, 2020); *In re: American Federation of Labor and Congress of Industrial Organizations, supra* note 14.
[25] *See Palmer v. Amazon*, at *5 (E.D.N.Y. 2020); *Rural Community Workers Alliance,* at 1241.

any claim for relief to a court.[26] As discussed previously, the OSHA enforcement process is lengthy: the agency must respond to a complaint, conduct an investigation, make findings, and issue a citation before any possibility of administrative or judicial review is available.[27] In addition, OSHA has broad enforcement discretion in deciding to respond to complaints, conduct investigations, and issue citations.[28] Any decision by OSHA to deny a complaint or refuse to enforce standards must be administratively appealed to the OSHRC before a plaintiff can then petition a federal court of appeals for review. The delays inherent in this administrative process—exacerbated by a recalcitrant administration[29]—combined with the primary jurisdiction doctrine left vulnerable workers without a means of seeking timely relief for COVID workplace safety violations.

B. *OSHA's applicability to state employees*

Though OSH Act federalized workplace safety and health regulations and purports to offer broad coverage to employees across the country, state and local government employees are statutorily exempted from coverage under the federal act.[30] This exemption for state employees could be read through a federalism lens, reflecting the federal government's desire to avoid unnecessary interference with state's public administration, and to allow states themselves to regulate the health and safety of their employees. This interpretation is supported by provisions in OSH Act that allow states to opt out of regulation by federal OSHA by designing their own state

[26] *Palmer,* at *5-6; *Rural Community Workers Alliance*, at 1240-41.
[27] *See supra* notes 18-23 and accompanying text.
[28] *See supra* notes 14-16 and accompanying text.
[29] Eyal Press, *Trump's Labor Secretary is a Wrecking Ball Aimed at Workers* (Oct. 26, 2020), https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers.
[30] 29 U.S.C. § 652(5); *see also Standard Interpretation: Federal OSHA has no jurisdiction over State, municipal, or volunteer fire departmetnts,* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Oct. 11, 2006), https://www.osha.gov/laws-regs/standardinterpretations/2006-10-11-1 (stating that federal OSHA has no authority over state and local government employees).

health and safety plans, as long as the state plan is at least as effective as the federal program.[31] Twenty-two states have designed full coverage plans that assume responsibility for regulating health and safety for both private sector and public employees, opting out of federal OSHA entirely, while five other states have implemented public employee-only state plans in which federal OSHA maintains jurisdiction over private employees.[32] In each of these 27 states, public employees are covered under a state health and safety administration and receive the benefits of standard-setting and access to government enforcement of said standards. However, this leaves 23 states in which state and local government employees are not covered by either federal OSHA or a state analogue. This gap in coverage has raised concerns that these public-sector employees who witness or experience workplace safety hazards are left without recourse to file complaints and pressure employers to improve their workplace safety, resulting in higher workplace injury rates.[33] In response to these concerns, members of Congress have repeatedly introduced the Protecting America's Workers Act, which, among other expansions of OSHA's coverage, would include state employees in the Act's purview.[34]

II. The prisoner exception to federal protective legislation

A. Who is an employee?

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[31] 29 U.S.C. § 667(b)-(c).
[32] *See State Plans,* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, https://www.osha.gov/stateplans.
[33] *See* Katherine Torres, *Congress Pushes OSHA Coverage for Public Workers*, EHS TODAY (May 24, 2007), *https://www.ehstoday.com/standards/osha/article/21910936/congress-pushes-osha-coverage-for-public-workers*; *Protecting America's Workers Act: Modernizing OSHA Penalties: Hearing before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor,* 111th Cong. 111-51 (2010) (statement of Hon. David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor) at 12, *available at* https://www.govinfo.gov/content/pkg/CHRG-111hhrg55302/pdf/CHRG-111hhrg55302.pdf (state government and local government injury and illness incident rates were 21% and 79% higher than injury rates in the private sector).
[34] *Id.; see also House lawmakers reintroduce Protecting America's Workers Act,* SAFETY AND HEALTH MAGAZINE (Feb. 13, 2019), https://www.safetyandhealthmagazine.com/articles/18039-house-lawmakers-reintroduce-protecting-americas-workers-act.

Importantly, the standards promulgated by OSHA and the enforcement mechanisms available under OSH Act only cover workers who are classified as "employees."[35] The term "employee" is defined by the Act in self-referential terms: an employee is "an employee of an employer who is employed in a business of his employer which affects commerce."[36] This definition, similarly to definitions of employee in many other federal statutes, gives little clear guidance on who the statute is intended to cover. The question of which workers qualify as employees and thus receive the panoply of statutory work protections is a controversial and important threshold question in most areas of employment and labor law.[37] Employers have an incentive to misclassify employees as independent contractors to avoid liability under protective legislation, including minimum wage laws, overtime requirements, and payroll taxes for social security and workers compensation.[38]

OSH Act, along with many other federal statutes, uses the "right-to-control test" to determine if an employee has been misclassified as an "independent contractor" by their employer.[39] To establish that an individual is an employee under the "right-to-control test," a worker has to show that the employer "controlled or had the right to control the manner and means of the agent's work."[40] To make this determination, a court or administrative agency considers various factors, including "the skill required; the source of the instrumentalities and tools; the location of the work; . . . the extent of the hired party's discretion over when and how long to work;

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[35] 29 U.S.C. §§ 655 ("Each employer shall furnish to each of his *employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.") (emphasis added).
[36] 29 U.S.C. §§ 653(6).
[37] Kenneth Dau-Schmidt, *The Problem of "Misclassification," or How to Define Who is an "Employee" under Protective Legislation in the Information Age*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 141-42 (Richard Bales & Charlotte Garden eds. 2020).
[38] *Id.* at 146-47.
[39] *Id.* at 143 (federal statutes that employ the right-to-control test include the NLRA, Title VII of the CRA, ADA, and ERISA).
[40] *Id.* at 142.

