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# The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers

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— Note —

THE VOLUNTARY WORK PROGRAM:  
EXPANDING LABOR LAWS TO  
PROTECT DETAINED  
IMMIGRANT WORKERS

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INTRODUCTION

Every day, approximately 5,500 detained immigrant workers pick up mops, brooms, pots, pans, spatulas, shovels, jackhammers, and

hair trimmers to take part in the “Voluntary Work Program”<sup>1</sup>—a detention center program that provides detained immigrants with “opportunities to work and earn money while confined.”<sup>2</sup> This program, marketed to the public as a way to reduce the “negative impact of confinement,”<sup>3</sup> serves a dual purpose: to undercut the American labor market and bolster profits within the private prison industry.

Although Congress may determine the compensation rate for the Voluntary Work Program “from time to time,” the pay scale for detained immigrant workers has remained the same since its codification in the 1978 Appropriations Act.<sup>4</sup> This antiquated piece of legislation permits payment at rates as low as \$1.00 a day.<sup>5</sup> As such, immigrant detention centers may compensate workers at \$0.13 an hour for as many as eight working hours a day—a cost-saving mechanism that many detention centers welcome. Rather than employ workers from the American workforce, who would require minimum wage payments of at least \$7.25 per hour,<sup>6</sup> detention centers use the Voluntary Work Program to save approximately \$40 million a year on labor costs.<sup>7</sup>

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1. Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html> [<https://perma.cc/5Z7G-M7SU>].
  2. U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 382 (2013), <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> [<https://perma.cc/DNV4-X88Z>] [hereinafter PBNDS].
  3. *Id.*
  4. 8 U.S.C. § 1555(d) (2012).
  5. Department of Justice Appropriation Act of 1978, Pub. L. No. 95-86, 91 Stat. 419, 426 (1977).
  6. See U.S. DEP'T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (2009), <http://www.dol.gov/whd/regs/compliance/whdfs14.pdf> [<https://perma.cc/9ZAG-AE39>] (providing general information concerning the coverage of the FLSA, including minimum wage requirements).
  7. Urbina, *supra* note 1. There are claims, however, that the government underestimates the scope of the Voluntary Work Program. *Id.* An independent review of ICE contracts with detention centers suggests that approximately 135,000 detained immigrants participate in the Voluntary Work Program every year, saving the government and private prison operators as much as \$200 million in wages that, otherwise, would be used to employ ordinary workers from the American workforce. *Id.* As such, some argue that the federal government, in employing thousands of detained immigrant workers, is “the biggest employer of undocumented immigrants in the country.” Alexandra Starr, *At Low Pay, Government Hires Immigrants Held at Detention Centers*, NAT'L PUB. RADIO (July 23, 2015, 5:11 AM), <http://www.npr.org/2015/07/23/425511981/at-low-pay-government-hires-immigrants-held-at-detention-centers> [<https://perma.cc/V6DK-CFK2>].

This Note examines the Voluntary Work Program in for-profit detention centers across the country.<sup>8</sup> It argues that the Voluntary Work Program violates contemporary labor laws, which emphatically prohibit employers from hiring undocumented immigrants. Ultimately, this Note proposes that detained immigrant workers qualify as “employees” under the Fair Labor Standards Act (FLSA) and are entitled to its protections.

Part I of this Note presents the creation and implementation of the Voluntary Work Program in immigrant detention centers. Part II explores the ways immigrant detention centers benefit from cheap labor through the Voluntary Work Program. It also explores the private prison industry’s attempts to influence U.S. immigration policy to maintain detention rates that fully staff the Voluntary Work Program. Part III considers labor laws—including the FLSA and the Immigration Reform and Control Act of 1986 (IRCA)—that regulate the immigrant workforce and prohibit employers from engaging in unfair labor practices. Lastly, Part IV challenges the reasoning behind decisions to deny FLSA protections to detained immigrant workers. While courts have historically relied on an analogy between immigrant detainees and ordinary prisoners as the basis for their analysis, this Note proposes other analogies that more closely reflect the nuances of detained immigrant workers and serve as better comparators to determine employment status under the FLSA. Ultimately, this Note rejects comparisons between detained immigrants and ordinary prisoners. Instead, it encourages courts to apply the economic realities test to find that detained immigrant workers are “employees” under the FLSA and, therefore, are entitled to compensation at no less than the prevailing minimum wage.

## I. THE VOLUNTARY WORK PROGRAM: LEGISLATIVE EVOLUTION AND INDUSTRY ADOPTION

The Voluntary Work Program operates in immigrant detention centers across the country to support the “essential operations and

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8. Although this Note focuses on privately owned and operated detention facilities, the Voluntary Work Program exists in government-operated detention centers as well. Urbina, *supra* note 1. There are approximately 250 immigrant detention facilities nationwide, some operated through partnerships with state and local jails, some through contracts with private companies, and others that are operated by Immigration and Customs Enforcement itself. *Immigration Detention*, LUTHERAN IMMIGR. AND REFUGEE SERV., <http://lirs.org/immigrationdetention/> [https://perma.cc/LET7-UVLK] (last visited Feb. 3, 2017). The Voluntary Work Program operates at approximately 55 of the 250 immigrant detention centers. Urbina, *supra* note 1. Of these 55 detention centers that benefit from detained immigrant labor, 34 of them are privately owned, while the other 21 are government operated. *Id.*

services” of immigrant detention.<sup>9</sup> The government frames the program as a way to reduce the “negative impact of confinement . . . through decreased idleness, improved morale and fewer disciplinary incidents.”<sup>10</sup> But while the government presents the Voluntary Work Program as a benefit to detainees, the true beneficiaries are prison operators, who receive cheap labor to maintain immigrant detention facilities.<sup>11</sup> This in-house employment scheme allows detention facilities to avoid recruiting from the traditional labor market—thereby reducing operational costs and increasing industry profits.<sup>12</sup> In doing so, the Voluntary Work Program contributes to the substandard living conditions found in immigrant detention centers,<sup>13</sup> while padding the multi-million dollar pockets of the private prison industry.<sup>14</sup>

*A. The Codification of the “Dollar-a-Day” Provision*

The Voluntary Work Program is codified in Section 1555 of Title 8 of the United States Code, which provides that the Immigration and Naturalization Service (INS) may use its appropriations to provide “payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed.”<sup>15</sup> Despite this statutory language that encourages—and, arguably, requires—Congress to review and revise payment allowances “from time to time,” Congress has not adjusted the minimum rate of compensation

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9. PBNDS, *supra* note 2, at 382.

10. *Id.*

11. See Urbina, *supra* note 1 (noting the financial benefits that the Voluntary Work Program offers to private prison companies).

12. *Id.*

13. See generally TOM K. WONG, RIGHTS, DEPORTATION, AND DETENTION IN THE AGE OF IMMIGRATION CONTROL 109–43 (Stanford Univ. Press 2015) (describing the substandard living conditions and inhumane treatment of detainees in immigrant detention centers).

14. See generally Noah D. Zats, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relations*, 61 VAND. L. REV. 857, 867–74 (2008) (explaining the financial benefits that inmate work programs provide to the private prison industry).

15. 8 U.S.C. § 1555(d) (2012). The Immigration and Naturalization Service oversaw U.S. immigration and naturalization until 2003 when its functions were divided into three separate agencies under the Department of Homeland Security: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). *Our History*, U.S. CITIZENSHIP AND IMMIGR. SERV. (May 25, 2011), <https://www.uscis.gov/about-us/our-history> [https://perma.cc/6UJC-TWMF].

in over thirty-five years, with the Appropriations Act of 1978 continuing to serve as the legal basis for the “dollar-a-day” provision,<sup>16</sup> and permitting “payment of allowances (at a rate not in excess of \$1 per day) to aliens, while held in custody under the immigration laws, for work performed.”<sup>17</sup>

Based on this archaic piece of legislation, the private prison industry (as well as its government-operated associates) finds legal justification for compensating detainees with as little as \$0.13 an hour. In fact, in defending its use of low-cost labor under the Voluntary Work Program, the GEO Group, Inc., a leading corporation in the private prison industry, explained, “The voluntary work program at immigration facilities as well as the wage rates and standards associated with the program are set by the federal government.”<sup>18</sup> As such, while Congress ignores its obligation to re-determine pay rates for the Voluntary Work Program, the GEO Group and other private prison operators may lawfully compensate detained immigrant workers at subminimum wages.<sup>19</sup>

#### *B. Implementing the Voluntary Work Program*

Without congressional oversight, Immigration and Customs Enforcement (ICE), the division of the Department of Homeland Security (DHS) responsible for enforcing immigration laws within the interior of the United States, maintains independent authority to define the character of the Voluntary Work Program.<sup>20</sup> ICE’s Performance-Based National Detention Standards (PBNDS) provide agency guidance on the Voluntary Work Program and specifies the

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16. See Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, 29 GEO. IMMIGR. L.J. 391, 428–30 (2014) (discussing the legislative basis for the Voluntary Work Program’s compensation policy).
  17. Department of Justice Appropriation Act of 1978, Pub. L. No. 95-86, 91 Stat. 419, 426 (1978).
  18. See Rachel Estabrook, *Colorado Immigrant Detainees’ Labor Claims May be Part of National Issue*, COLO. PUB. RADIO (Oct. 27, 2014), <http://www.cpr.org/news/story/colorado-immigrant-detainees-labor-claims-may-be-part-national-issue> [<https://perma.cc/8W5M-TWMR>] (interviewing detained immigrant workers in an immigrant detention facility in Aurora, Colorado, where detainees are paid as little as one dollar a day for work under the Voluntary Work Program).
  19. *Id.* (quoting a statement from the GEO Group that detention center work programs are in compliance with administrative regulations and federal laws).
  20. See ALISON SISKIN, ANDORRA BRUNO, BLAS NUNEZ-NETO, LISA M. SEGHETTI & RUTH ELLEN WASEM, IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 8 (Bruno T. Isenberg ed. 2007) (explaining the different government agencies responsible for maintaining immigration laws).

program's purpose, standards, and expected outcomes.<sup>21</sup> According to the most recent version of the PBNDS, "detainees who are physically and mentally able to work shall be provided the opportunity to participate in a voluntary work program."<sup>22</sup> Importantly, despite the use of binding language (e.g., "shall"), the PBNDS are unenforceable,<sup>23</sup> and detention facilities may decide whether or not to adopt the provisions.<sup>24</sup>

In some respects, the PBNDS resemble an employee handbook, detailing selection criteria for the Voluntary Work Program, as well as safety precautions and prohibitions against discrimination.<sup>25</sup> In other respects, however, the PBNDS are vague and ambiguous, leaving detention centers free to shape the Voluntary Work Program in ways that benefit internal operations. Although the PBNDS do not specify the type of work that detainees perform under the Voluntary Work Program, they do differentiate the program's work assignments from

