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Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?

*An increasing number of Americans are witnessing life through the bars of prison cells. More than 450 of every 100,000 United States residents were confined in jails and prisons on any given day in 1990*¹

I. INTRODUCTION

The federal government's "war on drugs" and other anti-crime measures launched in the 1980s have enjoyed some success. A recent F.B.I. report revealed that our nation's crime rate decreased from 1991 to 1992.² While that statistic seems to provide a glimmer of hope to crimefighters—and to Americans in general—considerable costs have accompanied the government's efforts to control and deter criminal activity. In fact, the billions of dollars spent on increased law enforcement and prosecution have led to billions of dollars more being spent on the incarceration of prisoners.³ As a result, the cost of maintaining overcrowded prisons or building new ones continues to burden our society.⁴

1. Michael Tonry, *The Ballooning Prison Population*, in THE 1993 WORLD BOOK YEAR BOOK 392, 392 (1993).

2. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES, 1992: UNIFORM CRIME REPORTS 5 (1993) [hereinafter CRIME REPORTS]. Unfortunately, the number of reported crimes still totalled 14,438,191 during this same period. *Id.* The F.B.I.'s crime index includes reported instances of murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny, theft, motor vehicle theft, and arson. *Id.* Not surprisingly, with the large number of criminal offenses still being reported annually, the number of arrests and subsequent prison sentences is still staggering. See generally Tonry, *supra* note 1 (describing the high rate of incarceration in the United States).

3. Tonry, *supra* note 1, at 394-95. In addition to the stepped-up efforts of the war on drugs, harsher sentencing procedures and rising parole violations have also contributed to the rising prison populations. *Id.* at 394.

4. Indeed, at the close of 1989, our federal prisons were already operating at 164% of capacity. *Federal Prison Industries and Implementation of the Federal Prison Industries Provisions of the Anti-Drug Abuse Act of 1988: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 9 (1990) [hereinafter *Hearings*] (testimony of J. Michael Quinlan, Director, Federal Bureau of Prisons). Even so, the Federal Bureau of Prisons projected that the federal inmate popula-

In addition to magnifying the obvious costs related to physical facilities, such rapid growth in the number of inmates creates significant management and control problems. To alleviate these problems, prison managers must look for ways to occupy the prisoners' time while minimizing costs. Partially in an attempt to achieve this, the federal and state governments have either encouraged or required participation in inmate work programs.⁵ This is not a recent development. In fact, "[t]hroughout most of the history of the American prison system prisoners have worked while incarcerated."⁶

Proponents of inmate work programs claim these programs have proven an effective way of reducing inmate idleness.⁷ In addition, prison industries and other work programs save costs and earn profits which can offset prison expenses. The federal government and some states have also used this revenue to help support prisoners' families and to compensate crime victims.⁸

Despite the positive aspects of prison labor, the goods and services sold by prison industries necessarily take a share of the market from related businesses in the private sector. Some question whether prison industries and private industries compete on a level playing field, especially since inmate laborers traditionally receive wages well below the state and federal minimums.⁹ Others charge that, in addition to giving an unfair advantage to prison industries competing in the market place,

tion would nearly double by 1995. *Id.* The trends of state and local correctional institutions appear to be following suit. In 1991, state prisons operated at 131% of capacity, with some states, such as California and New Jersey, operating above 151% of capacity. Tonry, *supra* note 1, at 394-95.

5. See, e.g., ARIZ. REV. STAT. ANN. § 31-251(A) (1992) (granting state prison official authority to require hard labor from prisoners); UTAH CODE ANN. § 64-13-16 (1992) (allowing state department to employ any inmate not otherwise incapable of employment).

6. Abstract, *The Modern Prison: Let's Make It a Factory for Change*, 18 U. TOL. L. REV. 51, 51 (1986).

7. *Hearings*, *supra* note 4, at 2 (testimony of Hon. Robert W. Kastenmeier).

8. *Id.* at 1. Prison labor serves other purposes as well. For example, some see mandatory labor as a form of punishment, while others see it as a means of rehabilitation. Josephine R. Potuto, *The Modern Prison: Let's Make It a Factory for Change*, 18 U. TOL. L. REV. 51, 51 (1986). Such work programs can aid by teaching inmates responsibility and other useful skills, hopefully facilitating the inmate's return to society. See GAIL S. FUNKE ET AL., ASSETS AND LIABILITIES OF CORRECTIONAL INDUSTRIES 7 (1982).

9. See FUNKE ET AL., *supra* note 8, at 14-16. Indeed, remuneration sometimes came in the form of "good time" (reduced prison sentences) rather than as wages at all. *Id.*

such treatment also unfairly discriminates against inmate workers.

In light of such arguments, some maintain that the time has arrived to recognize prisoners as "employees" covered by the Fair Labor Standards Act (FLSA or Act).¹⁰ In fact, a panel of judges from the Ninth Circuit recently ruled that the Arizona Correctional Industries should pay inmates minimum wages according to provisions of the FLSA.¹¹ This decision implied, if not expressly held, that inmates working for and in behalf of the prison were state employees, entitled to FLSA coverage. However, when the case was reheard en banc, the Ninth Circuit refused to follow the panel decision.¹²

Nevertheless, a trend may be emerging. Although most courts recently addressing the issue have agreed that inmates should not be considered employees for purposes of the Act,¹³ no court since 1984 has categorically ruled out the possibility of FLSA coverage for working prisoners. Congress and the Supreme Court have left no clear roadmap to guide the courts. How should the courts treat working inmates? Should FLSA coverage be extended to them? If so, in what situations should they be covered? Did Congress intend such an application of the FLSA? If not, would Congress at least approve?

This Comment attempts to answer these questions. Part II sets forth a brief history of the FLSA and traces the development of FLSA coverage of prisoners. Parts III and IV analyze *Hale v. Arizona I*,¹⁴ *Hale v. Arizona II*,¹⁵ and *Vanskike v. Pe-*

10. 29 U.S.C. §§ 201-219 (1988).

11. *Hale v. Arizona*, 967 F.2d 1356 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993). The 1992 Ninth Circuit opinion will hereinafter be referred to as *Hale I*, and the 1993 Ninth Circuit opinion will be referred to as *Hale II*.

12. *Hale II*, 993 F.2d at 1389.

13. See *Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir.) (inmate not covered by FLSA), *cert. denied*, 114 S. Ct. 238 (1993); *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) (prisoners not entitled to minimum wage under FLSA), *cert. denied*, 113 S. Ct. 1303 (1993); *Miller v. Dukakis*, 961 F.2d 7 (1st Cir.) (prisoners not "employees" under FLSA), *cert. denied*, 113 S. Ct. 666 (1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991) (Arizona Department of Corrections not "employer" under FLSA). *But see Hale I*, 967 F.2d 1356 (9th Cir. 1992) (inmates working in state work programs considered "employees" of the state), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

14. 967 F.2d 1356 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

15. 993 F.2d 1387 (9th Cir. 1993) (en banc).

ters,¹⁶ three recent opinions which consider arguments for and against extending FLSA coverage to prisoners. Part V examines the language and purposes of the Act as well as competing public policy concerns in attempting to discern Congress's intent toward prisoners. Part VI proposes a new test for the courts to apply in determining the "economic reality" of employer-employee relations. Finally, this Comment concludes that the FLSA should not be extended to cover prisoners since Congress did not intend such coverage and would likely not approve such action, which undermines public policy regarding the incarceration of criminals, and because the courts have not yet adequately addressed the "economic reality" of working prisoners.