. . . [and] whether the work is part of the regular business of the hiring party . . . ."[41] The right-to-control test is a totality of the circumstances evaluation in which no single factor is necessary or determinative and the test's coverage is often interpreted quite narrowly. The right-to-control test is considered the most employer-friendly of the three tests customarily employed to determine who is an employee.[42]

Though much scholarship and caselaw has focused on the "independent contractor" exemption to legislation intended to protect workers, misclassified independent contractors are not the only workers who are excluded from protective legislation. Most federal protective statutes passed as part of the New Deal contained explicit statutory exclusions of agricultural and domestic workers, a carve-out intended to exclude primarily black workers and appease Southern white legislators.[43] Most of these carve-outs have been repealed by Congress, but the National Labor Relation Act still does not protect agricultural and domestic workers' rights to unionize and collectively bargain.[44] Congress has also amended federal protective legislation to exempt certain classes of workers from coverage.[45]

Courts have also interpreted the breadth of the term employee to exclude certain workers who courts determined Congress did not intend to cover with protective legislation. For the purpose of this paper, I will focus on the judicially-created "prisoner exception" that courts have articulated to exclude incarcerated workers from federal protective legislation, especially under

[41] *Id.* (citing Community for Creative Non-violence v. Reid*,* 490 U.S. 730, 751-752 (1989)).
[42] *Id.* at 145-146.
[43] Juan Perea, *The Echoes of Slavery: recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act,* OHIO STATE L. REV 95, 96 n.1; 102-118 (2011).
[44] *Id.* at 95-96.
[45] *See, e.g.*, 29 U.S.C. § 213 (amended in 2002) (exempting school teachers, outdoor salesmen, and babysitters from coverage under FLSA).

the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act (CRA).[46] I will first provide a brief overview of the history of prison labor and current practices before discussing how courts have interpreted protective statutes to exempt the majority of incarcerated workers.

B. Prison labor

Prison labor has served as a linchpin of the American carceral system since its creation. Colonial penitentiaries promoted prison labor programs as a crucial element of the reformation of the prisoner, who would develop the skills to be economically useful upon release.[47] Hard labor performed in public—primarily in the form of the chain gang—was intended to serve as a strong deterrent to the public.[48] Prison labor (and the accordant practice of convict leasing) expanded rapidly in the wake of the abolition of chattel slavery, as Southern states enacted laws to criminalize and incarcerate emancipated black men and women and then leased their labor out to plantation owners and private companies.[49] These convict leasing programs served as a source of enormous profit for both private companies and the state lessors, as prisoners were paid little to no wages and worked long hours, under unsafe and often deadly work conditions.[50] Northern states did not lease out prisoners in the same manner, but instead built out a "contract" system, in which prisoners worked at factories within the prisons' walls, but were overseen by private firms who provided the raw materials and sold the prison-produced goods.[51] The lack of wages, long hours

[46] *See, e.g.*, *Bennett v. Frank,* 395 F.3d 409, 409 (7th Cir. 2005) ("[P]risoners are not employees of their prison . . . . Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA.").
[47] *See G*enevieve Lebaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective,* 15 JOURNAL OF LABOR AND SOCIETY 327, 332 (2012); Patrice Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates* 27 J. of Civ. R. and Econ. Dev. 679, 685-86 (2015); Stephen P. Garvey, Freeing Prisoners' Labor, 50 STAN. L. REV. 339, 348 (1998).
[48] Lebaron, *supra* note 47, at 332.
[49] *Id.* at 337; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 28 (2010); Garvey, *supra* note 47, at 355-56.
[50] *See* Lebaron, *supra* note 47, at 337-340 (detailing how convict laborers were frequently worked for 15-17 hours daily, fed below subsistence amounts, whipped for falling behind in work, and often died before their sentence was completed).
[51] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers,* 52 IDAHO L. REV. 953, 957-58 (2019).

and unregulated working conditions made for a profitable system—a system that was opposed both by prison reformers and labor unions because it sanctioned poor working conditions and fostered unfair competition with free labor.[52] In response to pressure from organized labor, most states had phased out their contract and convict-lease systems by the mid-1900s, moving to a "state-use system" in which the state was the only authorized buyer of prison-made goods.[53]

Today, most prisoners work in some capacity, in either voluntary or mandated jobs.[54] The majority are engaged in "prison housework," performing institutional jobs within the prison, including maintenance, food service, custodial and grounds work.[55] A much smaller number of prisoners work in "prison industries:" prison factories or labor programs that produce goods and services for government agencies and private corporations.[56] Some states also provide opportunities for prisoners near the end of their sentence to work for outside employers through prison work-release programs.[57]

Incarcerated workers today are paid almost nothing for their work, even when that work is dangerous and life-threatening. Prisoners who work for the state of California fighting wildfires are paid $2 per day, plus $1 per hour when they are actively fighting fires.[58] Incarcerated workers

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[52] Fulcher, *supra* note 47, at 686.
[53] *Id.* This transition was advanced by the 1929 Hawes-Cooper Act which prevented states from selling goods made by state prisoners in other states. *Id.*
[54] This paper focuses on work performed by sentenced prisoners, who comprise the majority of incarcerated workers. However, in most pretrial facilities (jails) and immigration detention centers, many detainees work in "prison housework" positions. *See e.g.,* Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor,* THE NEW YORK TIMES (May 24, 2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html. The majority of the cases below pertain to sentenced prisoners; when cases discuss labor protections as they apply to pretrial and immigration detainees, I will note that in the footnotes.
[55] *See* Fink, *supra* note 51, at 953; Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships,* 61 VANDERBILT L. REV. 857, 868 (2008).
[56] *See* Fink, *supra* note 51, at 953; Zatz, *supra* note 55, at 869-870. In recent years, a privatized "contract system" has reemerged, in which private sector entities operate prison factories and/or purchase prison-produced goods. *See* Zatz, *supra* note 55, at 869-870.
[57] *See* Stanley E. Grupp, *Work Release in the United States*, 54 J. Crim. L. & Criminology 267, 267-68 (1963) (describing the history of work release in the United States).
[58] Maanvi Singh, *Pandemic sidelines more than 1,000 incarcerated wildfire fighters in California,* GUARDIAN (Jul. 10, 2020), https://www.theguardian.com/us-news/2020/jul/10/california-wildfire-coronavirus-prison-incarcerated-firefighters.

in New York made 16 to 65 cents per hour bottling hand sanitizer in a congregate factory setting in response to the COVID-19 shortage,[59] while women in a California prison made 35 cents to $1 per hour making masks that they were not allowed to wear.[60] In all of these low-paid positions, workers are subject to the supervision of prison authorities, who wield almost absolute control over their charges. Incarcerated workers recount that prison authorities often threaten disciplinary sanctions—such as loss of good time credits, solitary confinement, or immediate termination—to coerce workers into working against their consent.[61] Despite increasing media coverage of these issues, workers have little legal recourse to challenge their low pay, dangerous working conditions, or any retaliation they might face for raising concerns to supervisors.