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21. PBNDS, *supra* note 2, at 382–87.
  22. *Id.* at 383.
  23. See ALEXANDRA (SACHI) COLE, AM. CIVIL LIBERTIES UNION, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 32 (Azadeh Shahshahani, ed. 2012), [http://www.acluga.org/download\\_file/view\\_inline/42/244/](http://www.acluga.org/download_file/view_inline/42/244/) [<https://perma.cc/4N8N-2JWT>] ("Although ICE's standards are non-binding, they are promulgated by the Department of Homeland Security and set forth aspirational standards for every immigration detention facility."). Government-owned detention centers, however, are required to comply with the PBNDS. U.S. CIVIL RIGHTS COMM'N, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 29 (2015), [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2015.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf) [<https://perma.cc/QMR8-PJP5>]. Still, it remains disputed whether ICE-owned facilities truly comply with the PBNDS. *Id.* at 31–32.
  24. See Sarah Dávila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 J. MARSHALL L. REV. 1433, 1440–41 (2014) (describing the failure of immigrant detention facilities to adopt certain PBNDS, including provisions related to solitary confinement); see also AM. CIVIL LIBERTIES UNION, HOLIDAY ON ICE: THE U.S. DEPARTMENT OF HOMELAND SECURITY'S NEW IMMIGRATION DETENTION STANDARDS 14 (2012), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_detention\\_standards\\_hearing\\_statement\\_final\\_2.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_detention_standards_hearing_statement_final_2.pdf) [<https://perma.cc/XDG8-FQ38>] (explaining the deficiencies of the PBNDS).
  25. If viewed as an employee handbook, the PBNDS raise interesting questions concerning whether or not the document constitutes a contract between the employer (the detention facility) and the employee (the detained immigrant worker), and what effect it may have on their employment relationship. Most courts recognize that employee manuals may function as unilateral contracts. See SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT LAW 46–64 (3d ed. 2008) (describing employee handbooks and personnel manuals as binding unilateral contacts).

those that are required of all detainees.<sup>26</sup> For instance, personal housekeeping requirements, expected of all detainees, consist of making beds, stacking loose papers, and keeping the floor free of debris.<sup>27</sup> ICE spokespersons emphasize that participants in the Voluntary Work Program perform work beyond personal housekeeping that directly contributes to institutional operations.<sup>28</sup>

But without more detailed information from the individual detention facilities concerning the nature of the Voluntary Work Program, the actual character of the Voluntary Work Program relies on firsthand reports from inside the detention centers. At the Stewart Detention Center, an immigrant detention center in Lumpkin, Georgia, owned by Corrections Corporation of America with a capacity of 1,752 detainees,<sup>29</sup> detainees reported jobs including cleaning up cells, working in the kitchen, and performing barber services.<sup>30</sup> At the Denver Contract Detention Center, an immigrant detention facility in Aurora, Colorado, operated by the GEO Group, detainees explained that their duties involved waking up at 5:00 a.m. to serve meals, clean showers, give haircuts, and perform outdoor maintenance.<sup>31</sup>

Of particular concern, some detainees report that the Voluntary Work Program is not truly “voluntary” and allege that they are victims of forced labor.<sup>32</sup> For instance, one detainee in the Stewart Detention Center explained that he was disciplined and placed in a segregated unit for refusing to work.<sup>33</sup> Others alleged being threatened with “the hole” if they did not work fast enough.<sup>34</sup> Even worse, one

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26. PBNDs, *supra* note 2, at 383.

27. *Id.*

28. See Urbina, *supra* note 1 (describing an ICE spokeswoman’s response to claims of exploitation of detained immigrant labor under the Voluntary Work Program).

29. *Stewart Detention Center*, CORRECTIONS CORP. OF AM., <https://www.cca.com/facilities/stewart-detention-center> [<https://perma.cc/A8F7-2JHY>] (last visited Jan. 19, 2016).

30. See COLE, *supra* note 23, at 57 (providing testimonies from detained immigrants concerning their experience as workers in the Voluntary Work Program in the Stewart Detention Center in Lumpkin, Georgia).

31. See Estabrook, *supra* note 18 (reporting on the Voluntary Work Program at a GEO-owned immigrant detention center in Aurora, Colorado).

32. See Anita Sinha, *Slavery by Another Name: “Voluntary” Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1, 36–42 (2015) (considering constitutional violations resulting from coercive and forced labor under the Voluntary Work Program).

33. COLE, *supra* note 23, at 58.

34. *Id.*



detainee in the Steward Detention Center suffered two leg injuries while working in the detention center's kitchen.<sup>35</sup> Despite medical orders to rest and the fact that the detainee was confined to crutches, the detention center guards forced him to continue working.<sup>36</sup> These personal accounts of forced labor suggest that the Voluntary Work Program facilitates an abusive work environment, compromising the health and well-being of immigrant detainees.

At the same time, however, some detainees value the opportunity to participate in the Voluntary Work Program, claiming that it serves as an outlet to reduce the stress and boredom of immigrant detention.<sup>37</sup> Further, they explain, the Voluntary Work Program allows detainees to develop positive relationships with facility operators and earn money to spend at the commissary.<sup>38</sup> For some, therefore, the Voluntary Work Program provides a small piece of normalcy in an otherwise dark and distorted system. This suggests that the Voluntary Work Program could be a positive feature of immigrant detention if it is properly regulated and managed in compliance with contemporary labor laws.<sup>39</sup>

## II. THE GROWTH AND PRIVATIZATION OF IMMIGRANT DETENTION

In the run-up to the 2016 presidential primaries, then-presidential-hopeful Senator Bernie Sanders, along with Congressmen from Minnesota, Arizona, and Illinois, introduced a bill<sup>40</sup> to “end the private prison racket.”<sup>41</sup> Among other provisions to mitigate the power of the for-profit prison industry, the Justice Is Not For Sale Act targets

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35. *Id.* at 61.

36. *Id.* at 58.

37. *See* Sinha, *supra* note 32, at 33 (explaining the benefits and detriments of the Voluntary Work Program).

38. *Id.* Although detained immigrant workers may spend their earnings at the detention facility's commissary, the price of goods is often significantly inflated in order to further maximize industry profits. *See* Molly Hennessy-Fiske, *Paid \$1 to \$3 a Day, Unauthorized Immigrants Keep Family Detention Centers Running*, L.A. TIMES (Aug. 3, 2015, 4:00 AM), <http://www.latimes.com/nation/immigration/la-na-detention-immigration-workers-20150803-story.html> [<https://perma.cc/9NX9-5BDX>] (describing the inflated cost of goods at immigrant detention center commissaries).

39. *Id.*

40. S. 2054, 114th Cong. (2015).

41. Press Release, Sen. Bernie Sanders, Sanders, House Leaders Introduce Bill to Ban Private Prisons (Sept. 17, 2015), <http://www.sanders.senate.gov/newsroom/press-releases/sanders-house-leaders-introduce-bill-to-ban-private-prisons> [<https://perma.cc/HJ32-JDK5>].

ICE's reliance on private companies to serve its law enforcement needs. Specifically, the bill: (1) prohibits ICE from contracting with private companies, (2) terminates requirements instructing ICE to detain 34,000 immigrants (the so-called "Bed Mandate" or "Bed Quota"), (3) improves government oversight over immigrant detention centers, and (4) ends immigrant family detention.<sup>42</sup> This not-so-subtle assault on the for-profit prison industry reflects renewed efforts to reform immigrant detention to "uphold justice—not to house innocent refugees or feed the greed of corporate interests."<sup>43</sup> This bill, however, remains stalled in the Senate, where Congress has not taken any action to pass the measure since it referred the bill to the Committee on the Judiciary in September 2015.<sup>44</sup> And despite efforts to reduce ICE's reliance on for-profit detention centers, private detention centers remain a multibillion-dollar industry that relies on cheap labor from the Voluntary Work Program.<sup>45</sup>

*A. Immigration Enforcement and Reliance on Immigrant Detention*

Immigrant detention first emerged as a mechanism to protect public health and ensure orderly immigration processing.<sup>46</sup> Over time,

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42. *Id.* The Obama administration introduced family detention in 2014 to detain asylum-seeking families fleeing violence in Central America. *Featured Issue: Family Detention*, AM. IMMIGR. LAWYERS ASS'N (Mar. 1, 2016), <http://www.aila.org/advo-media/issues/enforcement/detention> [<https://perma.cc/89RH-NNX3>]. Congressional pushback against family detention argued that the "prolonged detention of asylum-seeking mothers and children who pose no flight risk or danger to the community is unacceptable and goes against our most fundamental values." Letter from Thirty-Three U.S. Senators to Jeh Johnson, Sec'y of the Dep't of Homeland Sec. (June 1, 2015), [https://lofgren.house.gov/uploadedfiles/6.1.15\\_-\\_family\\_detention\\_letter\\_to\\_secretary\\_johnson\\_cc\\_sarah\\_saldana.pdf](https://lofgren.house.gov/uploadedfiles/6.1.15_-_family_detention_letter_to_secretary_johnson_cc_sarah_saldana.pdf) [<https://perma.cc/636L-CF87>].
43. See Press Release, *supra* note 41 (announcing the introduction of the Justice is Not For Sale Act in the U.S. Senate and House of Representatives).
44. All Actions, *All Bill Information (Except Text) for S.2054—Justice is Not For Sale Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2054/all-info#all-actions> [<https://perma.cc/373R-U4H7>] (last visited May 9, 2017).
45. The Justice is Not For Sale Act was assigned to a congressional committee on September 17, 2015, and remains stalled in committee today, with some government tracking analysts giving it a "1% chance of being enacted." *S. 2054: Justice is Not For Sale Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s2054#>. [<https://perma.cc/6RF5-U6WX>] (last visited July 24, 2016).
46. See Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 U. MICH. J.L. REFORM 879, 885 (2015) (describing public policy concerns that led to the codification of mandatory immigrant detention policies).

however, public concerns over national security became the primary justification for mass detention.<sup>47</sup> Today's immigrant detention system is largely based on a 1988 congressional statute—and its successive iterations—that supports mass immigrant detention to protect the American economy, reduce crime, and prevent terrorism.<sup>48</sup>

The Anti-Drug Abuse Act of 1988 created the first mandatory detention scheme, requiring detention of any noncitizen convicted of an “aggravated felony.”<sup>49</sup> Despite U.S. Department of Justice concerns that it lacked the resources to detain “each and every criminal alien until removal can be effected,”<sup>50</sup> Congress remained fixed on expanding mandatory detention requirements. In 1996, Congress terminated discretionary release of certain criminal offenders<sup>51</sup>—many of whom, at one point or another, were lawfully admitted to the United States.<sup>52</sup>

#### 1. Mandatory Detention Under the Immigration and Nationality Act

Section 236(c) of the Immigration and Nationality Act (INA) codifies mandatory detention.<sup>53</sup> This provision states that the Attorney General “shall take into custody” noncitizens who commit a generalized and expansive list of offenses, but mostly crimes involving moral turpitude, drug offenses, or arriving aliens in removal

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47. *See id.* at 887–88 (describing security concerns related to political dissidents and communism as the basis for immigrant detention in the early to mid-twentieth century).

48. *Id.* at 890.

49. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(2), 102 Stat. 4469, 4470 (1988).

50. *See Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 103d Cong. 100 (1993) (explaining prosecutorial discretion in immigration enforcement).

51. Under the 1996 Anti-Terrorism and Effective Death Penalty Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, Congress increased its reliance on mandatory detention, rapidly increasing the number of detained immigrants from 8,500 in 1996 to 16,000 in 1998. *Analysis of Immigration Detention Policies*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/analysis-immigration-detention-policies> [https://perma.cc/NPC4-DM9F] (last visited Jan. 30, 2017). *See also* Torrey, *supra* note 46, at 895 (describing Congress's decision to implement mandatory detention policies, despite administrative preferences for prosecutorial discretion).

52. *See Zadvydas v. Davis*, 533 U.S. 678, 697–99 (2001) (recognizing the use of mandatory detention as a means to protect public safety, but holding that a noncitizen may only be detained for a “reasonable” period of time).