II. THE DEVELOPMENT OF FLSA COVERAGE OF PRISONERS

Some scholars recognize the FLSA as "the original anti-poverty law."¹⁷ As originally passed in 1938, the FLSA was an attempt to combat the ill effects of the Great Depression.¹⁸ Indeed, the Senate Committee on Labor and Public Welfare reiterated this same thought nearly thirty years later:

The Fair Labor Standards Act was enacted in 1938 to meet the economic and social problems of that era. Low wages, long working hours and high unemployment plagued the Nation, which was then in the midst of an unprecedented depression. The policy of the act, as set forth therein, was to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.¹⁹

By establishing a minimum wage, Congress hoped to raise the standard of living of low-wage workers and to increase their purchasing power.²⁰ By requiring increased pay for overtime

16. 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

17. Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607, 607 (1972).

18. JAMES LEDVINKA, *FEDERAL REGULATION OF PERSONNEL AND HUMAN RESOURCE MANAGEMENT* 249 (1982); CHARLES H. LIVENGOOD, JR., *THE FEDERAL WAGE AND HOUR LAW 6-7* (1951); Willis, *supra* note 17, at 607. The Supreme Court upheld the constitutionality of the FLSA in *United States v. Darby*, 312 U.S. 100 (1941).

19. SENATE COMM. ON LABOR AND PUBLIC WELFARE, *FAIR LABOR STANDARDS AMENDMENTS OF 1966*, S. REP. NO. 1487, 89th Cong., 2d Sess. 1 (1966).

20. LEDVINKA, *supra* note 18, at 249.

hours, Congress hoped to reduce unemployment by making it less expensive for employers to hire additional employees than to overwork existing ones.²¹ Finally, Congress believed the Act would reduce labor disputes by increasing compensation in low-paying jobs and cutting down long work days.²²

In fact, many of these same purposes remain part of the FLSA today. Section 202 declares:

(a) The Congress finds that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes . . . the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among [American] workers . . . ; (2) burdens commerce . . . ; (3) constitutes an unfair method of competition . . . ; (4) leads to labor disputes . . . ; and (5) interferes with the orderly and fair marketing of goods in commerce. . . .

(b) It is declared to be the policy of this chapter . . . to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.²³

Though these problems certainly do not stifle the economy as severely today as they did during the Great Depression, scholars stress the importance the FLSA's enumerated purposes have played in the Act's interpretation and subsequent amendments.²⁴

Originally, the FLSA covered less than thirty-three percent of the nation's work force.²⁵ While the Act affected less than twelve percent of those initially covered, it still increased the wages of roughly 200,000 employees.²⁶ Also, nearly 1,400,000 workers benefitted from shorter work weeks or overtime pay.²⁷

Since 1938, amendments to the FLSA have served primarily to broaden its coverage. The most substantial inclusion of

21. *Id.*

22. *Id.*

23. 29 U.S.C. § 202 (1988).

24. LEDVINKA, *supra* note 18, at 249; LIVENGOD, *supra* note 18, at 7.

25. LEDVINKA, *supra* note 18, at 249.

26. MARY ANNE Q. WOOD ET AL., FAIR EMPLOYMENT PRACTICES AND STANDARDS 591 (1982).

27. *Id.* (citing William S. Tyson, *The Fair Labor Standards Act of 1938: A Survey and Evaluation of the First Eleven Years*, 1 LAB. L.J. 278 (1950)).

previously excluded workers came in 1974, when Congress extended coverage to almost all state and local government employees.²⁸ Presumably, the FLSA now covers all employees unless Congress has specifically made such workers "exempt" in another section of the Act.²⁹ However, in spite of this presumption, most courts have held the FLSA inapplicable to inmates. And despite numerous amendments to encompass more workers within the Act, Congress has yet to specifically address the situation of inmate workers. This has left the courts to debate the coverage of this overlooked labor class, relying on general presumptions regarding the FLSA and the employer-employee relationship.

A. Traditional Refusal of Courts to Acknowledge Inmates as Employees

Since the FLSA's passage in 1938, the Act has provoked endless litigation by employers and employees alike. As a result, substantial case law now supplements and interprets the Act and its amendments. Even so, debate regarding the definition of the employer-employee relationship continues. The Supreme Court has offered only general guidance, holding in 1961 that the coverage of any given relationship hinges on the "economic reality" of the employment situation.³⁰

Still, for more than fifty years workers in various employment situations have sought judicial declarations of "covered" status under the Act. While the courts have been receptive to

28. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, sec. 6(a), § 3, 88 Stat. 55, 59-60 (codified at 29 U.S.C. § 203). The Court, however, held the 1974 amendments unconstitutional in *National League of Cities v. Usery*, 426 U.S. 833 (1976). When the Court overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Congress quickly acted to again include state employees. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787.

29. See 29 U.S.C. § 213 (1988) (providing an "exemption" from the minimum wage provision for certain common employment situations, such as school teachers, outdoor salesmen, babysitters, etc.); 29 U.S.C. § 214 (1988) (providing special "exemptions" from minimum wages for learners, apprentices, messengers, etc.). The Supreme Court has reasoned that "[s]uch specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517 (1950).

30. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961). Since this decision, courts have applied "economic reality" as the general legal standard. See, e.g., *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993); *Hale I*, 967 F.2d 1356, 1364 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

many arguments in behalf of workers, they have traditionally been reluctant to hold working prisoners in the same category as other more "typical" classes of workers.

In 1948, *Huntley v. Gunn Furniture Co.*³¹ became the first federal court opinion to address the issue of prisoners' rights under the FLSA. On March 11, 1947, a group of inmates at the State Prison of Southern Michigan filed a complaint seeking to recover minimum wages and overtime compensation.³² Prison officials had assigned the inmates to work on parts and assemblies of shell casings, which Gunn Furniture Co. (Gunn) then supplied to the Ordnance Division of the United States War Department.³³ Judge Starr rested the opinion on the fact that no employment or compensatory contract existed between the prisoners and Gunn:

"It is difficult to conceive instances wherein an industrial plant . . . 'suffers or permits to work' within the meaning of the Act, employees with whom the plant has no contractual relationship as employer and employee or as master and servant."³⁴

The court held that the inmates were not employees of Gunn within the meaning of the Act; instead, they were employees of the Michigan prison industries.³⁵

In 1971, the Sixth Circuit dealt a major blow to inmates' hopes for recognition under the FLSA. In *Sims v. Parke Davis & Co.*,³⁶ the appellate court denied the inmates the right to recover minimum wages and other damages under the FLSA. Instead, the court affirmed and adopted the district court's "detailed and comprehensive opinion."³⁷

In *Sims*, Parke Davis & Co. (Parke Davis) and Upjohn Co. (Upjohn) conducted clinical research on the prison premises.³⁸ The inmates performed services for these companies, including

31. 79 F. Supp. 110 (W.D. Mich. 1948).

32. *Id.* at 111.

33. *Id.*

34. *Id.* at 115 (quoting *Maddox v. Jones*, 42 F. Supp. 35, 42 (N.D. Ala. 1940)).

35. *Id.* at 116. The court also rejected the prisoners' claim under an unjust enrichment theory: "[T]o invoke [quantum meruit] in the present case for the sole purpose of labelling the plaintiffs as 'employees' of defendant under the Act would extend the doctrine and legal fiction beyond reason." *Id.* at 114.

36. 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

37. *Id.* at 1259.

38. *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 778 (E.D. Mich. 1971).

janitorial duties, maintenance and repair work, clerical tasks, and cooking.³⁹ The district court examined the "economic reality" of the inmates' working relationship with Parke Davis and Upjohn by considering "the extent to which [the companies could] hire, fire and control those inmates."⁴⁰ The court concluded that the inmates did not qualify as employees of Parke Davis or Upjohn:

The economic reality is that plaintiffs are convicted criminals incarcerated in a state penitentiary. As state prisoners, they have been assigned by prison officials to work on the penitentiary premises for private corporations at rates established and paid by the State. In return for the use of this convict labor, the private corporations have relinquished their normal rights: [i.e., the rights to hire, fire, or control the inmates] except in the most routine matters.⁴¹

Accordingly, the court found that the prison's control over the inmates precluded the inmates from being employees of a private corporation.