C. FLSA protections for prisoners

As of 2017, the wage for a prisoner working in a "prison housework" position ranged from nothing to $2 per hour.[62] The average wage across the states was .63 cents per hour. For prison industry jobs, workers were paid slightly more: up to $5.15 per hour, with an average hourly wage of $1.41 across the states.[63] None of these wages come close to the federally-mandated minimum wage of $7.25, a complaint that was central to prison work strikes in 2016 and 2018.[64] These wages

[59] *See* Michaels, *supra* note 4.
[60] *See* Feldman, *supra* note 1.
[61] *See e.g.*, *id.* (workers were threatened with losing their factory jobs or facing discipline if they refused to work because of COVID fears); Ainsley, *supra* note 4 (workers threatened with solitary confinement for refusal to work); Planet Money, *The Uncounted Workforce*, NPR (Jun. 29, 2020), https://www.npr.org/transcripts/884989263 (recounting use of disciplinary sanctions and solitary confinement to coerce people to work even when they were sick).
[62] Wendy Sawyer, *How much do incarcerated people earn in each state?,* PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/.
[63] *Id.*
[64] German Lopez, *America's Prisoners are going on strike in at least 17 states,* VOX (Aug. 22, 2018), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018; Tom Kutsch, *Inmates strike in prisons nationwide over 'slave labor' working conditions,* GUARDIAN (Sep. 9, 2016), https://www.theguardian.com/us-news/2016/sep/09/us-nationwide-prison-strike-alabama-south-carolina-texas.

are possible because courts have overwhelmingly interpreted FLSA to exclude prison workers from the statute's protections.[65]

Most courts deny incarcerated workers coverage under FLSA at the threshold inquiry by determining that they are not employees for purposes of the statute.[66] There is no statutory exemption of prisoners and no demonstrated congressional intent to exclude people working in prison from FLSA's protections, so courts have had to engage in more in-depth analysis of how employee status maps onto those working in prison.[67] Instead of applying the traditional "economic realities" test,[68] courts have fashioned new, often convoluted analyses specifically for determining the applicability of employment protections to incarcerated workers, utilizing inferred legislative intent, contract theory, and penological concepts to categorize incarcerated laborers as not-employees and remove them from the reach of protective legislation.[69] A handful of courts

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[65] *Compare* Zatz, *supra* note 55, at 882 n.101-02 (2008) (collecting over forty-five cases in which courts found no employment relation) *with id.* at 883 n.103 (collecting seven cases in which courts found that there *could* be an employment relationship at the motion to dismiss or summary judgment stage; no reported cases were ever decided for the incarcerated worker at the final judgment stage).

[66] *See* Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers,* U. PENN. J. OF LABOR AND EMPLOYMENT L. 191, 193-97 (2002) (detailing how courts have evaluated whether prison workers are employees for the purpose of coverage under the FLSA); *see also* Vanskike v. Peters, 974 F.2d 806, 807 n.2 (7th Cir. 1992) ("FLSA lists specific exceptions to its coverage of "employees" but does not list prisoners as an exception. This framework does suggest that all individuals within the general category of "employees," if not specifically excluded, come within the statute's scope. . . The argument does not take us anywhere, however, because it assumes that prisoners plainly come within the meaning of the term 'employees.'").

[67] *See Vanskike,* 974 F.2d at 807 (inferring Congressional intent from the passage of other legislation, not from discussions of FLSA itself). The conclusion of the *Vanskike* court runs counter to Supreme Court precedent, where the court has taken the position all individuals within the general category of "employees," if not specifically excluded, are presumed to be covered by protective legislation. *See* Powell v. United States Cartridge Co.*,* 339 U.S. 497, 516–17 (1950).

[68] *See id.* at 809 (conceding that an application of the economic reality test might result in a finding of employee status and choosing not to apply it); Hale v. State of Ariz.*,* 993 F.2d 1387, 1393-94 (9th Cir. 1993) (stating that the economic reality test is inappropriate in the prison work context).

[69] *See* Zatz, *supra* note 55, at 885 (2008) (discussing how courts have excluded incarcerated laborers from FLSA protections in part by relying on a "penological justification" for prison labor that obviates an employment relationship.); *see also* Kara Goad, *Columbia University and Incarcerated Worker Labor Unions under the National Labor Relations Act,* 103 CORNELL L. REV. 177, 188-190 (2018) (applying the logic of FLSA and Title VII cases to the question of the NLRA's applicability to incarcerated workers); Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons,* 111 COL. L. REV. 1048 (2011) (discussing how courts analyze whether Title VII applies to incarcerated laborers).

have determined prison workers can be classified as employees,[70] but only in certain work arrangements: when they are performing non-compulsory labor for private employers on work release in locations outside the prison.[71] When a prisoners' work is compelled, the prisoner is not covered by FLSA because he is "truly an involuntary servant to whom *no* compensation is actually owed."[72]

Courts' reasoning in denying incarcerated workers protection under FLSA hinges on their characterization of their principal-agent relationship as fundamentally different than a traditional employment relationship. The analysis of whether incarcerated workers are employees by necessity turns both the "economic realities" and "right to control" tests on their heads. As put by one court: "the problematic point is that there is *too much* control to classify the relationship as one of employment."[73] As such, the economic reality test elucidates only one "boundary of the definition of 'employee;' in the prison context, courts "are concerned with a different boundary."[74]

The vast majority of incarcerated worker claims for protection under FLSA fail because courts adopt what Noah Zatz terms an "exclusive market approach."[75] Courts have found that incarcerated workers cannot engage in true economic or market relationships with their employers.[76] Under this logic, imprisonment "take[s] [workers] out of the national economy" and places them in "a separate world of the prison."[77] When courts segregate the prison from the

[70] *See Zatz, supra* note 55, at 882 n.103 (collecting only seven cases in which courts found that there *could* be an employment relationship at the motion to dismiss or summary judgment stage; no reported cases have ever been decided for the incarcerated worker at the final judgment stage).
[71] *See e.g.*, Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990); Carter v. Dutchess Community College, 735 F.2d 8, 12 (2d Cir. 1984), Henthorn v. Dep't of Navy, 29 F.3d 682, 686 (D.C. Cir. 1994).
[72] *Henthorn*, 29 F.3d at 686 (emphasis in original).
[73] *Vanskike v. Peters*, 974 F.2d at 810 (denying coverage to incarcerated workers under FLSA) (emphasis in original)
[74] *Id.*
[75] Zatz, *supra* note 55, at 882.
[76] *Id.* For a concise and clear summary of Zatz's "exclusive market approach" argument, see Goad, *supra* note 69, at 189-90.
[77] *Vanskike,* 974 F.2d at 810, 812 & n.5; *see also* Zatz, *supra* note 55, at 885.

economy, it is easy to presume that Congress intended to exclude those incarcerated from statutory coverage: since incarcerated workers are "removed from American industry," they "are not within the group that Congress sought to protect."[78] This analysis is sometimes bolstered by purposive interpretations of FLSA.[79]