53. 8 U.S.C. § 1226(c)(1) (2012) (“The Attorney General shall take into custody any alien who . . .”).

proceedings.<sup>54</sup> Mandatory detention, combined with strict federal sentencing guidelines, maintains a constant flow of immigrants in detention facilities across the country. For example, Congress expanded the definition of the term “aggravated felony,” specifically as it relates to immigration law, to expand the reach of mandatory detention, which requires detention of noncitizens convicted of aggravated felonies.<sup>55</sup> Although many of these detainees have lived lawfully in the United States and maintain significant community ties, they are ineligible for most forms of discretionary relief and are held in detention—without eligibility for bond—for the duration of their immigration proceedings.<sup>56</sup> Although prosecutorial discretion is an accepted component of immigration law, Section 236(c) suggests that “mandatory detention is the rule while discretionary release is the narrow exception.”<sup>57</sup>

## 2. Immigrant Detention Quotas and the “Bed Mandate”

First introduced under the Department of Homeland Security Appropriations Act of 2010,<sup>58</sup> the “bed mandate” or “bed quota” refers to the number of beds that DHS must have available in immigrant detention facilities across the country.<sup>59</sup> This mandate, reaffirmed in the Department of Homeland Security Appropriations

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54. *Id.* An arriving alien is an applicant for admission to the United States who comes or attempts to come to the United States through a valid port-of-entry. 8 C.F.R. § 1.2 (2016).
55. Under the Anti-Drug Abuse Act of 1988, the term “aggravated felony” only referred to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4469–70 (1988). Under the INA, however, Congress expanded the definition of “aggravated felony” to include over thirty types of offenses, including battery, theft, and filing a false tax return. 8 U.S.C. § 1101(43)(A)–(U) (2012). This, therefore, increased the number of noncitizens subjected to mandatory detention. *See Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2012), <http://immigrationpolicy.org/just-facts/aggravated-felonies-overview> [<https://perma.cc/3WHD-UQPR>] (explaining the possible immigration consequences of an “aggravated felony” conviction).
56. *See Alina Das, Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 145 (2015) (arguing that mandatory detention policies cast a wide net that incarcerates noncitizens who are not violent and pose no threat to national peace or security).
57. *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001).
58. H.R. Res. 2892, 111th Cong. (2009) (enacted).
59. *See SOFYA APTEKAR, THE ROAD TO CITIZENSHIP: WHAT NATURALIZATION MEANS FOR IMMIGRANTS AND THE UNITED STATES* 26 (2015) (considering the economic impact of the detention bed mandate).

Act of 2017, requires ICE to “maintain a level of not less than 34,040 detention beds.”<sup>60</sup> To justify this standard, the Act emphasizes that “[m]aintaining an adequate number of detention beds is critical to ensuring the integrity of our entire immigration enforcement system, including border enforcement.”<sup>61</sup> And because the Appropriations Act does not define what it means to “maintain” a bed, some legislative officials argue that ICE must not only have 34,040 beds available, but the agency must actually *fill* those beds.<sup>62</sup> One editorial board put it as follows: “Imagine if Congress mandated that an arbitrary number of jail cells be filled with prisoners—regardless of the crime rate. Authorities would be required to incarcerate people, no matter the circumstances or the affront to human rights. That’s basically the state of immigration detention in the U.S.”<sup>63</sup>

If the concept of an incarceration quota seems unusual, it is. ICE is the only law enforcement agency that Congress subjects to these standards.<sup>64</sup> Supporters of the bed mandate argue that it is necessary in order to “compel the agency to enforce existing immigration law,”<sup>65</sup> while opponents tag the policy as a paradigmatic example of the “denial of justice” imposed on noncitizens.<sup>66</sup> But while politicians and

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60. H.R. Res. 5634, 114th Cong. (2016) (enacted). *See also Immigration Detention Bed Quota Timeline*, NAT’L IMMIGR. JUSTICE CTR. (Mar. 2016), <http://www.immigrantjustice.org/immigration-detention-bed-quota-timeline> [<https://perma.cc/YE5D-RA6J>] (tracking the legislative developments that created and maintained the detention bed quota).
61. S. REP. NO. 114-264, at 55 (2016).
62. Under the Obama administration, the Department of Homeland Security has interpreted the bed mandate to require ICE to maintain—but *not fill*—the specified number of beds. *Department of Homeland Security Oversight*, C-SPAN, at 1:57:58 (May 29, 2014), <http://www.c-span.org/video/?319614-1/homeland-security-department-oversight-hearing> [<https://perma.cc/H8DP-TFP8>] (providing testimony from Secretary Johnson to the House Judiciary Committee on his interpretation of the bed mandate).
63. Editorial, *The Madness of U.S. Immigration Policy, Continued*, BLOOMBERGVIEW (Sept. 27, 2013), <http://www.bloombergvie.com/articles/2013-09-26/the-madness-of-u-s-immigration-policy-continued> [<https://perma.cc/ZQ53-CJWT>].
64. *See* Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NAT’L PUB. RADIO (Nov. 19, 2013, 3:05 AM), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full> [<https://perma.cc/22ZQ-STFQ>] (describing the bed mandate as part of a “massive increase in enforcement” of immigration laws).
65. *Id.*
66. Irving E. Figueroa, *The Bed Quota: Mandatory Detention and the Denial of Justice*, UNIV. OF N.C. CONF. ON RACE, CLASS, GENDER & ETHNICITY: BLOG (Jan. 31, 2014, 4:00 PM), <http://blogs.law.unc.edu/crcge/2014/01/31/the-bed-quota-mandatory-detention-and-the-denial-of-justice> [<https://perma>

advocates debate the effectiveness of the bed mandate, the burden on the American taxpayer remains. Even with the Obama Administration's efforts to reduce the bed mandate to 30,913, the yearly 2017 budget for detention beds and related transportation reaches \$1,748,000,000 (29,953 adult beds at a daily cost of \$126.46 per bed and 960 family beds at \$161.36, plus related transportation expenses).<sup>67</sup>

Seeking to fill these beds, Congress pressures ICE to detain many nonviolent offenders who may have criminal histories, but pose no public threat—the logic being that if Congress agrees to pay for the detention space, the agency needs to use it.<sup>68</sup> This is especially disturbing in light of the fact that grounds for removability have no statute of limitations; noncitizens face removal on the basis of their misconduct, regardless of how long ago it occurred.<sup>69</sup> As such, noncitizens with criminal convictions are particularly vulnerable.<sup>70</sup> To meet the bed mandate, DHS initiates removal proceedings against noncitizens with criminal convictions long after they complete their

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.cc/Q8TJ-LUE4] (challenging the effectiveness of the bed mandate as a tool for immigration enforcement).

67. DEP'T OF HOMELAND SEC., BUDGET IN BRIEF 38 (2017), [https://www.dhs.gov/sites/default/files/publications/FY2017\\_BIB-MASTER.pdf](https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf) [<https://perma.cc/TBK5-JFGG>]. For an interesting discussion of the monetary costs and individual harms associated with lengthy pre-trial detention in the criminal context, see Seth Osnowitz, Note, *Demanding A Speedy Trial: Re-Evaluating the Assertion Factor in the Barker v. Wingo Test*, 67 CASE W. RES. L. REV. 273, 283–84 (2017).
68. See Christina Elhaddad, Comment, *Bed Time for the Bed Mandate: A Call for Administrative Immigration Reform*, 67 ADMIN. L. REV. ACCORD 32, 43 (2014) (“By placing ICE officers under the pressure of a quota system, Congress is compelling ICE supervisors to force ICE agents to ‘bring more bodies’ to detention facilities in order to abide by quotas without assessing whether the noncitizen is subject to detention.”).
69. Generally, under non-criminal federal law, an action may not be brought against an individual for the enforcement of a civil penalty after five years from the date that a crime occurred. 28 U.S.C. § 2462 (2012). Similarly, under federal criminal law, an individual may generally not be prosecuted for a non-capital offense, unless charges are brought within five years of the crime. 18 U.S.C. § 3282 (2012). Courts, however, have refused to apply similar time constraints on immigration charges. See, e.g., *Restrepo v. Attorney General*, 617 F.3d 787, 801 (3d Cir. 2010) (“Despite our discomfiture with the prolonged delay in initiation of removal proceedings, we are compelled to concur in the conclusions of the BIA [that a statute of limitations does not apply] . . . . [T]he task of creating a limitations period lies with the legislature, not the judiciary.”).
70. See *Bedtime Stories*, DET. WATCH NETWORK, <http://endthequota.org/bedtimestories/> [<https://perma.cc/6MEB-P7BP>] (last visited Jan. 30, 2017) (documenting the stories of immigrants in detention on account of the bed mandate).

sentences—no matter how long ago or how long the noncitizen spent in prison.<sup>71</sup> Take, for instance, Manuel Roman, father of two U.S. citizen children, a five-year-old and a one-month-old, who was arrested, detained, and placed in removal proceedings on the basis of a ten-year-old misdemeanor for simple drug possession.<sup>72</sup> Although Manuel lived in the United States since childhood and may have been eligible for relief from removal under administrative reforms proposed by the Obama Administration,<sup>73</sup> he was separated from his family and removed from the United States.<sup>74</sup> Although many immigrants, like Manuel, have rehabilitated from their criminal pasts—attended counseling, enrolled in school, paid taxes, grown involved in their local communities, and taken steps to gain legal status—they nonetheless suffer from a looming threat of detention and, ultimately, removal.<sup>75</sup>

*B. The Privatization of Immigrant Detention Centers and the Boom of the For-Profit Prison Industry*

While the American taxpayer may squeal at the growing cost of immigrant detention—especially considering the availability of less expensive and more effective alternatives to detention—the private prison industry rejoices. The growing reliance on immigrant detention requires an increasing number of noncitizens to go through

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71. See IMMIGR. LEGAL RES. CTR., LIMIT REMOVAL BASED ON LONG AGO CONDUCT, <http://www.ilrc.org/files/documents/ijn-statute-of-limitations-factsheet.pdf> [<https://perma.cc/74FK-YUJC>] (last visited Jan. 30, 2017) (hereinafter LIMIT) (“[I]mmigrants face deportation for conduct that happened many years ago because federal immigration authorities have deemed that the lack of a ‘statute of limitations’ in the Immigration and Nationality Act itself allows them to reach back in time as far as they want to deport people.”).
72. *Father of Two to be Deported This Friday for 10-Year Old Misdemeanor*, NOT ONE MORE DEPORTATION, <http://www.notonemoredeportation.com/portfolio/manuelroman/> [<https://perma.cc/H8DL-T7GJ>] (last visited Mar. 15, 2016).
73. See *Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/daca> [<https://perma.cc/7PF4-PXEP>] (last visited Feb. 1, 2017) (describing how the Obama Administration’s proposed administrative reforms to the U.S. immigration system would impact people detained in immigrant detention facilities). See also Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1185–94 (2015) (discussing ongoing challenges to the constitutionality of DACA and DAPA).
74. NOT ONE MORE DEPORTATION, *supra* note 72.
75. See LIMIT, *supra* note 71 (arguing that “holding immigrants under the threat of deportation for decades-old offenses violates basic notions of fairness long recognized in the law”).

immigration proceedings.<sup>76</sup> In other words, the government is legally required to pay detention contractors to hold immigrant detainees, functionally guaranteeing multi-million-dollar profits to private prison operators.

1. The Main Players:

GEO Group and the Corrections Corporation of America

Corrections Corporation of America<sup>77</sup> opened the first private prison in the United States—an immigrant detention center in Houston, Texas—in 1984.<sup>78</sup> To meet immigrant detention quotas, the government partners with private prisons to operate a joint network of over 200 immigration jails across the country.<sup>79</sup> In 2014, ICE held sixty-two percent of its detainees in private facilities.<sup>80</sup> Two companies dominate the private detention center market: the GEO Group (GEO) and Corrections Corporation of America (CCA).<sup>81</sup> Together, GEO and CCA operate eight of the ten largest immigrant detention centers, constituting seventy-two percent of detained immigrants.<sup>82</sup> And with Congress’s increased reliance on the detention bed mandate,

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76. See generally Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 218–19 (2015) (explaining the judicial process for noncitizens facing removal from the United States).