Additionally, the dicta in *Sims* appeared even more damaging to inmate labor rights. The court clearly did not believe that Congress intended FLSA coverage for inmates:

The setting of wages for incarcerated prisoners working on assignment by prison officials requires the consideration of many variables which are unique to that situation and which directly affect government policy on rehabilitation of criminals. It is unlikely that Congress considered any of those variables at the time it adopted general legislation designed to give employees the right to a subsistence wage.⁴²

Subsequent cases over the next twelve years continued to deny prisoners FLSA protection. Most often, the courts would find that the "economic reality" identified the state or federal government, not the private corporations, as the inmates' "employer." This was usually not difficult for the courts to justify because of the extensive control exercised by prison officials

39. *Id.*

40. *Id.* at 783.

41. *Id.* at 787.

42. *Id.*

over working prisoners.⁴³ Such a showing ended a plaintiff's cause of action.⁴⁴

The Supreme Court never heard any of these controversies. Even so, several of the circuits took turns cutting down inmate claims. The courts would typically apply the same rationale as in *Sims*, while continuing to express doubts as to Congress's intent toward prisoners. In *Wentworth v. Solem*,⁴⁵ the Eighth Circuit proclaimed doubt that "Congress, [even] by the 1974 amendments, intended to extend the coverage of the minimum wage law to convicts working in state prison industries."⁴⁶ Just six years later, the Fifth Circuit affirmed a district court's conclusion that inmates were not covered by the FLSA in part because "the Congressional concern in enacting the Act was with the standard of living and general well-being of the worker in American industry, so that the extension to the prison inmate was not legislatively contemplated."⁴⁷

Nevertheless, after 1983, some courts began to apply a different rationale for determining the "economic reality" of the inmate-worker situation. Indeed, a refined test has proved much more favorable to the inmates than the traditional rationale. This test, established in *Bonnette v. California Health & Welfare Agency*,⁴⁸ still has vitality in several of the federal circuits today.

B. *Developments Since the Advent of the Bonnette Test*

In 1983, the Ninth Circuit combined a number of generalized inquiries previously considered by other courts in determining the "economic reality" of working relationships.⁴⁹ The

43. In some cases, the inmate plaintiffs would even name a government agency as the defendant. See *Sprouse v. Federal Prison Indus., Inc.*, 480 F.2d 1, 3 (5th Cir.) (holding that "a suit against an essentially non-proprietary government corporation is in essence a suit against the United States"), *cert. denied*, 414 U.S. 1095 (1973).

44. At that time, Congress still had not extended the FLSA to government employees—at least not successfully. See *supra* note 28 and accompanying text.

45. 548 F.2d 773 (8th Cir. 1977).

46. *Id.* at 775.

47. *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir. 1983). The court also held that "there was no employer-employee relationship, because the inmates' labor belonged to the penitentiary, which was the sole party to the contract with Sara." *Id.*

48. 704 F.2d 1465, 1470 (9th Cir. 1983).

49. *Id.*; see, e.g., *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 756 (9th Cir. 1979); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

result was a more bright-line test for the courts, reducing the need for a purely discretionary case-by-case analysis. Specifically, the courts would determine "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."⁵⁰ Nevertheless, the court cautioned that these "four factors . . . are not etched in stone and will not be blindly applied. The ultimate determination must be based 'upon the circumstances of the whole activity.'"⁵¹

Bonnette only involved "chore workers" in a state welfare program.⁵² Even so, courts quickly began to adopt the *Bonnette* standard for other determinations of "economic reality" under the FLSA. A year after *Bonnette*, the Second Circuit became the first court to apply the test in an inmate labor situation.

In *Carter v. Dutchess Community College*,⁵³ a New York inmate (Carter) had worked in the prison as a teaching assistant for a local college.⁵⁴ Carter conducted tutorial classes in business math for inmate students. For his work, Carter received wages well below the statutory minimum.⁵⁵ The lower court granted summary judgment for the defendants on the ground that the prison officials, and not the college, had the ultimate control over Carter.⁵⁶ Against tradition, the Second Circuit reversed and remanded, holding that "ultimate control" was not the sole dispositive factor.⁵⁷ Instead, the court applied the *Bonnette* test, stating that "an inmate may be entitled under the law to receive the federal minimum wage from an *outside employer*, depending on how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent."⁵⁸

50. *Bonnette*, 704 F.2d at 1470.

51. *Id.* (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

52. *Id.* at 1467.

53. 735 F.2d 8 (2d Cir. 1984).

54. *Id.* at 10.

55. *Id.*

56. *Id.* at 11-12.

57. *Id.* at 13-14.

58. *Id.* at 14 (emphasis added). *Carter* was decided before the 1985 amendments to the FLSA; therefore, the states were not yet subject to the FLSA provisions. Even so, the *Carter* court seemed reluctant to go beyond granting FLSA coverage for prisoners working for "outside" employers. *See id.*

Carter represented a major reversal in the judicial trend which, until then, had the practical effect of absolutely precluding inmates from FLSA coverage. Now, by satisfying the four-factor *Bonnette* test, inmates could argue that they were in fact employees according to "economic reality." *Carter* led the way for *Watson v. Graves*,⁵⁹ which became the first case to actually grant prisoners "employee" status under the FLSA.

In *Watson*, two officers (the sheriff and the warden) of a Louisiana parish jail operated and administered a work release program.⁶⁰ The sheriff and warden would grant "trustee" status to certain prisoners and would allow these prisoners "to work outside the jail for private individuals or companies."⁶¹ This would occur usually at the request of the outside parties. As part of the program, two inmates (Watson and Thrash) worked outside the prison for a small construction business operated by the sheriff's daughter and son-in-law (the Jarreaus). The inmates worked for \$20 per day regardless of the hours worked.⁶²

The *Watson* court applied the *Bonnette* test and found that the Jarreaus clearly met the supervision prong of the test.⁶³ The court also found that "Jarreau . . . had the de facto power to hire and fire" and that the "Sheriff 'set' the rate of pay."⁶⁴ The court ignored the record-keeping prong since no records were kept.

Not surprisingly, the court held that Watson and Thrash "were 'employees' of the Jarreaus for purposes of FLSA coverage."⁶⁵ However, the facts of that case were unusual when compared with the typical on-site prisoner work program.⁶⁶ The sheriff had operated the work release program to directly benefit his daughter and son-in-law and had violated state policy regarding such programs.⁶⁷ At best, *Watson* should be

59. 909 F.2d 1549 (5th Cir. 1990).

60. *Id.* at 1551.

61. *Id.*

62. *Id.*

63. *Id.* at 1554-55.

64. *Id.* In fact, the Sheriff had set the pay rate illegally under Louisiana law. *Id.* at 1555.

65. *Id.* at 1556.

66. "Up to now this court believed, apparently naively, that in the last decade of the twentieth century scenarios such as the one before us no longer occurred in country or parish jails of the rural south except in the imaginations of movie or television script writers." *Id.* at 1550.

67. *Id.* at 1557. The court stated that work release programs were meant to

narrowly read to hold that prisoners who participate in a work release program, completely unsupervised by prison officials, may be entitled to FLSA coverage.