Courts demarcate the separate world of the prison from the economic realm of employment by highlighting the lack of contractual freedom in the penal labor sphere.[80] As Zatz explains, the penal sphere's inherent "inhospitab[ility] to contract" consists of three components: there is no free contract when prison labor is involuntary; there cannot be a contract when there is no exchange between the parties; and any exchange that does exist lacks the "bargained-for exchange of labor for consideration."[81] Courts treat incarcerated workers' inability to engage in freely-formed contractual relationships as obviating any possibility of workers engaging in economic or market relationships.[82]

Assumptions about the experiences of incarcerated workers characterize courts' reasoning and determination that FLSA should not be read to cover incarcerated laborers. When a court opines that FLSA's goal to ensure a minimum standard of living for workers is inapplicable because "prisoners' basic needs are met in prison, irrespective of their ability to pay,"[83] the court is defining basic needs narrowly and ignoring the reality of day-to-day life inside a prison. Prisons often contract with private vendors to provide daily meals to inmates; these private vendors often

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[78] *Alvarado Guevara v. INS,* 902 F.2d 394, 396 (5th Cir. 1990) (discussing immigration detainees).
[79] *See, e.g.*, *Vanskike,* 974 F.2d at 810-12 (noting that FLSA's aim was to ensure a minimum standard of living for workers and prevent unfair competition through the use of underpaid labor and finding that neither rationale applied in the prison work context).
[80] Zatz *supra* note 55, at 885.
[81] *Id.*
[82] *Id.*
[83] *Vanskike*, 974 F.2d at 810–11; *see also* Hale v. State of Ariz., 993 F.2d 1387, 1396 (9th Cir. 1993) (holding that the problem of substandard living conditions does not apply to prisoners); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (holding that there is no need to protect the standard of living for prisoners because they do not have to purchase food, shelter or clothing).

seek to cut costs by eliminating fresh fruits and vegetables and serving low quality food that does not meet individuals' nutritional needs.[84] Individuals can supplement the food the prison provides by buying food from the commissary; the average amount of money spent on commissary purchases far surpasses the typical amount a prisoner can earn from an in-prison job.[85] Prisons are often poorly heated and cooled, and individuals have to buy additional clothes at their own expense to stay warm, or fans to keep cool.[86] People incarcerated may have previously been the sole provider for family members who are left without support upon the person's incarceration.[87] Phone calls from prison—also handled by private contractors—are often prohibitively expensive, making staying in touch with family difficult for those with fewer outside resources.[88] Basic nutrition, warmth, support and connection with family are necessary to a minimum standard of living, and courts' disregard of the true economic reality of incarceration is illustrative of a larger devaluation of those incarcerated as both workers and people.

D. Title VII protections for prisoners

As detailed above, courts have consistently found that incarcerated individuals are not employees for the purposes of FLSA protections, with a few exceptions for work arrangements where individuals on work release perform labor for third parties.[89] In contrast, the federal circuits are split on whether Title VII should apply to incarcerated workers. Despite the fact that "courts

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[84] *See* David M. Reutter, *Prison Food and Commissary Services: A Recipe for Disaster,* PRISON LEGAL NEWS (Aug. 4, 2018), https://www.prisonlegalnews.org/news/2018/aug/4/prison-food-and-commissary-services-recipe-disaster/; Kevin Bliss, *Summit Food Services Provides Inadequate Nutrition at Missouri Jail*, PRISON LEGAL NEWS (Oct 7., 2019), https://www.prisonlegalnews.org/news/2019/oct/7/report-summit-food-services-provides-inadequate-nutrition-missouri-jail/.

[85] *See* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries,* PRISON POLICY INITIATIVE (May 2018), https://www.prisonpolicy.org/reports/commissary.html.

[86] Roxanna Asgarian, *Why people are freezing in America's prisons*, VOX (Dec. 13, 2019), https://www.vox.com/identities/2019/12/13/21012730/cold-prison-incarcerated-winter; Feldman, *supra* note 1.

[87] *See* Lang, *supra* note 66, at 194-95.

[88] Bonita Tenneriello & Elizabeth Matos, *The Telephone Is a Lifeline for Prison Families. And Calls Are Outrageously Expensive*, WBUR (Jan. 27, 2020), https://www.wbur.org/cognoscenti/2020/01/27/cost-of-phone-calls-prison-bonita-tenneriello-elizabeth-matos.

[89] *See supra* notes 70-71 and accompanying text.

have consistently interpreted FLSA as carrying a broader definition of 'employee' than Title VII,"[90] some courts have held that the remedial intent of Title VII may extend to the prison context, even when FLSA does not apply. In *Vanskike v. Peters,* a lead case denying incarcerated workers coverage under FLSA, the Seventh Circuit distinguished between the applicability of FLSA and Title VII in the prison context:

> Prison is in many ways a society separate from the outside world. Discrimination, however, maintains the same invidious character within the world of the prison and outside it. Given the broad policies behind Title VII, there would appear to be no reason to withhold Title VII's protections from extending inside the prison walls. The policies underlying the FLSA, in contrast, are tied to the national economy, and those policies have limited application in the separate world of the prison.[91]

Since 1986, the Equal Employment Opportunity Commission (EEOC) has interpreted Title VII to preclude a finding of employee status for any prisoner who "is required to work by or does work for the prison."[92] In their initial interpretation letter excluding prisoners from coverage as employees under Title VII, the EEOC leaned on the primacy of the penological relationship over any employment relationship, noting that "the [prison] exercised control and direction not only over the Charging Party's work performance but over the Charging Party himself. The conditions under which he performed his job were, thus, functions of his confinement to the Respondent's institution under its control."[93] This initial guidance has since been interpreted by the EEOC to permit individuals employed on work release to be covered under Title VII.[94]

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[90] Benjamin Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants,* 2009 U. CHIC. L. FORUM 562, 567 (2009).
[91] *Vanskike*, 974 F.2d at 810 n.5.
[92] Equal Employment Opportunity Comm'n, EEOC Dec. No. 86-7 (1986).
[93] *Id.*
[94] *See* EEOC, EEOC Informal Discussion Letter (Mar. 26, 2016), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-315; *see also* Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 128 (9th Cir. 1988) (citing 1986 EEOC guidance).