77. On October 28, 2016, Corrections Corporation of America changed its name to CoreCivic as part of a strategic decision to “transform [its] business.” Bethany Davis, *Corrections Corporation of America Rebrands as CoreCivic*, CORECIVIC (Oct. 28, 2016, 11:00 AM), <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic> [<https://perma.cc/FXR8-MV9L>]. This corporate rebranding occurred in the immediate aftermath of increased public scrutiny of for-profit detention centers nationwide. See *infra* notes 85–89 and accompanying text. Because existing literature and commentary on for-profit detention centers refer to CoreCivic by its former name, this paper will also refer to CoreCivic as Corrections Corporation of America or CCA.

78. SILKY SHAH, MARY SMALL & CAROL WU, BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET 3 (2015), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf> [<https://perma.cc/LV93-J345>].

79. *Id.* at 1.

80. See BETHANY CARSON & ELEANA DIAZ, PAYOFF: HOW CONGRESS ENSURES PRIVATE PRISON PROFITS WITH AN IMMIGRANT DETENTION QUOTA 6 (2015), <http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota> [<https://perma.cc/R7RH-7TDC>] (describing how “the percent of the detained population held in private facilities has increased” as a result of the bed mandate).

81. *Id.* at 8.

82. *Id.* at 4.



CCA and GEO profits continue to rise. In 2007, CCA had a yearly profit of \$133,373,000, while in 2014, it reported a profit of \$195,022,000.<sup>83</sup> GEO realized even more substantial gains, increasing from a 2007 profit of \$41,845,000 to \$143,840,000 in 2014.<sup>84</sup>

In 2016, however, GEO and CCA's profits reached an unexpected roadblock when the Department of Justice (DOJ) announced that it would gradually reduce—and, ultimately, end—its use of private prisons.<sup>85</sup> In a DOJ memo tilted “Reducing our Use of Private Prisons,” Sally Yates, then the U.S. Deputy Attorney General, explained that the DOJ would either terminate or fail to renew contracts with private prison companies, including GEO and CCA.<sup>86</sup> The basis for this decision, according to the DOJ, was that private prisons “compare poorly” to Bureau of Prison facilities.<sup>87</sup> As the DOJ memo explains: “[Private prisons] simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and . . . they do not maintain the same level of safety and security.”<sup>88</sup> While the initial announcement sent GEO and CCA stocks into a nosedive, the plummeting stock prices gradually recovered once shareholders learned that DOJ contracts comprised only a small amount of government contracts.<sup>89</sup> Instead, DHS contracts for immigrant detention centers comprise most of GEO and CCA's government expenditures.<sup>90</sup>

Nevertheless, eight days after the DOJ announcement, DHS Secretary Jeh Johnson instructed DHS to “evaluate whether the immigration detention operations conducted by Immigration and Customs Enforcement should move in the same direction [as DOJ].”<sup>91</sup> In other

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83. *Id.*

84. *Id.*

85. Sally Q. Yates, *Phasing Out Our Use of Private Prisons*, U.S. DEP'T OF JUSTICE (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons> [<https://perma.cc/V2H2-J4E3>].

86. Memorandum from Sally Q. Yates, Deputy Att'y Gen., to the Acting Dir. of the Fed. Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download> [<https://perma.cc/X3BS-ZKKY>].

87. *Id.*

88. *Id.*

89. Hui-Yong Yu & Chris Strohm, *Private Prison Stocks Sink After U.S. Signals the End*, BLOOMBERG (Aug. 18, 2016, 5:22 PM), <https://www.bloomberg.com/news/articles/2016-08-18/prison-reits-sink-on-report-u-s-to-end-private-facility-use> [<https://perma.cc/C9Y7-JQSS>].

90. *Id.*

91. Press Release, DHS Press Office, Statement by Sec'y Jeh C. Johnson on Establishing a Review of Privatized Immigration Det. (Aug. 29, 2016), <https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration> [<https://perma.cc/HL73-NTRH>].

words, Secretary Johnson called for a review of for-profit immigrant detention centers to determine whether the Department should discontinue contracts with private prison operators. After a two-month investigation, a DHS report concluded that “fiscal considerations, combined with the need for realistic capacity to handle sudden increases in detention, indicate that DHS’s use of private for-profit detention will continue.”<sup>92</sup> Despite this conclusion, a nonpartisan DHS advisory council voted to reject the key section of the report that said that DHS, logistically, was forced to rely on privately run detention centers.<sup>93</sup> While the advisory council elected to uphold portions of the report calling for increased oversight over immigrant detention, the majority voted to support a dissent that rejected the finding that “reliance on private prisons should, or inevitably must, continue.”<sup>94</sup>

But both the DHS report and advisory council’s vote are nonbinding, and the Secretary of Homeland Security makes all final decisions.<sup>95</sup> And within the first months of Donald Trump’s presidency, the Trump Administration scrapped all Obama-era proposals to phase out the use of private prisons.<sup>96</sup> This was an unsurprising decision, given Trump’s vocal support for the private prison industry during the presidential campaign, where he stated that prison policy would involve “a lot of privatizations and private prisons,” which, according to Trump, “work a lot better [than government-operated incarceration facilities].”<sup>97</sup> Ultimately, despite expert findings that private prisons are inefficient and unsafe, the era of private prisons will likely continue for the foreseeable future.

## 2. The For-Profit Prison Industry as a Special Interest Group

Given the financial benefit that for-profit prisons stand to gain from mandatory detention provisions, it is of little surprise that the

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92. Alan Neuhauser, *Homeland Security Panel Rejects Reliance on Private Prisons to House Immigrants*, U.S. NEWS & WORLD REP. (Dec. 1, 2016, 7:20 PM), <http://www.usnews.com/news/national-news/articles/2016-12-01/homeland-security-splits-with-justice-department-on-private-prisons> [<https://perma.cc/599L-MFVZ>].

93. *Id.*

94. *Id.*

95. *Id.*

96. Laura Jarrett, *DOJ Walks Back Guidance Discouraging Use of Private Prisons*, CNN (Feb. 23, 2017), <http://www.cnn.com/2017/02/23/politics/doj-walks-back-guidance-discouraging-use-of-private-prisons/index.html?iid=EL> [<https://perma.cc/3ZCY-W9PL>].

97. Full Transcript: MSNBC Town Hall with Donald Trump Moderated By Chris Matthews, MSNBC (Mar. 30, 2016), [http://info.msnbc.com/\\_news/2016/03/30/35330907-full-transcript-msnbc-town-hall-with-donald-trump-moderated-by-chris-matthews?lite](http://info.msnbc.com/_news/2016/03/30/35330907-full-transcript-msnbc-town-hall-with-donald-trump-moderated-by-chris-matthews?lite) [<https://perma.cc/F3Q6-MHKV>].

industry invests substantial funds into lobbying efforts and political campaigns. After all, with increased political capital, CCA and GEO can promote detention quotas that benefit their shareholders at the expense of immigrant men, women, and children.

According to GEO, its lobbying campaigns focus on “government actions (legislative, regulatory and executive) that impact the construction and operation of prisons and detention facilities under public-private partnerships.”<sup>98</sup> This includes lobbying for “expanding the use of public-private partnerships generally and the use of alternatives to incarceration and detention.”<sup>99</sup> In 2014, GEO spent a total of approximately \$2,500,000 on direct lobbying, \$300,000 at the Federal level, and \$2,200,000 at the state and local levels.<sup>100</sup> CCA reports similar figures with \$2,600,000 on federal, state, and local lobbying efforts.<sup>101</sup>

Although both companies claim that they do not lobby for or against legislation that would undermine the justice system or alter the duration of detention,<sup>102</sup> their deep involvement in political contributions suggests otherwise. Both CCA and GEO operate political action committees that use employee and shareholder contributions to make state and federal political campaign contributions.<sup>103</sup> According to GEO disclosures, it gave approximately \$1,700,000 to political candidates and political parties in 2014.<sup>104</sup> CCA, on the other hand, made a little over \$1.1 million in campaign contributions in twenty-eight states that same year.<sup>105</sup> More recently, GEO contributed \$125,000 to the Trump campaign on November 1, 2016.<sup>106</sup> These political contributions paid off: the day after Trump’s victory, private prison

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98. See GEO GRP., POLITICAL ACTIVITY AND LOBBYING REPORT 1 (2014), [http://www.geogroup.com/documents/Political\\_Activity\\_Report\\_2014.pdf](http://www.geogroup.com/documents/Political_Activity_Report_2014.pdf) [<https://perma.cc/QWB4-PHXT>] (presenting GEO’s 2014 lobbying activities and political contributions).

99. *Id.*

100. *Id.* at 4.

101. See CORRECTIONS CORP. OF AM., POLITICAL ACTIVITY AND LOBBYING REPORT 6 (2014), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzA0Njc5fENoaWxkSUQ9LTF8VHlwZT0z&t=1&cb=635779353796645825> [<https://perma.cc/H6HL-A34V>] (describing CCA’s 2014 political and lobbying activities, including campaign contributions).

102. *Id.* at 1; GEO GRP., *supra* note 98, at 1.

103. See GEO GRP., *supra* note 98, at 2 (explaining GEO’s use of a federal political action committee to make contributions to federal elections).

104. *Id.* at 4.

105. CORRECTIONS CORP. OF AM., *supra* note 101, at 3.

106. *Itemized Receipts of Rebuilding American Now*, FED. ELECTION COMM’N (Jan. 13, 2017, 2:19 PM), <http://docquery.fec.gov/cgi-bin/forms/C0061887/1132787/sa/ALL> [<https://perma.cc/F3TR-2Z9M>].

company stock soared, with CCA stock jumping nearly forty percent and GEO stock rising around twenty percent.<sup>107</sup> Given Donald Trump's support for private prisons, compared to Hillary Clinton's calls to "[end] the privatization of prisons,"<sup>108</sup> GEO and CCA held a direct stake in the outcome of the presidential race.<sup>109</sup> Using their financial leverage, private prison companies support policies—including the bed mandate and mandatory detention—that commodify immigrants and increase detention rates.<sup>110</sup>

### III. IMMIGRATION AT THE INTERSECTION OF LABOR LAW

Although immigration laws prohibit employers from hiring undocumented immigrants,<sup>111</sup> approximately five percent of the U.S. workforce consists of unauthorized immigrant workers.<sup>112</sup> It is no secret, therefore, that undocumented workers are major contributors to the American workforce.<sup>113</sup> This reality raises questions concerning the scope of employment rights afforded to unauthorized workers. The Supreme Court addressed this issue in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,<sup>114</sup> where an employer fired a group

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107. Bob Bryan, *Private Prison Stocks Are Soaring After Donald Trump's Election*, BUS. INSIDER (Nov. 9, 2016, 9:55 AM), <http://www.businessinsider.com/private-prison-stocks-are-soaring-after-donald-trumps-election-2016-11> [<https://perma.cc/KSA4-TCR9>].

108. Criminal Justice Reform, HILLARY FOR AM., <https://www.hillaryclinton.com/issues/criminal-justice-reform/> [<https://perma.cc/MW4W-PZKY>] (last visited Jan. 16, 2017).

109. *Id.*

110. CORRECTIONS CORP. OF AM., *supra* note 101, at 3–4.

111. See 8 U.S.C. § 1324a (2012) (prohibiting “employment of unauthorized aliens”).

112. See Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the United States*, PEW RES. CTR. (Nov. 19, 2015), <http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/5TQC-HA6F>] (presenting data concerning employment rates of unauthorized immigrant workers in the United States).

113. There are approximately 1.2 million undocumented workers in the U.S. manufacturing sector, 1.3 million undocumented workers in the U.S. service sector, and millions of other undocumented workers employed in a variety of low-wage, high-risk occupations. See REBECCA SMITH ET AL., NAT'L EMP'T LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTIC COMPOUNDS V. NLRB*, <http://www.nelp.org/content/uploads/2015/03/wlghoff040303.pdf> [<https://perma.cc/F9KJ-23TG>] (last visited Mar. 13, 2016) (explaining how *Hoffman Plastic Compounds* impacted undocumented workers' rights).