Since *Watson*, however, some courts have refused to apply the *Bonnette* test to inmate labor situations. At one point, even the Ninth Circuit refused to consider the *Bonnette* factors in reviewing a case of prisoners working for the state department of corrections. In *Gilbreath v. Cutter Biological, Inc.*,⁶⁸ all three judges voiced a different opinion.⁶⁹ Judge Trott's opinion, which was adopted as the court opinion, claimed that the "economic reality" issue did not apply to inmates:

A review of the FLSA in the light of its evident purpose and legislative history, conducted with an eye guided by common sense and common intelligence, leads . . . to the inescapable conclusion that it is highly implausible that Congress intended the FLSA's minimum wage protection be extended to felons serving time in prison. This is a category of persons . . . whose civil rights are subject to suspension and whose work in prison could be accurately characterized in an economic sense as involuntary servitude⁷⁰

Furthermore, Judge Trott concluded that the state's "complete control" over its inmates was inconsistent with the "economic reality" in a true employer-employee relationship.⁷¹

Nevertheless, several courts now seem to recognize that prisoners may have a right to FLSA coverage when they are employed in the service of private businesses. Even more eye catching is an emerging trend to grant prisoners a right to minimum wages when they work for the prison or the state. Judge Dorothy Nelson, who wrote a strong dissent in *Gilbreath*,⁷² commanded the majority in a 1992 case which held prisoners to be "employees" of the Arizona Correctional Industries.⁷³ That panel's opinion, and its possible implica-

help inmates "earn wages with which to help support their families and pay their fines." Also, "a portion of the wages earned by a work release inmate [was] to be applied to his room and board, thereby easing the burden on the taxpayer." *Id.* The sheriff's program met none of these purposes. *Id.*

68. 931 F.2d 1320 (9th Cir. 1991).

69. *Id.* at 1321 (Trott, J.); *id.* at 1328 (Rymer, J., concurring in part and concurring in the judgment); *id.* at 1331 (Nelson, J., dissenting).

70. *Id.* at 1324-25.

71. *Id.* at 1325.

72. *Id.* at 1331 (Nelson, J., dissenting).

73. Hale I, 967 F.2d 1356 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th

tions are examined in Part III. Part IV then examines a Seventh Circuit opinion⁷⁴ that seems written almost as a rebuttal to *Hale I*, and *Hale II*, the en banc rehearing by the Ninth Circuit.⁷⁵

III. PRISON INMATES AS STATE EMPLOYEES:

HALE V. ARIZONA I

A. *The Facts*

Hale I involved the consolidated claims of two groups of inmates in the Arizona Correctional Industries (ARCOR) program.⁷⁶ One group of inmates (Fuller inmates) performed a wide variety of jobs in ARCOR enterprises, ranging from raising hogs for Farmer John meats to making license plates.⁷⁷ To work for ARCOR, the inmates had to apply to the program, be accepted by the prospective department, and pass a security review.⁷⁸ ARCOR placed all revenues in a revolving fund from which it paid wages and expenses.⁷⁹

The only appellant from the other inmate group (Hale inmates) worked as an office manager and clerk for a business participating in the Inmate-Operated Business Enterprise (IOBE) program.⁸⁰ The IOBE was a division of ARCOR which allowed inmates to run businesses and to market goods in the private sector. The Department of Corrections (DOC) monitored the businesses and credited the inmates' accounts with the wages collected.⁸¹

Both groups of inmates sued to recover minimum wages under the FLSA and Arizona law. One lower court dismissed the claim of the Fuller inmates, while another court granted summary judgment against the Hale inmates.⁸²

Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

74. *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

75. *Hale II*, 993 F.2d 1387 (9th Cir. 1993) (en banc).

76. *Hale I*, 967 F.2d at 1360.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

B. *The Ninth Circuit's Panel Opinion*

On appeal, the Ninth Circuit first upheld the applicability of the FLSA to states.⁸³ The court then turned to the critical issue: whether the inmates were involved in an employer-employee relationship with the state, as defined under the FLSA.⁸⁴

The court's analysis first addressed the issue of whether inmates could ever be employees. In so doing, the court expressly followed the well-settled principle requiring courts "to define 'employer' and 'employee' expansively and to construe exemptions narrowly."⁸⁵ The court then recognized that Congress, in 29 U.S.C. § 213 (1988), had not specifically "exempted" prisoners. This, the court claimed, created a presumption that prisoners remained covered by the Act.⁸⁶

Furthermore, the court found that "[c]onstruing the FLSA to include inmate workers is also consistent with the purposes of the Act."⁸⁷ Indeed, "[r]equiring that prisoners receive a minimum wage for their labor [even] furthers the goal" of eliminating "unfair competition between employers and between workers seeking employment."⁸⁸ As a result of this analysis, the court concluded that "Congress did not intend automatically to exclude inmate employees from the protections of the Act."⁸⁹

The court next turned to an inquiry into whether an employment relationship actually existed between the inmates and the state agency.⁹⁰ Because *Gilbreath v. Cutter Biological, Inc.* had contained three "widely divergent views," the court in *Hale I* more or less ignored the prior opinion of Judge Trott.⁹¹

83. *Id.* at 1361.

84. *Id.* at 1362.

85. *Id.* (citing *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295-96 (1985)).

86. *Id.* at 1363.

87. *Id.* The opinion quickly brushed over the importance of the FLSA's purpose to provide a minimum standard of living. While most commentators consider that to be the primary purpose of the Act, the court in *Hale I* concluded that it was only "equally important" with eliminating unfair competition. *Id.*

88. *Id.*

89. *Id.* at 1364.

90. *Id.*

91. *Id.* at 1364-66 (analyzing the three opinions and explaining away the court's holding (Judge Trott's opinion) in *Gilbreath*). Interestingly, Judge Nelson, who had not joined Judge Rymer's opinion concurring in part and concurring in the judgment in *Gilbreath*, actually applied Rymer's rationale in *Hale I* when that application would result in an outcome consistent with Nelson's thinking. *Id.* at 1364-65.

Instead, the court chose to apply the four-pronged *Bonnette* test to ARCOR and the DOC.⁹²

Applying the test to the Fuller inmates, the court found that the state was responsible, through ARCOR and the DOC, for (1) hiring and firing the inmates, (2) supervising and controlling the work, (3) determining the rate and method of payment, and (4) maintaining any existing employment records.⁹³

In the case of the Hale inmate, the court sidestepped the possible liability of the IOBE business, which was owned and operated by inmates. Instead, the court reverted to a traditional standard and held that the state had "effective" or "ultimate" control over hiring and firing, supervising, and paying the inmates through ARCOR and the DOC.⁹⁴

In essence, meeting the prongs of the *Bonnette* test proved dispositive.⁹⁵ The Ninth Circuit panel effectively held the State of Arizona liable for not paying minimum wages to state prisoners working in the ARCOR program. In reality, the state could not help but meet the factors of the *Bonnette* test because of the absolute control it maintained over prisoners in all situations—not just those involving inmate labor. Furthermore, the court never considered that, by statute, Arizona could require inmates to "engage in hard labor for not less than forty hours per week."⁹⁶ Previously, courts had found this factor enough to disqualify the inmates' claims.⁹⁷ Clearly, the *Hale I* holding would have made it difficult for courts to ever justify not extending FLSA coverage to prisoners.

IV. PRISON INMATES NOT STATE EMPLOYEES: *VANSKIKE V. PETERS AND HALE V. ARIZONA II*

Just two months after *Hale I*, the Seventh Circuit addressed the issue of an inmate's right to receive minimum wages from the state.⁹⁸ Although the court attempted to dis-

92. *Id.* at 1364.

93. *Id.* at 1366.

94. *Id.* at 1367.

95. However, failing to meet one or more of the prongs would not have ended the inquiry: "failure to satisfy one of the factors is not automatically fatal to a worker's claim." *Id.* at 1364.