Leaning heavily on the EEOC's reasoning, the Tenth Circuit has established a per se ban on Title VII coverage for incarcerated workers based on the "primary purpose" of the relationship between prisoner and prison being "incarceration, not employment."[95] This "primary purpose" analysis presupposes a mutual exclusivity between being a prisoner and being an employee.[96] In this analysis, courts bypass the traditional "right to control" or "economic reality" analysis and focus solely on the primacy of the penological relationship.[97] Under this reasoning, the indicia of employment relationship as considered under the traditional employee tests are irrelevant.[98] This formalistic test fails to address the concern at the heart of Title VII: whether "the employer's control over employment opportunities permits the erection of artificial, unnecessary barriers to those opportunities based on the worker's race, sex, national origin, or religion."[99]

In contrast, the Sixth and Ninth Circuits have allowed for the possibility of Title VII claims by incarcerated workers in certain situations.[100] The Ninth Circuit has rejected a per se exclusion of incarcerated workers, purporting instead to apply an "economic reality" test to establish employee status for purposes of Title VII coverage.[101] In its analysis, the Ninth Circuit doesn't invoke contract theory, look for indicia of a free-market relationship, or rely on the primacy of incarceration to negate employee status. Instead, the Ninth Circuit focuses primarily on "the extent

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[95] *Williams v. Meese,* 926 F.2d 994, 997 (10th Cir. 1991). One Ninth Circuit case has also utilized this "primary purpose" analysis, contravening clear circuit precedent. *See* Kirklin, *supra* note 69, at 1073-74 (discussing Wade v. California Dep't of Corr*.,* 171 F. App'x 601 (9th Cir. 2006)).

[96] This "primary purpose" analysis has also been operationalized in the FLSA context. *See, e.g.,* Wilks v. D.C., 721 F. Supp. 1383, 1384 (D.D.C. 1989) ("Inmate labor belongs to the penal institution and inmates do not lose their primary status as inmates just because they perform work."); Burleson v. State of Cal., 83 F.3d 311, 313 (9th Cir. 1996) (holding that "fundamentally penological character" of prison work arrangements precludes the finding of an employment relationship).

[97] *See* Kirklin, *supra* note 69, at 1069.

[98] *Williams v. Meese,* 926 F.2d at 997.

[99] Nancy E. Dowd, The Test of Employee Status: Economic Realities and Title VII, 26 WILLIAM & MARY L. REV. 75, 86 (1984); *see also* J.S. Welsh, *Sex Discrimination in Prison: Title VII Protections for America's Incarcerated Workers,* 42 HAR. J. OF L. & GENDER 477, 491 (2019).

[100] Kirklin, *supra* note 69, at 1068. The Sixth, Seventh, and Eighth Circuits have conflicting case law and the First and Second Circuits have not addressed this question. *Id.* at 1068, 1075.

[101] Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 128 (9th Cir. 1988).

of the employer's right to control the means and manner of the worker's performance."[102] This approach seems to more fully address the motivating concern of Title VII: that employers can use the control they exercise over their employees to discriminate and improperly limit their opportunities.[103] However, the Ninth Circuit has also interpreted the term "employee" to exclude workers "who are obligated to work at some job pursuant to a prison work program," thus covering only workers in voluntary positions.[104]

As courts carved out a prisoner exception to FLSA, they asserted that a prison's high level of control over its workers operates as a definitionally limiting factor, necessitating a unique analysis of employee status that diverges from the traditional coverage tests. In contrast, at least one court in the Title VII context has focused on the fact that a prison's near-total ability to control "the means and manners of the worker's performance" may in-and-of-itself justify the application of statutory protections, even if other traditional indicia of an employment relationships are lacking.[105] In both contexts, courts have drawn lines between compelled and voluntary labor, and work inside the prison versus work for outside entities, finding that voluntary workers—especially those in work release positions—most resemble "free employees," and thus are more likely to merit the benefits of protective employment legislation. These attempts to reason through the employee status of incarcerated workers have resulted in counter-intuitive categorizations that leave out the workers most vulnerable to discrimination and abuses: those compelled to work within the prison walls.

III. OSHA in prisons

[102] *Id.*
[103] *See* Dowd, *supra* note 99, at 86.
[104] Castle v. Eurofresh, Inc., 731 F.3d 901, 907 (9th Cir. 2013).
[105] *Baker v. McNeil Island Corr. Ctr.*, 859 F.2d at 128.

Incarcerated workers are regularly subject to coercive, unsafe, and unhealthy workplaces and have little recourse to raise complaints and improve their work conditions. In this section, I will analyze how health and safety regulations currently apply in the prison setting, identify concerning gaps in coverage, and argue that federal and state OSHA agencies should provide more substantial coverage to those working in prisons. I will then engage with the prisoner exception courts have carved out from other protective statutes and discuss why this exception should not be extended to the health and safety context.

A. Whom does OSHA currently cover in prisons?

Though there is no statutory exemption for prisoners, OSHA has long interpreted its authorizing statute to exclude most incarcerated workers from its protections. This has been achieved primarily through agency interpretations of the term "employee." The question of whether and which incarcerated workers OSH Act covers does not appear to have ever been considered in any depth by a court.[106]

First, OSHA has issued an agency directive interpreting OSH Act to exclude federal prisoners from employee status.[107] In the same directive, OSHA advised that although no prisoners are statutorily protected as "employees," incarcerated workers working in prison industry positions are entitled to OSHA's applicable protections, including the right to file hazard reports.[108] This

[106] A few courts have considered, and rejected, the idea that the Eighth Amendment requires complete compliance with OSHA safety regulations, without considering the applicability of OSHA to the prison setting. *See* Anderson v. Kernan, 2018 WL 9986805, at *1 (E.D. Cal. Aug. 10, 2018), *appeal dismissed,* No. 19-16062, 2019 WL 3916603 (9th Cir. June 27, 2019) ("In addition, nothing about the OSHA statutes cited by Plaintiff indicates that they can serve as the basis for a claim by a prisoner of a violation of his constitutional rights, and "complete compliance with the numerous OSHA regulations" has not been found to be required under the Eighth Amendment.") (citing French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985)).

[107] Occupational Safety and Health Administration, Dir. FAP 01-00-002 (1995), *available at* https://www.osha.gov/enforcement/directives/fap-01-00-002..

[108] *Id.* OSHA appears to have conducted some investigations into federal BOP prison industries. *See* Office of the Inspector General, *A Review of Federal Prison Industries' Electronic-Waste Recyclying Program*, DEP. OF JUSTICE (Oct. 2010), https://oig.justice.gov/reports/BOP/o1010_appendix.pdf (cataloguing a number of OSHA inspections conducted of BOP prison industry sites). Additionally, a search of the OSHA Establishment database returned 5 cases

directive suggests that the agency's jurisdiction categorically does not extend to the large number of workers who perform "prison housework," such as cooking, serving food, and janitorial duties. Complicating the coverage question, at least one court has found that OSHA safety standards in the federal prison industries context are advisory, rather than mandatory.[109]

Though federal prison industry jobs are ostensibly subject to OSHA supervision, the agency directive also sets significant limitations OSHA's supervisory powers. First, OSHA must give prison administrators advance notice of any inspections and get approval from BOP officials before talking to any prisoners, measure which threaten to severely minimize the effectiveness of the inspections.[110] Second, prison industries workers facing reprisals by prison authorities for reporting safety violations are not covered by whistleblower protections but rather must submit administrative grievances complaining of staff retaliation directly to prison authorities, raising concerns about further retaliation.[111]

Second, OSHA has interpreted the statute's exclusion of state employers and employees from OSHA's jurisdiction to include state prisoners and detainees.[112] In its interpretation letter on this matter, OSHA appears to presume that incarcerated workers are covered under state health and safety regulations, to the extent that said regulations exist for state employees.[113] Since 23

involving the federal prison industries. *See* https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=federal+prison+industries&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020.