114. 535 U.S. 137 (2002).

of employees for supporting a union-organizing campaign.<sup>115</sup> The National Labor Relations Board (NLRB) found that the employer's retaliatory discharge of employees based on union activity violated the National Labor Relations Act (NLRA) and ordered the employer to provide back pay and other relief to the discharged employees.<sup>116</sup> The Supreme Court, however, held that undocumented workers—unlike lawfully employed workers—could not receive back pay under the NLRA.<sup>117</sup> The Court's decision raised concerns that denying back pay to undocumented workers failed to adequately deter employers from taking illegal employment actions against undocumented employees.<sup>118</sup> In response to *Hoffman Plastic Compounds*, the Department of Labor (DOL) defined its agency position on labor law as applied to undocumented immigrants.<sup>119</sup> Specifically, the DOL decided to enforce the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the Migrant and Seasonal Worker Protection Act (MSPA), and the Mine Safety and Health Act (MSHA) without regard to an employee's immigration status.<sup>120</sup>

This Part examines the legal protections afforded to *non-detained* immigrant workers. It sets the framework for the following Part, which asks why government protections are so stringent in the traditional American workplace, but not applied to the Voluntary Work Program in immigrant detention facilities.

#### *A. Fair Labor Standards Act of 1938*

The Fair Labor Standards Act of 1938 (FLSA), commonly known as the “Wage and Hour Law,”<sup>121</sup> provides substantive guarantees for individual “employees” who work for “employers,” including minimum

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115. *Id.* at 140.

116. *Id.* at 140–41.

117. *Id.* at 140.

118. *Id.* at 153 (Breyer, J., dissenting) (arguing that requiring employers to provide remedies for unlawful employment actions against undocumented workers “reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent”).

119. Some employers read *Hoffman Plastic Compounds* to suggest that undocumented workers have no protections under U.S. labor laws, leading the Department of Labor to issue its position on the matter. See SMITH ET AL., *supra* note 113, at 1 (describing the changes to employment law following *Hoffman Plastic Compounds*).

120. *Id.* at 11.

121. Susan Charnesky, Comment, *Protection for Undocumented Workers Under the FLSA: An Evaluation in Light of IRCA*, 25 SAN DIEGO L. REV. 379, 382 (1988) (presenting the limited application of the FLSA to undocumented workers before *Hoffman Plastic Compounds*).

wage and overtime provisions.<sup>122</sup> Specifically, the FLSA requires employers to pay employees no less than the federal minimum wage and one and a half times their normal salary for overtime hours.<sup>123</sup> When President Roosevelt signed the FLSA into law, eleven-million workers gained greater workplace protections, balancing the unequal bargaining power that existed—and continues to exist—between employers and employees in the American workplace.<sup>124</sup>

The FLSA requires employers to provide minimum wages “to each of his employees who . . . is engaged in commerce or in the production of goods for commerce.”<sup>125</sup> The question, however, of who qualifies as an “employee” remains largely unsettled.<sup>126</sup> The FLSA defines an “employee” as “any individual employed by an employer.”<sup>127</sup> An employer, in turn, is “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>128</sup> Given the circular definition of “employer” and “employee,” and without further guidance from legislative history, courts have used the power of the bench to define the scope of coverage under the FLSA.<sup>129</sup> Notably, courts consistently construe the FLSA to apply the act to “the furthest reaches consistent with congressional direction.”<sup>130</sup> This

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122. *See generally* WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* (5th ed. Cambridge Univ. Press 2013) (offering a foundational understanding of U.S. labor law, including the application and interpretation of the FLSA).

123. 29 U.S.C. §§ 202, 206, 207(a)(1) (2012).

124. *See* Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 *HOFSTRA LAB. & EMP. L.J.* 19, 140–41 (2000) (detailing the impact of the FLSA on the American family).

125. 29 U.S.C. § 206(a).

126. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (recognizing the difficulty of determining the meaning of “employee” and calling statutory definitions of the term as “completely circular and explain[ing] nothing”). The FLSA and its amendments exempt specific types of workers from protection under the FLSA, including agricultural employees, disabled workers, tipped employees, outside salesmen, and amusement and recreational employees. 29 U.S.C. § 203(e)(2)–(4) (2012).

127. 29 U.S.C. § 203(e)(1) (2012).

128. *Id.* § 203(d).

129. *See* Harris, *supra* note 124, at 142–43 (showing the difficulty interpreting terms within the FLSA).

130. *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959) (finding employees who are “engaged in commerce” to be protected under the FLSA); *see also* *Haro v. City of L.A.*, 745 F.3d 1249, 1256 (9th Cir. 2014) (“The FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers.”).

liberal construction recognizes that a broad interpretation of the FLSA is essential to maintaining decent working conditions.<sup>131</sup>

Despite the many uncertainties surrounding the scope of the FLSA, the Department of Labor strongly emphasizes that the Wage and Hour Division enforces the Fair Labor Standards Act without regard to a worker's immigration status.<sup>132</sup> And in recent years, courts have upheld undocumented worker protections under the FLSA,<sup>133</sup> while the Supreme Court has declined to hear challenges that argue otherwise.<sup>134</sup> As such, the FLSA protects non-detained immigrant workers—with or without work authorization—from wage and hour violations at the hands of unscrupulous employers.

*B. Immigration Reform and Control Act of 1986*

The Immigration Reform and Control Act of 1986 (IRCA) was one of the most sweeping legislative overhauls of the U.S. immigration system.<sup>135</sup> Also known as the “three-legged stool,” IRCA introduced a trio of regulations related to tougher border enforcement, a pathway to citizenship for select noncitizens, and harsh penalties for employers who employ undocumented workers.<sup>136</sup> With an inflow of migrants

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131. *E.g.*, *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir. 1999) (recognizing that the FLSA must be “broadly interpreted and applied to effectuate its [remedial and humanitarian] goals”).

132. *See* U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF *HOFFMAN PLASTICS* DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION 1 (2008), <http://www.dol.gov/whd/regs/compliance/whdfs48.pdf> [<https://perma.cc/U26V-7LHN>] (describing the U.S. Department of Labor Wage and Hour Division’s application of labor laws, including the FLSA, to unauthorized immigrant workers).

133. *See, e.g.*, *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 937 (8th Cir. 2013) (holding that undocumented workers were eligible for protection under the FLSA).

134. *See, e.g.*, *Jerusalem Cafe, LLC v. Lucas*, 134 S. Ct. 1515 (2014) (mem.) (denying to hear an employer’s appeal that challenged the application of the FLSA on unauthorized immigrant workers).

135. *See generally* MARÍA E. ENCHAUTEGUI, URBAN INST., A COMPARISON OF TODAY’S UNAUTHORIZED IMMIGRANTS AND THE IRCA LEGALIZED: IMPLICATIONS FOR IMMIGRATION REFORM (2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412980-A-Comparison-of-Today-s-Unauthorized-Immigrants-and-the-IRCA-Legalized-Implications-for-Immigration-Reform.pdf> [<https://perma.cc/RLW9-BJMQ>] (comparing the economic status of noncitizens at the time IRCA was passed with the economic conditions of noncitizens seeking legalization today).

136. *See generally* Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA’s Legacy Lives On*, MIGRATION POLICY INST. (Nov. 16, 2011), <http://www.migrationpolicy.org/article/its-25th->

crossing the southern border to find work in the United States, Congress enacted IRCA to control undocumented immigration.<sup>137</sup> In doing so, IRCA imposed widespread changes to employment practices—both on the employee and the employer.<sup>138</sup>

Under IRCA, employers are prohibited from hiring anyone without lawful work authorization, thereby restricting employment to U.S. citizens and noncitizens with employment authorization.<sup>139</sup> This “workplace-based immigration-enforcement scheme” established punishments for employers and employees who fail to follow employment laws.<sup>140</sup> Employers who knowingly employ unauthorized workers are subject to fines of up to \$3,000 per unlawful worker and imprisonment of up to six months.<sup>141</sup> Similarly, employees who produce fraudulent documentation to gain employment may be subject to a fine and imprisonment of up to fifteen years.<sup>142</sup>

Although many people read the government oversight and criminal penalties imposed under IRCA as indication of congressional intent to prevent noncitizens from gaining employment in the U.S. labor market, another reading of the statutory language suggests that the bill is designed to protect undocumented workers from discrimination, abuse, and exploitation.<sup>143</sup> In fact, IRCA’s relevance to contemporary employment law is based largely on the antidiscrimination protections that it offers undocumented workers. These protections are designed to “deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.”<sup>144</sup> Furthermore, IRCA’s pathway to

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anniversary-ircas-legacy-lives [<https://perma.cc/Y889-BPDJ>] (recounting the history, evolution, and adoption of IRCA).

137. *Id.*

138. *See Compliance Assistance—Immigration Reform and Control Act*, U.S. DEP’T OF LABOR, [http://www.dol.gov/ofccp/regs/compliance/ca\\_irc.htm](http://www.dol.gov/ofccp/regs/compliance/ca_irc.htm) [<https://perma.cc/L7GK-4GC5>] (last visited Mar. 15, 2016) (providing a synopsis of compliance requirements for employers under IRCA).

139. *Id.*

140. Kati L. Griffith, *ICE Was Not Meant to Be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 ARIZ. L. REV. 1137, 1138 (2011) (describing the challenges that ICE faces in its attempts to enforce IRCA and other workplace regulations).

141. 8 U.S.C. § 1324a(f)(1) (2012).

142. 8 U.S.C. § 1324c(e)(2) (2012).

143. *See* Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 881, 887–88 (2014) (assessing the congressional purpose underlying IRCA).

144. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3381 (codified as amended in scattered sections of the U.S. Code).



citizenship provisions “meant higher wages, improvement of workforce skills, and a level playing field for other workers.”<sup>145</sup> It is clear, therefore, that Congress intended IRCA to provide workplace protections for unauthorized workers.

#### IV. REDEFINING THE CLASSIFICATION OF IMMIGRANT DETENTION

If contemporary labor law—including the FLSA—protects *non-detained* immigrant workers in the traditional American workforce, then why do the same laws not apply to *detained* immigrant workers in the Voluntary Work Program? Until now, courts denied FLSA protections to detained immigrant workers on the basis that immigrants are comparable to prisoners—a class of people generally regarded as outside the scope of the FLSA.<sup>146</sup> This Note challenges the “immigrants-as-prisoners” analogy that courts rely on to deny FLSA protections to detained immigrant workers. Although there are similarities between prisoners and immigrant detainees, there are fundamental differences that suggest that immigrant detainees are eligible for greater labor rights than prisoners. As such, courts should reform their analysis of FLSA protections for detained immigrant workers and apply the “economic realities” test to extend the FLSA—including minimum wage requirements—to the Voluntary Work Program.

##### *A. Rejecting the “Immigrants-as-Prisoners” Framework*

Despite lawsuits from detained immigrant workers, alleging instances of forced labor and involuntary servitude under the Voluntary Work Program,<sup>147</sup> there are virtually no challenges to the

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145. SHERRIE A. KOSSOUDJI, AM. IMMIGR. COUNCIL, BACK TO THE FUTURE: THE IMPACT OF LEGALIZATION THEN AND NOW 4 (2013), [http://www.immigrationpolicy.org/sites/default/files/docs/back\\_to\\_the\\_future.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/back_to_the_future.pdf) [<https://perma.cc/ZN2M-KG9S>] (describing how legalization for select groups of undocumented immigrants strengthened workplace enforcement laws against unauthorized workers).