96. ARIZ. REV. STAT. ANN. § 31-251(A) (1992).

97. *See, e.g.,* *Watson v. Graves*, 909 F.2d 1549, 1553 n.7 (5th Cir. 1990) (recognizing that "when a prisoner is sentenced to labor as part of his sentence, his labor belongs to the prison and is at the disposal of the prison officials").

98. *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct.

tinguish its case from *Hale I*, it still felt the need to rebut most of the arguments presented by the *Hale I* court.⁹⁹

A. *The Facts of Vanskike*

Vanskike, an inmate at Illinois' Stateville Correctional Center, performed various work assignments for the prison. Vanskike claimed to have worked "as a janitor, kitchen worker, gallery worker" and other positions while incarcerated.¹⁰⁰ Vanskike also claimed that the Illinois Department of Corrections (DOC) did not pay minimum wages for his work.¹⁰¹

Vanskike filed a pro se complaint against the director of the DOC. The district court, construing the complaint as an FLSA claim, granted the defendant's motion to dismiss. Vanskike appealed.¹⁰²

B. *The Seventh Circuit's Opinion*

On appeal, the Seventh Circuit first indicated that the Act itself provides "little assistance, and the term 'employee' does not obviously include prisoners who perform work within a prison."¹⁰³ The court also brushed aside the argument that employees not specifically "exempted" remain within the Act, since that argument "assumes that prisoners plainly come within the meaning of the term 'employees.'"¹⁰⁴

The court also attacked the argument that paying prisoners minimum wages is necessary to fulfill the purposes of the FLSA. The court recognized that the primary purpose of the Act in providing a minimum standard of living had "little or no application in the context presented. Prisoners' basic needs are met in prison."¹⁰⁵ In addition, the court rejected the argument that the purpose of preventing unfair competition compelled FLSA coverage of prisoners, claiming that Congress has already adequately addressed that concern by regulating prison-made goods through the Ashurst-Sumners Act.¹⁰⁶

1303 (1993).

99. *Id.* at 808-09.

100. *Id.* at 806.

101. *Id.*

102. *Id.*

103. *Id.* at 807.

104. *Id.* at 807 n.2.

105. *Id.* at 810.

106. *Id.* at 811 (citing 18 U.S.C. §§ 1761-1762 (1988)). The court presumed that since Congress passed the Ashurst-Sumners Act in 1935, Congress certainly

Finally, the court declined to apply the *Bonnette* test, claiming that

the *Bonnette* factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation. Put simply, the DOC's 'control' over Vanskike does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself. . . . The *Bonnette* factors thus primarily shed light on just one boundary of the definition of 'employee,' and we are concerned with a different boundary.¹⁰⁷

The court concluded that, in accordance with the "economic reality," Vanskike was not an "employee" under the FLSA.¹⁰⁸ Furthermore, the court declared that "to the extent that [*Hale I*] may rule that a prisoner working within the prison and for the prison is an 'employee' of the prison under the FLSA, we respectfully disagree with its conclusion."¹⁰⁹

While the *Vanskike* court attempted to somewhat lessen the effect of the *Hale I* decision, the Seventh Circuit still left the door open for possible FLSA coverage of prisoners. The court agreed that "prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners."¹¹⁰

C. *The Ninth Circuit's En Banc Opinion*

The *Hale I* opinion raised eyebrows even within the Ninth Circuit. In the latter part of 1992, that court reheard the case en banc and issued a new opinion on May 4, 1993.¹¹¹ Specifically, the court indicated its need to "consider these questions en banc to resolve the tension between [its] decision in *Gilbreath v. Cutter Biological, Inc.*, and the panel opinion in [*Hale I*]."¹¹²

Interestingly, the Ninth Circuit adopted the Seventh Circuit's view in *Vanskike* that the *Bonnette* factors did not provide a useful framework for determining the existence of an

did not intend to render such a recently passed law superfluous when it enacted the FLSA just three years later. *Id.*

107. *Id.* at 809-10.

108. *Id.* at 810.

109. *Id.* at 809.

110. *Id.* at 808.

111. *Hale II*, 993 F.2d 1387 (9th Cir. 1993) (en banc).

112. *Id.* at 1389 (citation omitted).

employee-employer relationship.¹¹³ As in *Vanskike*, the lack of a free labor situation weighed heavily in the Ninth Circuit's decision:

The case of inmate labor is different from [the *Bonnette*] type of situation where labor is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude. . . . "Can these prisoners plausibly be said to be 'employed' in the relevant sense at all?"

We think not, because . . . the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner. It is penological, not pecuniary.¹¹⁴

The court next concluded that its decision that the inmates were not employees "is consistent with the purpose of the FLSA."¹¹⁵ The problem of sub-standard living conditions which the FLSA was designed to combat is simply not a concern for prisoners.¹¹⁶ The court further determined that the FLSA did not seek to redress unfair competition among goods in the marketplace, but rather unfair competition in the labor market.¹¹⁷ Although the court was willing to concede that a certain amount of unfair competition may result from the use of prison labor, "nothing in the FLSA indicates that that fact

113. *Id.* at 1394.

114. *Id.* at 1394-95 (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993)). The Fourth Circuit appears to agree with this rationale. See *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir.) (quoting *Vanskike* and citing *Gilbreath* while holding that the FLSA does not cover inmates), *cert. denied*, 114 S. Ct. 238 (1993).

115. *Hale II*, 993 F.2d at 1396.

116. *Id.*

117. *Id.* In support of this position, the court quoted President Roosevelt, President Roosevelt's Message to Congress on the Fair Labor Standards Act (May 24, 1937), reprinted in S. REP. NO. 884, 75th Cong., 1st Sess. 2 ("And so to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce."), and the Supreme Court, *Powell v. United States Cartridge Co.*, 339 U.S. 497, 509-10 (1950) ("In [the FLSA], the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation."). The court also concluded, like the Seventh Circuit, that Congress "specifically addressed its concern with unfair competition in the products market from prison-made goods in the Ashurst-Sumners Act." *Hale II*, 993 F.2d at 1397 (footnote omitted).

alone should convert the relationship between prison and prisoner to one of employer-employee."¹¹⁸

Finally, the Ninth Circuit recognized that other policy concerns applicable to prison industries programs provide evidence that Congress would not grant FLSA coverage to prisoners working in such programs.¹¹⁹ "Correctional industries . . . occupy idle prisoners, reduce disciplinary problems, nurture a sense of responsibility, and provide valuable skills and job training."¹²⁰ Requiring prisons to pay prisoners minimum wages without recouping expenses for their maintenance would make these work programs economically infeasible. Accordingly, the court concluded that "Congress cannot have intended the FLSA to impose a minimum wage obligation that would jeopardize prison industries programs structured by and for the prisons."¹²¹

For all these reasons, the Ninth Circuit declined to follow the panel opinion in *Hale I* and affirmed the lower court's denial of FLSA coverage for the prisoners.¹²² Even so, neither *Hale II* nor *Vanskike* went so far as to hold that prisoners are categorically excluded from the FLSA. Instead, the courts limited their holdings to cases of "hard labor," when the prisoners are statutorily required to work.¹²³ Both courts failed to address several other factors and competing policy interests which make it unlikely that Congress intended or intends for prisoners to be covered by the FLSA except in the narrowest of circumstances.

V. INTERPRETING THE FAIR LABOR STANDARDS ACT—DID CONGRESS INTEND TO COVER INMATES?

Part of the difficulty courts experience in determining whether or not inmate workers should be covered by the FLSA has resulted from a lack of clear guidance in the Act itself, lack of clear guidance from Congress, and the courts' failure to con-

118. *Hale II*, 993 F.2d at 1397.