[109] *See* Bagola v. Kindt, 131 F.3d 632, 635 (7th Cir. 1997) ("While UNICOR industries are not required by law to comply with the Occupational Safety and Health Administration's (OSHA) safety standards, OSHA officials inspect federal prison industries and advise prison officials regarding perceived safety problems.")

[110] OSHA, Dir. FAP 01-00-002.

[111] OSHA, Dir. FAP 01-00-002.

[112] Occupational Safety and Health Administration, *Standard Interpretation No. 1975* (Dec. 16, 1992), https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1. OSHA has also issued a non-binding legal opinion stating that courts would likely find a non-profit private corporation that manages Florida's prison labor system to be a "political subdivision" of the state and thus exempted from OSHA. *See* Memorandum from Jaylynn K. Fortney, Regional Solicitor to Davis Layne, RA/OSHA Re: Application of the Occupation Safety and Health Act to prisoners (May 15, 1996), https://www.osha.gov/laws-regs/standardinterpretations/1996-07-18.

[113] *Id.*

states do not fill the state and local government gap in federal OSHA's coverage with their own health and safety plan,[114] state prisoners and detainees in those states are presumably also not covered by any state-issued health and safety standards. Correctional officers and staff are covered under state plans,[115] but most state agencies do not appear to directly respond to complaints by incarcerated workers.[116] Some state agencies offer limited coverage to incarcerated workers in prison industry positions,[117] or cover only individuals on work release.[118]

Some states have devised intermediary regulatory mechanisms to channel incarcerated workers' health and safety complaints through the correctional facilities themselves. California's

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[114] *See* OSHA, State Plans, https://www.osha.gov/stateplans/faq.

[115] *See, e.g.,* OSHA, Establishment Search, https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=correctional&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020 (collecting 116 OSHA incident records for correctional facilities). Almost all of the pending investigation notices by state agencies that reviewed through OSHA's establishment database noted that the workers were unionized, a status that would only be applicable to outside staff.

[116] Arizona and Wyoming legislatively exempt incarcerated workers from coverage under state protective statutes, including health and safety regulation. *See* Ariz. Gen. Stat. 23-615(B)(6) (work performed by inmates of custodial and penal institution is not employment); Wyoming Gen. Stat. 27-3-105(b)(xii) (same).

No information was available online on how state health and safety agencies in the following states treat coverage under state OSHA for those incarcerated: Connecticut, Illinois, Maine, New Jersey, New York, Virgin Islands, Hawaii, Iowa, Kentucky, Maryland, Minnesota, Nevada, New Mexico, Puerto Rico, South Carolina, Tennessee, Utah, Vermont.

One state agency—Oregon—conditions its coverage of incarcerated workers on the extent of prisoners' coverage under a given city or states' workers compensation insurance policies. *See* Letter from Donald Arnold, Chief Counsel for Oregon Department of Justice to Barry Jones, Manager of Enforcement for Oregon Occupational Safety and Health Division (Jan. 5, 2004), available at https://www.doj.state.or.us/wp-content/uploads/2017/06/op2004-1.pdf.

[117] California, Michigan, and Washington's state agencies cover incarcerated workers when working in "prison industry" positions. *See* Cal. Occ. Safety and Health Reg. Ch. 3.2, art. 9, §344.42; Michigan Department of Corrections Policy Directive 04.03.101 (2016), available at https://www.michigan.gov/documents/corrections/04_03_101_Final_538901_7.pdf; Washington Industrial Safety and Health Act, Regional Directive 1.40, 2-3 (2006), available at https://www.lni.wa.gov/dA/e7f0fac8e3/DD140.pdf (incarcerated workers in industry positions are covered by WISHA but institutional support positions not covered).

[118] North Carolina and Virginia's agencies cover incarcerated workers on work release only. *See* North Carolina Gen. Stat. 148, art. 3, § 18-33.1 (Department of Labor shall exercise same supervision over conditions of employment for prisoners on work release as the department does over conditions of employment for free persons.); Virginia Occupational Safety and Health, VOSH Program Dir. 02-009B (2014), available at https://townhall.virginia.gov/l/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs%5C181%5CGDoc_DOLI_5491_v1.pdf (VOSH only has jurisdiction over prisoners employed by public employers on work release).

state agency (Cal/OSHA) has created a specific committee and procedure to review complaints by incarcerated workers in prison industry jobs.[119] This procedure first requires the committee to issue a notice to the facility recommending changes and give the facility time to comply before the complaint is passed on to the relevant agency division for further action.[120] In addition, prisoner complaints can be dismissed outright if filed anonymously.[121] Other states, such as Indiana, ostensibly require correctional agencies to comply with federal and state health and safety regulations but provide no real enforcement mechanisms, placing full supervisory power in the hands of to the state department of corrections, rather than with the state's health and safety agency.[122] This compliance arrangement is made even more toothless by exempting facilities from annual inspections by the state department of health if they are accredited by a nationally recognized accrediting organization.[123]

Other state, federal, and private prisons also point to accreditation by outside, private organizations as establishing that their correctional facilities comply with health and safety standards.[124] The primary accreditation agency is the American Correctional Association (ACA),

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[119] Cal. Occ. Safety and Health Reg. Ch. 3.2, art. 9, §344.42. Michigan has established a similar procedure, in which incarcerated workers are covered under health and safety standards but complaints are submitted to and handled by an internal prison committee. *See* Michigan Department of Corrections Policy Directive 04.03.101.

[120] *Id.* at § 344.42. There are six OSHA enforcement cases involving the California Prison Industry Authority (CALPIA). *See* OSHA, Establishment Search, https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=pia&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020.

[121] *Id.*

[122] *See e.g.* Ind. Code Ann. § 11-11-6-2 (West) (no mechanism for prisoners to file complaints); *see also French v. Owens* (discussing this statute).