146. *See* Alvarado Guevara v. INS, 902 F.2d 394, 396 (5th Cir. 1990) (declining to extend the Fair Labor Standards Act to detained immigrant workers “[b]ecause of the similarities in circumstances between the prison inmates and Plaintiff detainees”). Some courts, however, recognize FLSA protections for inmates who are assigned to work at private companies outside of the jailhouse and, therefore, are more closely tied to the American workforce. *See, e.g.,* Watson v. Graves, 909 F.2d 1549, 1555–56 (5th Cir. 1990) (granting inmates who voluntarily worked at a private construction company “employee” status and FLSA protections).

147. *See* Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997) (rejecting an immigrant detainee’s argument that the maintenance tasks he provided under threat of solitary confinement constituted “involuntary servitude,”

program as a whole.<sup>148</sup> Where challenges to the Voluntary Work Program do exist, courts rely nearly exclusively on *Alvarado Guevara v. INS*,<sup>149</sup> a 1990 case in which alien detainees at Port Isabel Detention Center in Los Frenos, Texas, sued the government for FLSA violations.<sup>150</sup> In reaching its holding that detained immigrant workers are not “employees” eligible for protections under the FLSA, the court relied on an analogy that likened detained immigrant workers to prison laborers.<sup>151</sup> This analogy, however, is severely misguided. In comparing detained immigrants to prisoners, courts fail to adequately consider the differences between detained immigrants and incarcerated prisoners, which, ultimately, undermine the “immigrants-as-prisoners” framework.

### 1. The Flawed Comparison Between Prison Labor and the Voluntary Work Program

The “immigrants-as-prisoners” model improperly likens immigrant detention with criminal incarceration. It is an often-overlooked fact that immigration violations are *civil* violations, not *criminal* offenses.<sup>152</sup> Whereas prisoners are in jail as punishment for committing a crime, detained immigrants are only incarcerated to ensure compliance with immigration decisions.<sup>153</sup> Unlike prisoners who receive sentences for a defined length, detained immigrants are generally held for an unspecified period of time that often lasts longer than six

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because the Thirteenth Amendment’s “civic duty” exemption permits the government to threaten criminal sanction to compel someone to perform “civic duties,” such as the plaintiff’s housekeeping chores).

148. Although, historically, there have been very few challenges to the Voluntary Work Program, a class action lawsuit filed by detained immigrant workers against GEO remains ongoing in the U.S. District Court for the District of Colorado. Docket, *Menocal v. GEO Group, Inc.*, 1:14-cv-02887 (D. Colo. Oct 22, 2014).

149. 902 F.2d 394 (5th Cir. 1990).

150. *See id.* at 395–96 (“[Prisoners] are similar to detainees in that they have been incarcerated and are under the direct supervision and control of a governmental entity [and] should not be protected under the FLSA.”).

151. *Id.*

152. *See* AM. IMMIGRATION COUNCIL, *TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 2* (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aic\\_twosystemsofjustice.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf) [<https://perma.cc/2R3W-VSS7>] (arguing that classifying immigration violations as a civil offense is an artificial distinction, and that the consequences resulting from deportation—such as family separation, for instance—makes it a more severe penalty than many administered in the criminal justice setting).

153. *See* Sinha, *supra* note 32, at 8–12 (describing how Congress and the Supreme Court view the purpose of immigrant detention).

months.<sup>154</sup> The law only supports immigrant detention “to the extent necessary to enforce compliance with immigration proceedings,”<sup>155</sup> and the Supreme Court recognizes that removal proceedings “[are] not a punishment for a crime.”<sup>156</sup> Instead, immigrant detention is a method of returning aliens to their home country for failing to comply with immigration laws.<sup>157</sup> As such, prisoners and detained immigrants exist within two separate justice systems, and drawing a direct comparison between the two classes of people overlooks important factors that distinguish the civil immigration and criminal systems.

Nevertheless, although immigration violations are not criminal offenses, heavy-handed enforcement policies and anti-immigrant politics have created an inaccurate perception that immigration violations are criminal in nature. So too, court rulings, such as *Alvarado Guevara*, which compare immigrants to criminals as the primary basis to deny labor protections, cultivate the misperception that immigrants should be viewed as criminals.<sup>158</sup>

To determine the application of labor laws on the Voluntary Work Program, courts must recognize and reject this misperception and conduct independent legal reasoning that considers the unique situation of detained immigrants. In *Gilbreath v. Cutter Biological, Inc.*,<sup>159</sup> the Ninth Circuit denied FLSA protections to prison workers

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154. See Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CTR. FOR MIGRATION STUD. (Feb. 13, 2014), <http://cmsny.org/immigration-detention-behind-the-record-numbers/> [<https://perma.cc/J4CR-G9AH>] (extrapolating data from the Department of Homeland Security which projects that the average length of immigrant detention is approximately thirty days, but varies widely depending on the form of relief that the detainee seeks).
155. Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1488 (2012) (arguing that immigration detention serves to control crime, not just manage immigration enforcement).
156. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (reasoning that deportation is merely “a method of enforcing [an alien’s] return to his own country,” and is not a deprivation “of life, liberty, or property without due process of law” that would entitle an alien to the procedural protections of the criminal justice system).
157. See Sinha, *supra* note 32, at 5 (distinguishing the purposes of immigrant detention from criminal incarceration).
158. Notably, if immigration violations were categorized as criminal offenses, then they would be eligible for the procedural protections that are available in the criminal system, but not in the immigration context. These safeguards include Miranda warnings, appointed counsel, right to a bail hearing, right to a speedy trial, prohibition of illegally obtained evidence, and right to trial before jury—all fundamental elements of justice in the criminal justice system that are denied in the civil immigration setting. AM. IMMIGRATION COUNCIL, *supra* note 152, at 5–10.
159. 931 F.2d 1320 (9th Cir. 1991).

on the grounds that “common sense and common intelligence” suggest that Congress did not intend the FLSA to protect felons serving time in prison.<sup>160</sup> The court went on to explain:

This is a category of persons—convicted murderers, rapists, burglars, armed robbers, swindlers, thieves, and the like—whose civil rights are subject to suspension and whose work in prison could be accurately characterized in an economic sense as involuntary servitude, peonage, or indeed slavery—all of which are prohibited by law—were it not for the exceptions carved out by the courts from these prohibitions for persons “duly tried, convicted, sentenced and imprisoned for crime in accordance with law.”<sup>161</sup>

While, as the court acknowledges, prisoners, such as those in *Gilbreath*, are “tried, convicted, sentenced and imprisoned,” immigrant detainees are not.<sup>162</sup> Most detainees are awaiting immigration hearings and are trapped in prolonged detention because of backlogs in the immigration courts—not as a result of their personal conduct.<sup>163</sup> In fact, approximately half of the people who appear before an immigration court are ultimately permitted to stay in the United States, either because they are lawfully present or as a result of judicial discretion.<sup>164</sup> That is not to say, however, that all detained immigrants are free from criminal pasts.<sup>165</sup> But immigrants who are convicted of crimes must generally serve their criminal sentences in prison before entering immigration proceedings.<sup>166</sup>

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160. *Id.* at 1324.

161. *Id.* at 1325 (quoting *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963)).

162. *Id.*

163. *See* Sinha, *supra* note 32, at 4–5 (“Unlike prison sentences in the criminal context, immigration detention is inherently indeterminate, and due in part to the extensive backlogs in the immigration court system, the average time some noncitizens remain in detention has gotten longer.” (citation omitted)).

164. *See* Urbina, *supra* note 1 (“Immigrants in holding centers may be in the country illegally, but they may also be asylum seekers, permanent residents or American citizens whose documentation is questioned by the authorities.”).

165. *See generally* WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf) [<https://perma.cc/28SN-36CQ>] (examining the relationship between immigration patterns and crime rates).

166. *See* Alex Nowrasteh, *Immigration and Crime—What the Research Says*, CATO INST. (July 14, 2015, 11:49 AM), <http://www.cato.org/blog/immigration-crime-what-research-says> [<https://perma.cc/XU9C-2HZA>] (comparing data to determine whether greater immigration leads to increased crime).

Detention centers, on the other hand, do not function as a form of punishment; they are merely waiting rooms for immigrants seeking to have their day in court.<sup>167</sup> Detained immigrants, therefore, are not incarcerated based on trial, conviction, or criminal sentence, and the Court's reasoning in *Gilbreath* for denying FLSA coverage to prisoners does not stand in the immigration context.

Although still not perfectly analogous, the immigration context is more appropriately related to that of pretrial detention. In *Villarreal v. Woodham*,<sup>168</sup> the Eleventh Circuit was the first Court of Appeals to hear a FLSA claim for pretrial detainees and to decide whether pretrial detainees are "employees" under the FLSA.<sup>169</sup> As in *Gilbreath*, the court ultimately concluded that correctional facilities for pretrial detainees provide inmates with their everyday needs and refused to extend FLSA protections.<sup>170</sup> Specifically, the court held that "[t]he relationship is not one of employment," because prisoners are removed from the national economy and are not subject to competition in the free market.<sup>171</sup>

But, like *Gilbreath*, *Villarreal* is distinguished from causes of action arising from the Voluntary Work Program. In *Villarreal*, the pretrial nonimmigrant detainee performed translation services for other inmates, court personnel, and medical staff.<sup>172</sup> He performed

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167. The number of detained immigrants with criminal history fluctuates based on the government's enforcement priorities. Between 1996 and 2006, "65 percent of immigrants who were detained and deported" committed nonviolent crimes. NAT'L IMMIGR. FORUM, THE MATH OF IMMIGRANT DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 5 (2013), <https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf> [<https://perma.cc/4MBM-7DFL>] (confronting the economic inefficiencies of U.S. immigration policy). From 2009 to 2011, however, over half of detained immigrants had no criminal records, and twenty percent of those with criminal records were for traffic offenses. *Id.* In more recent years, as the Department of Homeland Security exercises prosecutorial discretion to prioritize immigration enforcement against people with criminal pasts, the percentage of detained immigrants with criminal histories has increased. *FY 2015 ICE Immigration Removals*, U.S. IMMIGRATION AND CUSTOMS ENF'T, <https://www.ice.gov/removal-statistics/2015> [<https://perma.cc/W278-4TL4>] (last visited Feb. 26, 2017) (summarizing ICE's removal activities in 2015).

168. 113 F.3d 202 (11th Cir. 1997)

169. *See id.* at 207 ("Whether a restriction or condition accompanying pretrial detention is punishment turns on whether the restriction or condition is reasonably related to a legitimate government objective.").

170. *Id.*

171. *Id.*

172. *Id.* at 204.

these services relying on an unwritten proposition that the Sheriff's Department would provide compensation.<sup>173</sup> Furthermore, the court concluded that “[t]here was no ‘bargained-for’ exchange of labor which occurs in a true employer-employee relationship.”<sup>174</sup> The Voluntary Work Program, however, consists of an agreement with set pricing, hiring criteria, and other requirements that more closely resemble a bargained-for exchange of labor.<sup>175</sup> As such, although immigrant detainees are removed from society, they are part of an “apparent exchange of money for labor,”<sup>176</sup> and, therefore, are lost in the crosshairs of *Villarreal's* legal reasoning.

Cases such as *Villarreal*, *Gilbreath*, and *Alvarado Guevara* rely on an unsubstantiated comparison between the immigration and criminal systems and should not have determinative authority over cases arising from the Voluntary Work Program. Detention—and the deportation process, generally—is different. “It is a unique legal animal that lives in the crease between the civil and criminal labels,”<sup>177</sup> and attempts to categorize immigrant detention as exclusively civil or criminal will ultimately prove inadequate.