119. *Id.* at 1398.

120. *Id.*

121. *Id.*

122. *Id.* at 1400. However, Judge Norris wrote a scathing dissent. *Id.* (Norris, J., dissenting). Most of Judge Norris's arguments, as well as those of other proponents of FLSA coverage for prisoners, are examined in Parts V and VI of this Comment.

123. *See id.* at 1392-93, 1395.

sider some key policy concerns regarding the labor and payment of inmates.

A. *Language of the Act*

The Act defines the term "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."¹²⁴ If that circular definition is not very meaningful, it is made even less so by the Act's definition of "employee": "any individual employed by an employer."¹²⁵ Finally, the term "employ" merely "includes to suffer or permit to work."¹²⁶ These broad definitions could include almost anyone actually working in almost any capacity, even without expectation of payment. Indeed, under these definitions, the FLSA should cover anyone suffered or permitted to work by an employer.¹²⁷

Congress likely intended broad coverage of the Act, but it certainly did not intend absolute coverage of everyone.¹²⁸ This is evidenced by the list of "exempted" employees in 29 U.S.C. § 213. On the other hand, Justice Powell's language, indicating that "[s]uch specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act,"¹²⁹ has fueled the argument that because Congress did not specifically exempt inmates in § 213, Congress intended their inclusion within the Act.¹³⁰ This general assertion's weakness stems from the fact that it presupposes that Congress contemplated inmates as employees under the Act when listing the exemptions.¹³¹ Logically, Congress would only exempt those naturally considered to be employees in the first instance.

The plain meaning of the term "employee" also provides little insight into Congressional intent. Perhaps *Webster's*

124. 29 U.S.C. § 203(d) (1988).

125. 29 U.S.C. § 203(e)(1) (1988).

126. 29 U.S.C. § 203(g) (1988).

127. The federal government "suffers or permits" millions of Americans to work for their employers of choice. Can all those workers consider themselves employees of the federal government? Clearly, the definitional provisions of the FLSA should not be read too literally.

128. *See supra* text accompanying notes 25-28.

129. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517 (1950).

130. *See, e.g., Hale I*, 967 F.2d 1356, 1363 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

131. *See Vanskike v. Peters*, 974 F.2d 806, 807 n.2 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

Ninth New Collegiate Dictionary conveys what Congress intended, defining "employee" as "one employed by another [usually] for wages or salary and in a position below the executive level."¹³² Nevertheless, *Black's Law Dictionary* recognizes that "whether one is an employee or not within a particular statute [such as the FLSA] will depend upon facts and circumstances."¹³³ Accordingly, little guidance for the courts can be found in the actual language of the FLSA.

B. Purposes of the Act

In enacting the FLSA, Congress found the existence "of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹³⁴ According to Congress, perpetuation of this first problem led to other problems such as unfair competition and labor disputes.¹³⁵ Congress then declared that the Act was intended "to correct and as rapidly as practicable to eliminate [those] conditions . . . without substantially curtailing employment or earning power."¹³⁶ None of these purposes, however, compels a conclusion that inmates must be paid minimum wages under the Act.

1. Sub-standard living conditions

The Congress, judges, and other commentators generally agree that the need to improve Americans' standard of living provided the primary impetus for passage of the FLSA.¹³⁷ Nevertheless, "the problem of substandard living conditions . . . does not apply to prisoners, for whom clothing, shelter, and

132. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 408 (1990). Interestingly, Merriam-Webster's concept of an employee parallels that of Congress in many respects. Congress first chose to exempt "any employee employed in a bona fide executive, administrative, or professional capacity" from the minimum wage provisions. 29 U.S.C. § 213(a)(1) (1988). This exemption also raises some speculation as to the treatment of inmates who labor in executive positions—as in the case of selected inmates in Arizona's IOBE program. Hale I, 967 F.2d 1356, 1360 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

133. BLACK'S LAW DICTIONARY 525 (6th ed. 1990).

134. 29 U.S.C. § 202(a) (1988).

135. *Id.*

136. *Id.* § 202(b).

137. See *supra* text accompanying notes 17-22; see also Hale II, 993 F.2d 1387, 1396 (9th Cir. 1993) (agreeing that sub-standard living conditions were the primary concern of the FLSA).

food are provided by the prison."¹³⁸ Since the main purpose of the Act does not apply to prisoners, a finding that Congress intended to cover prisoners under the FLSA runs contrary to common sense.

In any event, instead of raising inmates' standard of living, the requirement of minimum wages could actually lead to fewer inmates working and earning *any* wages. In fact, very few states could afford to pay minimum wages to their working inmates.¹³⁹ In all likelihood, states would cut back on inmate-work programs rather than incur additional wage expenses.¹⁴⁰ Such a result would defeat Congress's goal of eliminating poor living and working conditions "without substantially curtailing employment or earning power."¹⁴¹

2. *Unfair competition*

Proponents of FLSA coverage for prisoners most often point to the unfair competitive advantage which inmate employers gain by paying wages below the statutory minimum.¹⁴² Congress likely intended the FLSA to deter employers from trying to make less expensive products through a strategy of paying low wages. Even so, while less expensive products may be a by-product, this is not the intent of most inmate work programs. Indeed, most courts recognize that the primary intent of the states is to "occupy idle prisoners, reduce disciplinary problems, nurture a sense of responsibility, and provide valuable skills and job training."¹⁴³ With this in mind, the Ninth Circuit, in *Hale II*, was willing to acknowledge

138. *Hale II*, 993 F.2d at 1396; *accord* *Vanskike v. Peters*, 974 F.2d 806, 807 n.2 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

139. "A 1992 study by The Sentencing Project, a nonprofit group that specializes in criminal-justice issues, estimated that jails and prisons cost taxpayers more than \$20 billion a year. . . . 'Corrections is [already] one of the biggest busters of state budgets now.'" Ed Timms, *Prison Boom a Bust: More Inmates, but Not Less Crime*, SALT LAKE TRIB., June 17, 1993, at A1 (quoting Jim Gondles, executive director of the American Correctional Association); *see also* Tonry, *supra* note 1, at 395-96 (describing the large "price tag" for building and operating prisons).

140. *See supra* text accompanying note 121.

141. 29 U.S.C. § 202(b) (1988). *But see* *Hale II*, 993 F.2d 1387, 1401 n.1 (9th Cir. 1993) (Norris, J., dissenting) ("The question [of] Congress' concern with the harmful effect that cheap labor has on the living standards of *all workers* [and not just prisoners] should inform our interpretation of the statute." (emphasis added)).

142. *See, e.g., Hale II*, 993 F.2d at 1400, 1403 (Norris, J., dissenting); *Hale I*, 967 F.2d 1356, 1363 (9th Cir. 1992), *rev'd on reh'g*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993).

143. *Hale II*, 993 F.2d at 1398; *see supra* notes 7-8 and accompanying text.

that some unfairness would have to be tolerated to accommodate these compelling interests for putting inmates to work.¹⁴⁴

In addition, the advantage of paying sub-minimum wages is likely offset by added expenses and, in some cases, the lower-quality work-product of prison labor. This is certainly true in the federal prison system:

[M]any believe the cost of inmate labor (an average of one dollar per hour) gives [Federal Prison Industries] an unfair advantage in the selling prices of products. However, labor costs in terms of a percent of the selling price are generally the same as that of most private sector operations manufacturing similar products. The reasons are that we focus on labor intensive operations, that we hire inmates who have little work experience, and that there are many "hidden" costs, including prison security, a high ratio of "civilian foremen" to inmate workers, and lost product time resulting from prison operation requirements.¹⁴⁵

Presumably, state prison programs experience many of the same difficulties as the federal programs in dealing with an unskilled labor force which can also represent a security risk.