[123] *Id.*

[124] *See e.g.* New York State Assembly, Public Hearing on Healthcare in New York Correctional Facilities (Oct. 30, 2017 at 74-75, https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_ddfafda03ce23b2164f9bfb016dd70f1.pdf&view=1 (discussing ACA accreditation standards regarding healthcare); Letter from Elizabeth Warren to James A. Gondles Jr., Executive Director of ACA (May 31, 2019) at 2 *available at* https://www.warren.senate.gov/imo/media/doc/2019-05-30%20Letter%20to%20ACA%20on%20Accreditation.pdf (accreditation by ACA presented by private prisons as a stamp of legitimacy that they are complying with federal health and safety standards).

which publishes authoritative standards for correctional operations and conducts triennial reaccreditations of state, federal, and privately-operated correctional and detention facilities.[125] For a facility to become accredited, it must comply (at the time of accreditation) with a certain percentage of ACA's mandatory and non-mandatory standards.[126] Though the ACA standards may overlap at times with federal OSHA standards, the ACA accreditation system is not a sufficient stop-gap for the absence of coverage by state and federal agencies. The ACA accreditation system relies on self-evaluation, paper audits, and on-site inspections for which the facility is given three months' notice to prepare.[127] Critics of the accreditation system cite the deficiency of the accreditation process, the lack of more frequent compliance investigations, and the "perverse incentives" arising from ACA's attempts to serve as both an objective accreditor and the primary trade association for the corrections industry.[128]

In addition to these critiques of the ACA accreditation as a "rubber-stamping process" that fails to provide actual oversight and prevent unsafe conditions, the standards are toothless when it comes to enforcement. ACA's most powerful sanction is denying accreditation to a facility, an action it hasn't taken in over six years, even when government investigation has revealed serious health and safety issues at accredited facilities.[129] There is also no mechanism for those incarcerated to raise health and safety concerns and file complaints about non-compliance with the accreditation standards.

B. Incarcerated workers should be covered under OSH Act

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[125] *See History of Standards & Accreditation,* AMERICAN CORRECTIONAL ASSOCIATION, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us.

[126] *See What are ACA's Standards*, AMERICAN CORRECTIONAL ASSOCIATION, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?New_ContentCollectionOrganizerCommon=1#New_ContentCollectionOrganizerCommon.

[127] Letter from Elizabeth Warren, *supra* note 124, at 4-6.

[128] *Id.* at 3, 4-6.

[129] *Id.* at 6-8; Dan Spinelli, *Elizabeth Warren Grills Pentagon About 'Toothless' Oversight of Military Prisons,* MOTHER JONES (Jun. 10, 2020), https://www.motherjones.com/crime-justice/2020/06/elizabeth-warren-grills-pentagon-about-toothless-oversight-of-military-prisons/.

The statutory purpose of OSH Act—to protect working men and women—is a broad mandate. Furthermore, the Supreme Court has held the act should be "liberally construed to effectuate the congressional purpose" of ensuring safe working conditions and protecting public health.[130] Despite the absence of a statutory exemption for prisoners, OSHA and its state corollaries have interpreted the Act to not cover most prison workers.[131] Even for the small number of incarcerated workers covered by federal OSHA—federal workers in prison industry jobs—the enforcement regime is whittled down by restrictions on surprise inspections and a lack of protection from reprisals for submitting complaints. This significant gap in coverage under OSH Act leaves some of the most vulnerable workers—often working in dangerous settings with little agency—at high risk for workplace accidents, illness, and death.

It is important to note that there is no other effective mechanism for incarcerated workers to raise concerns about dangerous workplace conditions and hold prison administrations accountable, which also means there is little incentive for prisons to take incarcerated worker safety seriously. The ACA accreditation standards that some states accept as a substitute for state health and safety inspections do not provide a mechanism for prisoners to raise complaints. Any grievances filed with the prison must go through layers of bureaucracy and can result in unlawful retaliation against complainant by staff.[132] Prisoners are excluded from most state workers' compensation statutes[133] and prison worker injuries are often not found to reach the level of a

[130] *Whirlpool Corp. v. Marshall*, 445 U.S. at 13 (citing United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969)).
[131] *See supra* Part III.A.
[132] *See, e.g.*, *Brunson v. Nichols,* 975 F.3d 275, 276 (5th Cir. 2017) (prison retaliated against prisoner with disciplinary action when he filed complaint about safety concerns).
[133] *See* Colleen Dougherty, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States,* 10 U. PA. J. OF BUS. AND EMPLOY. L. 483, 502-507 (2008).

constitutional violation.[134] Finally, sovereign immunity and other doctrinal hurdles preclude most tort claims against prison administrators.[135]

We know the conditions in prisons often violate OSHA standards because federal prison employees can and do file complaints with OSHA regarding violative work conditions. In May of 2020, a correctional officers' union filed an OSHA complaint against Oakdale Correctional Facility, alleging that the facility's mismanagement of the COVID crisis and lack of PPE created an "imminent danger" that put staff and their families at grave risk of infection.[136] OSHA is also reported to have begun an investigation into a private prison contractor that runs an immigration detention facility in Florida after a correctional officer died of COVID-19.[137] Though incarcerated workers in prison housework positions face the same perils outlined by correctional officers—lack of PPE, inadequate social distancing, poor ventilation, and frequent transfers of prisoners in and out of facilities without proper screening[138]—they are precluded from seeking outside review of these conditions.

Given this concerning gap in coverage, I argue that OSHA's authorizing statute should be interpreted more broadly, to cover all incarcerated laborers, including those that work in institutional "prison housework" work assignments. The regulatory interpretation exempting state prisoners should be reconsidered—or congressionally amended—in light of states' failure to fill in this large gap in coverage. OSHA standards should be mandatory in the prison context, with

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[134] *Id.* at 491-501.
[135] *See* Alexander Volokh, *The Modest Effect of Minneci v.Pollard on Inmate Litigants*, 46 AKRON L. REV. 287, 299-311 (outlining the difficulties inherent in suing prisons).
[136] Theresa Schmidt, *Union Leaders for prison employees file "imminent danger" complaints with OSHA* (May 21, 2020), https://www.kplctv.com/2020/05/21/prison-union-leaders-file-imminent-danger-complaints-with-osha/
[137] Mark Reagan, *OSHA investigating Port Isabel Detention Center over employee's COVID-19 death*, THE MONITOR (Jul. 17, 2020), https://www.themonitor.com/2020/07/17/osha-investigating-port-isabel-detention-center-employees-covid-19-death/.
[138] *See* OSHA Notice of Alleged Safety or Health Hazards filed by Council of Prison Locals 33 (Mar. 31, 2020), *available at* https://www.afge.org/globalassets/documents/generalreports/coronavirus/4/osha-7-form-national-complaint.pdf.

additional standards specific to prison work promulgated as necessary. Importantly, a mechanism should be designed so incarcerated workers can file complaints directly with an outside agency (rather than going through the prison administration) and an anti-retaliation provision should be introduced to protect workers from internal prison discipline for filing complaints.