## 2. Moving Past *Alvarado Guevara* as the Determinative Authority over Detained Immigrant Workers

As explained above, courts have historically relied on the “immigrants-as-prisoners” model to deny detained immigrant workers with FLSA protections—including, among other benefits, minimum wage payments. Before examining other approaches to FLSA application to detained immigrant workers, it is necessary to explain why courts should formally discard their reliance on *Alvarado Guevara* and open their eyes to see detained immigrant workers as distinct from prison laborers. While, at first blush, government-compelled incarceration may suggest a reliable comparison between the two classes, there are fundamental differences that suggest the court's reasoning in *Alvarado Guevara* was misguided—or at least shortsighted.

In *Alvarado Guevara*, detained immigrant workers at the Port Isabel Detention Center sued the Immigration and Naturalization Service (INS) (the former U.S. Agency responsible for administering

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173. *Id.*

174. *Id.* at 207.

175. See PBNDS, *supra* note 2, at 382–87 (establishing the operational details of the Voluntary Work Program).

176. *Alvarado Guevara v. INS*, 902 F.2d 394, 396 (5th Cir. 1990).

177. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1299 (2011) (considering the Supreme Court's evolving immigration jurisprudence to argue that deportation is not fully civil or criminal in nature).

immigration and naturalization issues) for violating the FLSA.<sup>178</sup> There, the detainees performed maintenance tasks in an immigrant detention facility, including cooking, laundry, and other services at a rate of \$1.00 per day.<sup>179</sup> Although the court recognized an “apparent exchange of money for labor,” the Fifth Circuit affirmed the lower court’s dismissal, because “[i]t would not be within the legislative purpose of the FLSA to protect those in Plaintiffs’ situation.”<sup>180</sup> The legislative purpose, the court reasoned, “was to protect the ‘standard of living’ and ‘general well-being’ of the worker in American industry.”<sup>181</sup> Because the government protects the “standard of living” for all immigrant detainees in the form of food, shelter, and clothing,<sup>182</sup> subminimum wages do not threaten the detainees’ “general well-being.” Thus, the court held that detained immigrants, like prisoners, “are not within the group that Congress sought to protect in enacting the FLSA.”<sup>183</sup>

The case law that formed the basis for the *Alvarado Guevara* decision drew exclusively from a handful of cases, each of which considered the labor rights of prison inmates.<sup>184</sup> While both parties in *Alvarado Guevara* “admit[ted] that there [were] no cases dealing directly with factually identical circumstances,” the court relied on legal precedent related to labor rights for prison workers and did not consider any other analogies that may more closely reflect the situation of a detained immigrant worker.<sup>185</sup>

Further distinguishing *Alvarado Guevara* from causes of action under the Voluntary Work Program is the fact that the supporting case law in *Alvarado Guevara* concerns work for independent profit-making private entities—not the incarceration center itself.<sup>186</sup> Because

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178. *Alvarado Guevara*, 902 F.2d at 395.

179. *Id.*

180. *Id.* at 396.

181. *Id.*

182. *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991).

183. *Alvarado Guevara*, 902 F.2d at 396.

184. *Id.*

185. *Id.*

186. *See, e.g.*, *Alexander v. Sara, Inc.*, 721 F.2d 149, 149–50 (5th Cir. 1983) (denying FLSA protection to prison laborers working for a blood plasma program); *Sims v. Parke Davis & Co.*, 453 F.2d 1259, 1259 (6th Cir. 1971) (denying FLSA protection for prison workers in drug clinics on prison grounds); *Worsley v. Lash*, 421 F. Supp. 556, 556 (N.D. Ind. 1976) (finding that a prison worker at an off-site hospital was not an “employee” within the FLSA); *Lavigne v. Sara, Inc.*, 424 So. 2d 273, 273–74 (La. Ct. App. 1982) (denying FLSA protection to prison workers at a scientific research company).

the Voluntary Work Program provides in-house labor for detention centers, it should be subject to a distinct legal analysis. The analytical reasoning in *Alvarado Guevara*, therefore, is flawed, and courts should discontinue their reliance on it in challenges to the Voluntary Work Program.

*B. Alternative Classifications*

In light of the incompatibilities between immigrant detainees and prisoners, courts should turn elsewhere to find case law that more closely resembles the situation of the detained immigrant worker. Because the purpose of the FLSA is to protect the “standard of living” and “general well-being” of workers in the American workforce, courts often hold that incarcerated workers are not entitled to minimum wage protections because their employer provides their everyday needs—including food, clothing, and shelter.<sup>187</sup> Still, there are select classes of workers who retain their basic living needs from their employer, but still receive minimum wage protections under the FLSA. This Section considers two of these protected classes: patient-workers and live-in domestic service workers. Courts should apply the same reasoning that they use to protect patient-workers and live-in domestic service workers to provide FLSA protections to detained immigrants.

1. Applying the Patient-Worker Analysis

Rather than the debunked “immigrants-as-prisoners” analogy, courts could consider detained immigrant workers in the framework of working in privately-operated mental institutions. In *Weidenfeller v. Kidulis*,<sup>188</sup> for instance, two men receiving treatment and custodial care at a privately owned and operated for-profit boarding house brought a lawsuit under the FLSA for unpaid wages.<sup>189</sup> While in custody, the institution employed the plaintiffs to provide maintenance services, including mowing the lawn, cleaning rooms, and washing dishes.<sup>190</sup> Plaintiffs alleged that this labor was entirely nontherapeutic and exclusively for the benefit of the institution.<sup>191</sup> On the basis that “a right to compensation exists for residents of mental institutions under the Fair Labor Standards Act,” the court refused to dismiss the cause of action and denied summary judgment for the

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187. 29 U.S.C. § 202(a) (2012); *see, e.g.*, *Villarreal v. Woodham*, 113 F.3d 202, 205–06 (11th Cir. 1997) (citing the legislative purpose behind the FLSA as grounds to deny minimum wage rights to detained immigrant workers).

188. 380 F. Supp. 445 (E.D. Wis. 1974).

189. *Id.* at 447.

190. *Id.*

191. *Id.*



defendant.<sup>192</sup> Because detained immigrant labor benefits prison operators, detained workers should have the same “right to compensation” under the FLSA that the court identifies in *Weidenfeller*.

Similarly, in *Souder v. Brennan*,<sup>193</sup> three residents at a state hospital for the mentally ill brought suit for minimum wage and overtime protection under the FLSA.<sup>194</sup> The court upheld their right to FLSA protection on the basis that patient-workers are engaged in an “employee” and “employer” relationship.<sup>195</sup> The court reached this conclusion in spite of the fact that patient-workers are not included in the enumerated list of workers who are statutorily eligible for FLSA protections.<sup>196</sup> Like patient-workers, detained immigrants are not explicitly exempted from or included in the FLSA.<sup>197</sup> Furthermore, as in *Weidenfeller*, the court found that the employer was the sole beneficiary of the employee’s labor, concluding:

So long as the institution derives any consequential economic benefit the economic reality test would indicate an employment relationship rather than mere therapeutic exercise. To hold otherwise would be to make therapy the sole justification for thousands of positions as dishwashers, kitchen helpers, messengers and the like.<sup>198</sup>

Ultimately, the court rejected the defendant-employer’s motion for summary judgment and upheld FLSA protections for the proposed class: “patient-workers in non-Federal institutions for the residential care of the mentally ill.”<sup>199</sup>

Recognizing wage and hour protections for patient-workers suggests that similar protections belong to detained immigrant workers who are employed in private detention facilities. To hold otherwise would be contrary to the court’s determination in *Weidenfeller* and *Souter* and provide unjust enrichment to employers such as GEO and CCA.<sup>200</sup>

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192. *Id.* at 449, 452.

193. 367 F. Supp. 808 (D.D.C. 1973).

194. *Id.* at 811.

195. *Id.* at 813–15.

196. *Id.* at 812.

197. 29 U.S.C. § 206 (2012).

198. *Souder*, 367 F. Supp. at 813.

199. *Id.* at 814.

200. In *Menocal v. GEO Group, Inc.*, detained immigrant workers brought a lawsuit against GEO for abuses under the Voluntary Work Program. *Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1125 (D. Colo. 2015). Although

## 2. Applying the Live-in Domestic Service Worker Analysis

Live-in domestic service workers “provide services of a household nature in or about a private home” and reside within such a household.<sup>201</sup> These workers include cooks, housekeepers, handymen, gardeners, and maids.<sup>202</sup> Although not originally identified as an independent class of workers, the 1974 amendments to the Fair Labor Standards Act explicitly extended FLSA wage protections to domestic service employees.<sup>203</sup> Like detained immigrant workers, many live-in domestic service workers receive room and board from their employer. Because the FLSA defines “wage” to include the “reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities,”<sup>204</sup> benefits such as food, shelter, and clothing are considered “wages in another form” and may be applied against an employee’s wage.<sup>205</sup> For the live-in domestic service worker, this means that an employer may consider the reasonable cost of the employer-provided everyday needs and subtract it from their actual income. But, even if the employer and employee agree to a form of alternative payment, the value of that payment must be no less than minimum wage.

This scheme, however, is not without government regulation. In relation to employer setoffs, the Wage and Hour Division of the Department of Labor stipulates that:

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the judge dismissed the detainees’ minimum wage claims, the court denied GEO’s motion to dismiss concerning claims related to unjust enrichment and violations of the Trafficking Victims Protection Act. *Id.* at 1135.

201. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #79B: LIVE-IN DOMESTIC SERVICE WORKERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (2013), <http://www.dol.gov/whd/regs/compliance/whdfs79b.pdf> [<https://perma.cc/SLE4-CWLT>] (describing who constitutes a live-in domestic service worker and the scope of their rights under the FLSA).
202. 29 C.F.R. § 552.3 (2016) (“The term *domestic service employment* means services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. This listing is illustrative and not exhaustive.”).
203. 29 U.S.C. § 206(f) (2012).
204. *Id.* § 203(m).
205. *Tony & Susan Alamo Found v. Sec’y of Labor*, 471 U.S. 290, 293–94 (1985) (finding that when an employer provides someone food, shelter, clothing, transportation, or medical expenses in exchange for labor, the employer’s goods and services constitute a form of wage payments); *see also* *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (considering the application of in-kind wages within the “economic realities” test).

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily “furnished” to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be *voluntary* and *uncoerced*.<sup>206</sup>

Put another way, an employer may not compensate an employee in the form of room and board, unless the employee voluntarily agrees to accept in-kind payment.<sup>207</sup> Because, however, detained immigrants are *required* to live and eat in the detention center, it cannot be said that they are *voluntarily* agreeing to have their compensation appear in the form of food, shelter, and other everyday essentials.

Although there is not a wealth of case law analyzing the “voluntary and uncoerced” provision of this DOL regulation,<sup>208</sup> courts generally consider whether or not the employee has a genuine choice as to whether or not to accept the position.<sup>209</sup> In *Marshall v. Intraworld Commodities Corp.*,<sup>210</sup> the court found that an employer was not permitted to deduct the cost of meals, lodging, or other facilities from his live-in domestic worker, because “[t]he claimant had no other place to live and no choice but to accept the food and facilities provided to him.”<sup>211</sup> The court concluded that if an employee has no other place to live and no choice but to accept non-monetary compensation, then an employer may not claim that the payment was voluntarily accepted without coercion.<sup>212</sup>

The same “voluntary and uncoerced” standard that the DOL recognizes for live-in domestic service workers should apply to detained

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206. 29 C.F.R. § 531.30 (2012) (emphasis added).

207. Some courts hold that acceptance of in-kind payment does not require an explicit agreement between parties. Rather, the nature of the work itself may be a sufficient basis to indicate that the employee voluntarily chose a position that provides an alternative form of compensation. *See, e.g., Lopez v. Rodriguez*, 668 F.2d 1376, 1380 (D.C. Cir. 1981) (finding that a live-in housekeeper understood that she would be compensated, in part, by board and lodging when she accepted a job that required “live-in” responsibilities).