Furthermore, the courts have failed to consider the costs of providing food, shelter, and clothing for prisoners as part of their imputed income. As of 1990, maintaining prisoners in federal prison cost about \$14,000 a year.¹⁴⁶ The cost to state prisons likely approaches or exceeds this amount.¹⁴⁷ Imputing those costs as income to working inmates could be one way of getting around the actual payment of minimum wages.

In any event, the prevention of unfair competition, without other compelling rationale, provides a weak argument for extending FLSA coverage to prisoners. Requiring payment of the minimum hourly wage to working prisoners would not necessarily solve the problem of unfair competition. In all likelihood, the average wage in several competing industries already exceeds the statutory minimum. Accordingly, simply requiring

144. See *supra* text accompanying note 118.

145. *Hearings, supra* note 4, at 11-12 (statement of J. Michael Quinlan, Director, Federal Bureau of Prisons).

146. *Id.* at 3 (testimony of Hon. Carlos J. Moorhead).

147. "The annual cost to operate [state] prisons ranges from \$15,000 to \$50,000 per prisoner per year, depending on the state." Tonry, *supra* note 1, at 395; see also *supra* note 139.

employers to pay inmate workers minimum wages would alleviate, but not cure, this problem of unfair competition of goods and labor in the marketplace.¹⁴⁸ Since prison work programs do not experience the same competitive pressures of a free labor system as do other public or private employers,¹⁴⁹ only requiring payment of the prevailing wage in the industry could fully solve the problem. In summary, the need to eliminate unfair competition fails to provide a compelling reason for covering inmates under the FLSA.

C. Congressional Action and Inaction

The question still remains whether the failure of Congress to exempt prisoners from coverage should be construed as express intent to include prisoners in the Act or as an oversight on the part of Congress. *Hale I* followed the former proposition,¹⁵⁰ while *Vanskike* followed the latter.¹⁵¹ Nevertheless, Congress has not acted to include the coverage of prisoners during the more than forty years in which the courts have generally denied it. Congress has had ample opportunity to amend the FLSA to include at least prisoners working for private industries, if not those working for the states.

Congress's silence on the matter may be indicative of its thinking, or lack thereof, concerning FLSA coverage of inmate workers. One possible interpretation is that Congress has found the courts' decisions denying coverage to be acceptable. Certainly, failure to legislatively counter a court decision will be viewed by some as ratification of that decision.¹⁵² Howev-

148. This assumes no extra expenses to employers who use prison labor to produce their products. *But see supra* text accompanying note 145.

149. *See supra* text accompanying notes 107, 114.

150. *Supra* text accompanying note 86.

151. *Supra* text accompanying notes 103-104. Compare Mark A. Cunningham, Recent Development, *Watson v. Graves: Locked into Minimum Wage: Fair Labor Standards Act Coverage of Prison Inmates*, 65 TUL. L. REV. 1767, 1775 (1991) (claiming that the Fifth Circuit's "express holding that inmate status does not automatically foreclose FLSA coverage resolves the confusion that resulted from prior case law which either stated or held that Congress did not intend for the FLSA to apply to work performed by prison inmates" (citations omitted)) with James J. Maiwurm & Wendy S. Maiwurm, Comment, *Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms*, 7 U. MICH. J.L. REF. 193, 212 (1973) (citing FLSA legislative history to support the proposition that Congress did not intend the FLSA to cover prison inmates).

152. In fact, those who do not favor completely excluding inmates from FLSA coverage have applied a similar argument. *See, e.g., Hale II*, 993 F.2d 1387, 1392 n.8 (9th Cir. 1993) (indicating that because "Congress has amended the FLSA twice

er, congressional inaction may simply represent a desire to leave the matter to the courts; or, it may result from the fact that prisoners lack a cohesive and influential lobbying voice.¹⁵³

In any event, some courts believe that Congress's passage of the Ashurst-Sumners Act¹⁵⁴ represented the extent of legislative action the lawmakers intended to take concerning prison labor.¹⁵⁵ Congress enacted this particular law to combat "the evils attending the sale of [prison-made] goods in competition with goods manufactured and produced by free labor."¹⁵⁶ Regardless of what Congress intended, "we cannot ignore the fact that prison industries programs have existed for a long time, Congress has been aware [of these programs] at least since passage of the Ashurst-Sumners Act in 1935, and important penological purposes are served by these programs."¹⁵⁷

Even so, the best evidence of what Congress may intend with regard to working state prisoners can be seen in congressional treatment of federal prisoners. Federal prison work programs pay wages well below the statutory minimum.¹⁵⁸ If Congress allows federal prisoners to be paid sub-standard wages, it certainly must not object to state prisoners being paid sub-standard wages. Unless Congress voices some rationale to the contrary, it presumably intends similar treatment of federal and state inmates.

D. Public Policy Toward Criminals

The courts have also failed to consider a number of other public policy concerns regarding prisoners. For example, schol-

since [the *Carter* holding] without taking action to limit [it,] congressional silence on the applicability of the FLSA to prisoners is some indication of its intent").

153. One commentator has suggested that Congress enacted the FLSA because the "political elites" conceded to pressures from the working class. RONNIE STEINBERG, *WAGES AND HOURS* 14 (1982). Steinberg believes that the working class's power to influence government or employers is the result of organized labor. *Id.* at 179-81 (claiming that organization begets power and power begets reform). Since working inmates lack the power to organize to the same extent as private labor, the inmates also lack the power for reform.

154. 18 U.S.C. §§ 1761-1762 (1988).

155. See *Hale II*, 993 F.2d at 1397; *Vanskike v. Peters*, 974 F.2d 806, 812 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

156. *Hale II*, 993 F.2d at 1397 (quoting S. REP. NO. 906, 74th Cong., 1st Sess. (1935)).

157. *Id.* at 1398.

158. See *Hearings*, *supra* note 4, at 4, 11-12.

ars have voiced several policy reasons supporting the imprisonment of criminals, including rehabilitation, incapacitation, retribution, and deterrence.¹⁵⁹

Rehabilitation of criminals is arguably served by allowing prisoners to work;¹⁶⁰ however, the payment of prisoners for their labor is usually not considered essential to this goal. The rehabilitative benefit comes from the job skills acquired, the responsibility learned, and the self-esteem gained by the inmate worker through productivity.¹⁶¹ Similarly, incapacitation is not affected by paying wages to inmate workers. Either way, the criminal remains incarcerated, hopefully unable to harm society.

On the other hand, paying prisoners for their labor clearly contradicts the goal of retribution. Requiring "hard labor" may be considered part of the criminal sentence.¹⁶² In any event, allowing prisoners to earn even meager wages while living at the expense of the state clearly lightens their punishment, at least economically.

Even so, a more compelling policy argument against the payment of minimum or normal wages to prisoners is that such payment reduces the general and specific deterrent effects of incarceration. Indeed, Professor James Wilson has recognized the view that "crime will be more frequently committed if, other things being equal, crime becomes more profitable compared to other ways of spending one's time."¹⁶³

159. See JAMES Q. WILSON, *THINKING ABOUT CRIME passim* (1977).

160. See *supra* notes 7-8, 143 and accompanying text.

161. See DAVID J. CHERRINGTON, *THE WORK ETHIC passim* (1980).

162. "Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added); see, e.g., ARIZ. REV. STAT. ANN. § 31-251(A) (1992) (granting state official authority to require that each able-bodied prisoner engage in hard labor).

163. WILSON, *supra* note 159, at 117. One scholar suggests that a potential criminal

would compare the hourly wage rate in his best legal occupation compared with the amount he could earn in his best criminal activity. . . .