This expansion in coverage could be achieved in part administratively: OSHA could issue new federal directives and interpretations that cover prison housework and make clear the mandatory nature of the regulations. States that already operate state OSHA plans could incorporate detainees and prisoners (including those performing prison housework) explicitly into their regulations.[139] Both federal and state agencies should devise grievance mechanisms to make it easy for incarcerated workers to file complaints and requests for inspections directly with an outside body, without prison oversight. In addition, members of Congress have repeatedly introduced the Protecting America's Workers Act which would expand OSHA coverage to state and municipal employees;[140] this bill could be amended to incorporate protections for workers incarcerated in state and local correctional facilities.

A possible counter-argument is that prisons are already subject to health and safety regulation and supervision by departments of correction and the American Correctional Association (ACA) and that the unique challenges correctional management support deference to this specialized regulatory regime. But allowing correctional departments to manage their own compliance with safety standards inhibits transparency and accountability and leaves incarcerated workers vulnerable to retaliation for raising complaints. In addition, this paper has already discussed the numerous shortcomings of ACA's privatized accreditation scheme.[141]

[139] This could be modeled after the CAL/OSHA provisions, ideally with a more streamlined review process and anti-retaliation provisions.
[140] *See supra* note 33.
[141] *See supra* notes 124-129 and accompanying text.

An explicit expansion of OSHA standards to incarcerated workers might prompt more extensive legal debate about whether incarcerated workers are "employees" for the purpose of the OSH Act. First, I would argue that the rationale for carving out a prisoner exception under FLSA and Title VII is inconsistent with statutory language and purpose, creates concerning policy outcomes, and should be reconsidered.[142] However, even if one accepts the logic of the courts' exclusion of prisoners from coverage under FLSA and Title VII, this precedent does not translate well into the occupational health and safety context. OSH Act's purpose—to ensure safe and healthful working conditions for working men and women—should not hinge on whether that labor is voluntary, nor on where the labor is performed. The "primary purpose" rationale—that prison labor is intended to serve a rehabilitative or penological purpose and thus should not be compensated at market rate or subject to anti-discrimination protections—does not similarly support an exemption from safety regulations. To claim that safety regulations should not apply to penologically-useful labor suggests that unsafe conditions, injuries, or death suffered by incarcerated workers should be regarded as part-and-parcel of an individual's punishment.

Similarly, the market relationship rationale for excluding incarcerated workers—especially those compelled to work—from FLSA falters in the OSHA context. The lack of a bargained-for relationship should not excuse the prison from providing for the health and safety of its workers. In fact, the mandatory nature of many prison labor programs counsels in the opposite direction: if workers cannot opt out, there is even more incentive to externally regulate the employers, who exercise almost total control over their workers. The *Baker* court's concern with the fact that prisons exercise enormous control over their workers is particularly relevant in the health and

[142] *See* Zatz, *supra* note 55; Kirklin, *supra* note 69; Lang, *supra* note 66; *see also* Fink, *supra* note 51 (discussing applicability of NLRA to incarcerated workers); Goad, *supra* note 69 (same).

safety context, where prisoners are liable to be subject to disciplinary sanctions for refusing to work based on perceived safety risks.

In both the FLSA and Title VII context, courts have been preoccupied with the distinction between work done inside the prison and work done outside the prison for private employers. This distinction rests on the idea that work done inside a prison, for the prison, should remain within the exclusive purview of the prison administration. This insulating rationale reflects remnants of the "hands-off" approach to prison administration that courts utilized through the 1960s.[143] The distinction between inside and outside work does not hold up in the health and safety context: an individual should enjoy safe working conditions, no matter whether they work in the prison kitchen, a prison factory, or for an outside employer through work release. Indeed, prisoners who work for the prison directly are more likely to face disciplinary sanctions for refusing to work because of safety concerns, and these safety concerns are most fully obscured from any outside scrutiny by the insularity of the prison.

IV. Conclusion

The current lack of remedies for incarcerated workers facing unsafe conditions or suffering from work-related injuries disincentivizes prisons from investing resources into maintaining safe working conditions. Expanding coverage under OSHA to include all workers inside correctional and detention facilities would allow incarcerated workers to file grievances with outside agencies, request inspections, and utilize the administrative appeals and mandamus procedures under the Act.

In addition, an increased OSHA presence in correctional facilities could assist prisoners in seeking damages or other judicial remedies for egregious health and safety violations. Though

[143] *See* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson,* 71 AL. L. REV. 100, 104-105 (2020).

courts have been clear that a violation of an OSHA regulation in a prison factory does not establish a constitutional violation,[144] OSHA inspections and citations could still provide a useful support for Eighth Amendment deliberate indifference claims for incarcerated workers who experience sickness or injury based on poor working conditions.[145] Deliberate indifference claims under the Eighth Amendment require both an objective component (an objectively substantial risk of serious harm) and a subjective component (a demonstration that officials knew of and disregarded an excessive risk to inmate health or safety).[146] It is often extremely challenging for prisoners to adequately document the objective risk component and to show that prison officials knew of and disregarded the risk.[147] More regular OSHA inspections and possible citations would provide objective proof of excessive risk and would serve as a type of notice to prison officials to establish knowledge of risk for the subjective inquiry.

This expansion of coverage would not only provide access to important independent enforcement mechanisms, but would also signal to prison administrators that the government takes prisoner health and safety seriously. This signaling, and the increased risk of fines and litigation, would hopefully have a deterrent effect and improve prisons' general accountability for the health and safety of those they incarcerate, affirming the inherent dignity, value, and humanity of incarcerated workers.

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[144] *See* Anderson v. Kernan, No. 118CV00021LJOBAMPC, 2018 WL 9986805, at *1 (E.D. Cal. Aug. 10, 2018), *appeal dismissed,* No. 19-16062, 2019 WL 3916603 (9th Cir. June 27, 2019) ("In addition, nothing about the OSHA statutes cited by Plaintiff indicates that they can serve as the basis for a claim by a prisoner of a violation of his constitutional rights, and "complete compliance with the numerous OSHA regulations" has not been found to be required under the Eighth Amendment.") (citing *French v. Owens,* 777 F.2d 1250, 1257 (7th Cir. 1985)).

[145] *See* Collins v. Derose, No. 3:CV-14-2425, 2016 WL 659104, at *3 n.2 (M.D. Pa. Feb. 17, 2016) (holding that OSHA does not create a private right of action but "if Plaintiff was to establish an OSHA violation it would be relevant to the merits of his Eighth Amendment claim.")

[146] Farmer v. Brennan, 511 U.S. 825 (1994).

[147] *See* Dougherty, *supra* note 133, at 491-501.