208. The DOL regulations do not define the terms “voluntary” or “uncoerced,” leaving the courts to determine their meaning. 29 C.F.R. § 531.30.

209. *See, e.g., Lopez*, 668 F.2d at 1380 (“[E]ven where an employee voluntarily and knowingly accepts a job which, by its nature, requires board and lodging in the employer’s home, an employer may impose ‘coercive’ conditions—that is, conditions so onerous and restrictive that the employee’s continued employment and acceptance of board and lodging ceases to be voluntary.”).

210. No. 79 C 918, 1980 WL 2097 (E.D.N.Y. June 9, 1980).

211. *Id.* at \*4.

212. *Id.* at \*4–5.

immigrant workers as well. And in the context of the Voluntary Work Program, detained immigrant workers have no choice besides accepting the food and shelter that the detention facility provides. This means that, because the detained workers have no choice but to accept the detention facility's food, clothing, and shelter, it is improper for courts to permit subminimum wage payments to detained immigrants on the basis that detention centers provide their basic needs.

*C. Revisiting the "Economic Realities" Test*

As a result of ambiguous statutory language in the FLSA, the terms "employee," "employer," and "employ" remain hotly litigated topics, with employers seeking to minimize their obligations to their workers and employees seeking to increase their rights.<sup>213</sup> Unless immigrant detainees are classified as "employees," then "[their] labor belongs to the penitentiary and it is not compensable."<sup>214</sup> As such, an analysis of FLSA protection over detained immigrant workers must prove that they fit within the statutory definition of "employee."

Without a precise line between protected and unprotected workers, courts look to one another for interpretative guidance. The Supreme Court, while not ruling on the application of the FLSA as it relates to detained immigrant workers, instructs a liberal application of the FLSA.<sup>215</sup> As a general rule, however, courts recognize social welfare legislation, including the FLSA, as applying to employees "who as a matter of economic reality are dependent upon the business to which they render service."<sup>216</sup> And to determine whether a

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213. See, e.g., David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J. L. & PUB. POL'Y 138, 138-42, 151-52 (2015) (explaining that employee classification is "often litigated," because "many employers misclassify their workers in order to save on labor costs" and "illegally depriv[e] employees of employment protections").

214. See Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. C.R. & ECON. DEV. 679, 700 (2015) (arguing that the economic realities test is an "uneven fit" to measure a prisoner's employment status under the FLSA).

215. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-30 (1947) (holding that a broad reading of the FLSA is appropriate to recognize that workers are employees under the FLSA); *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979) ("Courts have adopted an expansive interpretation of the definitions of 'employer' and 'employee' under the FLSA in order to effectuate the broad remedial purposes of the Act.").

216. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); see also U.S. DEP'T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR'S INTERPRETATION NO. 2015-1 (2015), [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf) [<https://perma.cc/XLC9-V5NQ>] (affirming the longstanding proposition that whether a worker qualifies as an employee under the FLSA "focuses

qualifying employment relationship exists to trigger FLSA protections, courts must consider the economic realities of the employment relationship.<sup>217</sup>

It is well recognized that the economic realities test is not measured by any one isolated factor; instead, it takes into account the totality of the circumstances to determine whether a protected relationship exists between the employer and the employee.<sup>218</sup> Notably, courts have uniformly rejected this approach as it pertains to prison workers.<sup>219</sup> In *Danneskjold v. Hausrath*,<sup>220</sup> for instance, the plaintiff, an inmate at Attica Correctional Facility, applied for a position as a clerk-tutor inside the facility, where he received compensation varying from \$0.95 to \$1.45 per day of work.<sup>221</sup> He sued the correctional facility for back pay under the FLSA. In upholding summary judgment for the defendant, the court noted:

Prisoners may . . . be ordered to cook, staff the library, perform janitorial services, work in the laundry, or carry our [*sic*] numerous other tasks that serve various institutional missions of the prison, such as recreation, care and maintenance of the facility, or rehabilitation. Such work occupies prisoners' time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing that prisoners bear a cost of their incarceration.<sup>222</sup>

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on whether the worker is economically dependent on the employer or in business for him or herself”).

217. See, e.g., *Safarian v. American DG Energy, Inc.*, 622 F. App'x 149, 152 (3d Cir. 2015) (“The fundamental point here is that courts must look to the economic realities, not the structure, of the relationship between the workers and the businesses [to define the employment relationship under the FLSA].”).

218. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)); see also U.S. DEP’T OF LABOR, *supra* note 216, at 4 (“In undertaking this analysis, each factor is examined and analyzed in relation to one another, and no single factor is determinative.”).

219. Matthew J. Lang, Comment, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prison Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 204 (2003) (“[A]lthough the Supreme Court or Congress has not grappled the issue, the circuits are in agreement that all inside prison work is not covered by the FLSA and thus inmate workers may be paid less than the minimum wage.”).

220. 82 F.3d 37 (2d Cir. 1996).

221. *Id.* at 39–40.

222. *Id.* at 43.

Even voluntary labor should not be protected, the *Danneskjold* court specified, because it “serves all of the penal functions of forced labor.”<sup>223</sup> But, as explained above, labor in the immigration context—including the Voluntary Work Program—is not intended as a punitive measure.<sup>224</sup> In fact, detention itself was not conceived as punishment, but, rather, as an operational requirement; its limited purpose is to ensure that noncitizens appear in immigration court and comply with removal orders.<sup>225</sup> So too, immigration offenses—for which the detainees are held in detention—are civil violations, not criminal.<sup>226</sup> These differences, combined with the other distinguishing features between labor in prisons as opposed to detention facilities,<sup>227</sup> provide sufficient reason to move past the *Danneskjold* court’s reasoning and for proceeding with the application of the economic realities test to detained immigrant workers.

As such, if we move away from the “immigrants-as-prisoners” analogy, then an “economic realities” analysis for detained immigrant workers is the appropriate analytical model to determine “employee” status under the FLSA.<sup>228</sup> Although there is no single determinative factor under the “economic realities” test, the analysis generally turns on the economic dependence of the worker on the employer.<sup>229</sup> Some other criteria courts consider in the economic realities test are as follows: (1) the nature and degree of the employer’s control over the employee (2) the employee’s opportunity for profit or loss (3) the employee’s investment in equipment or materials (4) whether the service provided requires special skill (5) the duration of the relationship and

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223. *Id.*

224. *See supra* Part IV.A.1 (distinguishing the characteristics of detained immigrant workers and prison laborers).

225. *Id.*

226. *Id.*

227. *Id.*

228. Although, today, the “economic realities” test remains the primary analytic framework to determine coverage under the FLSA, courts have historically used other tests to make this determination. Timothy J. Bartkiw, *Regulatory Differentials and Triangular Employment Growth in the U.S. and Canada*, 19 EMP. RTS. & EMP. POL’Y J. 1, 15–16 (2015) (describing the “statutory purposes,” “hybrid,” and “common law entrepreneurial control” tests). Outside of the FLSA, the most commonly used test to define “employee” is the common law “right to control” test, which lends special consideration to “the hiring party’s right to control the manner and means by which the [work] is accomplished.” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

229. Bartkiw, *supra* note 228, at 16.

(6) the extent to which the service integral the employer's business.<sup>230</sup> Because of the number of considerations and the subjectivity of the "economic realities" analysis, the test is generally considered more of a guideline than a conclusive formulaic evaluation.<sup>231</sup>

For present purposes, an analysis of whether workers in the Voluntary Work Program constitute employees will rely on the description of the program provided under the Performance-Based National Detention Standards.<sup>232</sup> In applying those standards to the elements of the "economic realities" test, it is clear that the detained immigrant workers should be viewed as employees.

The PBNDS empower the detention center with expansive control—including wage and compensation determinations, assigning daily tasks, and ensuring health and safety regulations—over detainees enrolled in the Voluntary Work Program.<sup>233</sup> Furthermore, according to the PBNDS, workers must be "within sight and sound" of staff members, and detainees who work outside the secure perimeter on facility grounds must "be directly supervised at a ratio of no less than one staff member to four detainees."<sup>234</sup> This large-scale supervision favors the conclusion that detained immigrant workers are employees under the FLSA.<sup>235</sup>

More so, facility administrators possess hiring and firing authority and are empowered to designate work assignments to detained workers.<sup>236</sup> The PBNDS also specifies record-keeping requirements, including an agreement that detainees must sign before commencing work and a reporting process if a detainee is injured on the job.<sup>237</sup> Furthermore, a willingness to participate in the program does not guarantee

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230. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987). The economic realities test is also the primary measure under which courts differentiate employees from independent contractors. *See id.* (applying the listed criteria as part of the economic realities test to determine whether seasonal agricultural workers should be considered "employees" under the FLSA).

231. U.S. DEP'T OF LABOR, *supra* note 216, at 2 ("[The economic realities test] should not be applied in a mechanical fashion, but with an understanding that the factors are indicators of the broader concept of economic dependence.").

232. PBNDS, *supra* note 2, at 382–87.

233. *Id.*

234. *Id.* at 383.

235. *Cf. Donovan v. Brandel*, 736 F.2d 1114, 1119 (6th Cir. 1984) (considering the fact that an employer did not closely supervise migrant farm workers as evidence that the workers were not statutorily protected "employees").

236. PBNDS, *supra* note 2, at 384–85.

237. *Id.* at 386–87.

work, and a participant must discontinue their employment after release from detention.<sup>238</sup> On the other hand, however, detained immigrant labor is temporary in nature, suggesting that detainees may not actually be sufficiently dependent on their employer to qualify as “employees” under the “economic realities” test.

The “economic realities” test, however, also considers the costs and benefits that the service provides both parties. The detained workers have no individual investment in their work program, and the detention center provides all of the necessary supplies related to the work assignments. As such, the detained workers face no risk of loss; they only stand to gain from their employment. Conversely, the immigrant detention center remains heavily dependent on the Voluntary Work Program and the cheap labor that it provides. In fact, the PBNDS provide that one of the “expected outcomes” of the Voluntary Work Program is to enhance the facility’s “[e]ssential operations and services.”<sup>239</sup> So while the transitory nature of the Voluntary Work Program may suggest that workers are not “employees,” the detention center’s expansive control over the workers and dependence on the workers’ services suggest that, under the totality of the circumstances, detained workers are “employees” under the FLSA and are entitled to minimum wage protections.

## CONCLUSION

As part of his statements on the National Industry Recovery Act—a law passed in 1933 to stimulate economic activity following the Great Depression—President Roosevelt introduced public policy that would eventually inspire Congress to pass the FLSA.<sup>240</sup> In the words of President Roosevelt:

[N]o business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By “business” I mean the whole of commerce as well as the whole of industry; by workers I mean all workers, the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.<sup>241</sup>

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238. *Id.* at 382–83.

239. *Id.* at 382.

240. Harris, *supra* note 124, at 105–09.

241. Franklin D. Roosevelt, Presidential Statement on N.I.R.A.—“To Put People Back to Work” (June 16, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE YEAR OF CRISIS 1933, at 251–52 (1938).



These remarks remain relevant today and illuminate the importance of the FLSA, as it applies to workers—detained and non-detained, immigrant and nonimmigrant—across the country. The Voluntary Work Program, however, undermines the underlying principles behind the FLSA and prioritizes the profits of the private prison industry over the well-being of the workers who sustain it. At the same time, Congress and the courts rely on antiquated laws and flawed reasoning to prevent the FLSA from reaching inside immigrant detention. It is time for courts to depart from the “immigrants-as-prisoners” framework and step forward to see detained immigrant workers in a new light—a light that recognizes the nuances of detained labor and the unique vulnerabilities of detained immigrants. In doing so, it becomes clear that the FLSA protects detained immigrant workers, securing the rights that comprise contemporary labor laws and touch the heart of the American worker.

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