[A] major factor in the costs of crime is the opportunity cost of foregone legal wages. . . . An individual would also consider the direct costs and occupational expenses associated with crime: the probability of being arrested, of being convicted, and punished.

MORGAN O. REYNOLDS, *CRIME BY CHOICE: AN ECONOMIC ANALYSIS* 68 (1985). Allowing prisoners to be paid for work in prison reduces this "direct cost" of punishment, increasing the likelihood that an individual will engage in criminal acts.

Paying criminals for their labor while in prison certainly makes incarceration seem less severe from an economic standpoint. If criminals know that if they are caught and convicted they can still have gainful employment while living off the state, the deterrent effect of imprisonment is seriously weakened.¹⁶⁴ Accordingly, increasing the wages of working inmates to the statutorily required minimum would further increase the likelihood that a person will undertake crime for its potential economic benefits.

This proposition seems especially true in light of evidence that crimes are more likely to be committed by unemployed persons who would stand to benefit economically from either perpetrating crime or prison employment.¹⁶⁵ Also, substantially more property crimes are committed annually than violent crimes,¹⁶⁶ further indicating a possible connection between criminal behavior and the need for property or economic gain.

Several scholars have developed models to support this economic hypothesis on a much more complex and scientific level. *See, e.g.,* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Sheldon Danziger & David Wheeler, *The Economics of Crime: Punishment or Income Redistribution*, 33 REV. SOC. ECON. 113 (1975); Isaac Ehrlic, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973). Indeed such views were espoused more than a century ago: "[M]en will resort to plunder whenever plunder is easier than work. History shows this quite clearly. And under these conditions, neither religion nor morality can stop it." FREDERIC BASTIAT, *THE LAW* 10 (Dean Russell trans., 1950) (1850).

164. This analysis obviously ignores other psychological viewpoints on criminal behavior. *See generally* WILSON, *supra* note 159, at 47-70. Certainly, mentally unstable individuals will be less likely to consider the economic prospects of criminal behavior. Nevertheless, "[t]he evidence supports the idea that criminals are rational and responsible for their own behavior." REYNOLDS, *supra* note 163, at 75.

A similar economic theory underlies much of the rationale behind tort liability as well. *See* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 25-26 (5th ed. 1984). The theory is that "[a] reasonable person will take care to avoid an accident as long as the cost of taking care is less than the cost of the accident to that person. Accident cost is a function of the gravity of the harm the accident will cause . . . and the probability that the accident will happen." Sharon E. Conaway, Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 420 n.111 (1988).

165. *See* CHARLES H. MCGAGHY, *CRIME IN AMERICAN SOCIETY* 65 (1980); RICHARD QUINNEY, *CLASS, STATE, AND CRIME: ON THE THEORY AND PRACTICE OF CRIMINAL JUSTICE* 50-60 (1977).

166. Reynolds claims that "over 90 percent of the crimes recorded by the police involve thefts and robberies." REYNOLDS, *supra* note 163, at 68; *see also* CRIME REPORTS, *supra* note 2, at 5.

Certainly Congress has considered this in its regulation of Federal Prison Industries and other prison work programs which still pay sub-minimum wages to inmates. Congress could not approve a program which would so strongly undermine public policy towards criminals while only marginally furthering the goals of the FLSA.¹⁶⁷

VI. A NEW TEST FOR ECONOMIC REALITY

In light of the fact that Congress likely did not, and would not, intend for the Fair Labor Standards Act to cover working prisoners in a majority of cases, the courts must find a way to interpret the Act in a logical and consistent manner. The Supreme Court has held that the coverage of any given relationship hinges on the "economic reality" of the employment situation.¹⁶⁸ Several courts have developed tests for determining the "economic reality" of the employment situation, but the Ninth Circuit's *Bonnette* test has become the most popular.¹⁶⁹ In addition to the Ninth Circuit, the Second¹⁷⁰ and Fifth Circuits¹⁷¹ have apparently also adopted the test.

Even so, the *Bonnette* test is flawed, failing to adequately recognize "economic reality" in several situations. Applied literally, most inmate workers would gain coverage under the FLSA. This is because the *Bonnette* test really only focuses on whether the employer (or group of employers) perform employer-like functions over the inmate worker. The inmate is held to be an employee by virtue of the entity paying the wages being held to be an employer. However, this does not always comport with reality.¹⁷²

Accordingly, this Comment proposes a new test which considers both the employer *and* employee sides of the relationship: an employee covered by the Fair Labor Standards Act is a person who, (1) while free to sell his or her labor to another

167. See the text accompanying notes 143-144 for a brief discussion of other compelling policies which require inmates to work.

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

169. See *supra* text accompanying notes 48-51.

170. *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984).

171. *Watson v. Graves*, 909 F.2d 1549, 1554-55 (5th Cir. 1990).

172. See *Hale II*, 993 F.2d 1387, 1394 (9th Cir. 1993) (holding that the *Bonnette* factors do not provide a useful framework in the case of prisoners who are statutorily required to work); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (stating that the *Bonnette* factors presuppose a free labor situation which does not exist), *cert. denied*, 113 S. Ct. 1303 (1993).

party (2) in reasonable expectation of standard compensation, (3) provides services for or on behalf of a party (4) who has power to hire or fire the person, (5) who supervises and controls the person while working, and (6) who determines the rate and method of payment to the person.

Under this test, workers must be free to sell their services¹⁷³ and must reasonably expect compensation.¹⁷⁴ Three *Bonnette* factors are still included to determine who the actual employer is.¹⁷⁵ Clearly, this test more closely reflects the economic reality of a true employer-employee relationship.

Under the test, inmate workers could never be employees of the state or prison for FLSA purposes. Inmates are not truly free to sell their labor to a party who not only can decide the terms of their employment but also can govern their entire daily routine. In other words, the state's "control over [an inmate] does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself."¹⁷⁶ "[T]he economic reality of [this] relationship . . . lies in the relationship between prison and prisoner. It is penological, not pecuniary."¹⁷⁷ This is especially true when inmates are required by state statute to work, but it applies equally to any situation in which the state or prison can establish the terms of employment or pays the inmate worker.¹⁷⁸

173. Steinberg contends that, though the contrary may seem true, freedom of contract was the source of the FLSA's philosophical foundation. STEINBERG, *supra* note 153, at 8.

174. This requirement would eliminate the possibility of volunteer workers later trying to demand payment from those on behalf of whom they volunteered their services. In addition, inmates would have no reasonable grounds for expecting minimum wages from the prison or state. If the employer is private, the result may change.

175. *Bonnette's* fourth factor, the keeping of employment records, should never be a dispositive factor. However, the fact that records are kept for a particular individual may provide valuable extrinsic evidence when other factors do not clearly point to one employer or another.

176. *Vanskike v. Peters*, 974 F.2d 806, 809-10 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

177. *Hale II*, 993 F.2d 1387, 1395 (9th Cir. 1993).

178. The situation in which it is easiest to conceive of an inmate who could be held to be an employee under FLSA involves an inmate who has been given permission to contract with outside employers on a work-release basis. However, these situations are relatively few in comparison to all inmate labor situations.

VII. CONCLUSION

While some courts seem likely to extend FLSA coverage to prisoners in several cases, the courts' actions are not supported by the Act or by congressional intent. Congress's inaction towards state prisoners and the FLSA should be viewed as approval of the traditional denial of coverage by the courts until 1984. In addition, competing policies regarding treatment of prisoners makes it unlikely that Congress would approve of such coverage, even today. Unless Congress or the Supreme Court provides more specific guidance, the courts should apply this Comment's proposed test for economic reality.

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