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

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Introduction

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

During the COVID-19 pandemic, incarcerated workers in both prison factories and institutional work assignments have faced some of the most high-risk work scenarios: crowded, congregate environments with poor ventilation and inadequate sanitation, lack of personal

* Yale Law School, J.D. 2021. I am grateful to Professor Christine Jolls for all of her encouragement and suggestions in the initial drafting of this piece. Additional thanks to the editors of the *ABA Journal of Labor and Employment Law* for their edits and support, and to Maureen McLaughlin and Juan Carlos Salamanca for being my most loyal editors.

1. Kiera Feldman, *California Kept Prison Factories Open. Inmates Worked for Pennies an Hour as COVID-19 Spread*, L.A. Times (Oct. 11, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-10-11/california-prison-factories-inmates-covid-19 [perma.cc/8QHF-MDFA].

2. *Id.*

3. *Id.*

4. *See, e.g.*, Cary Aspinwall, Keri Blakinger & Joseph Neff, *Federal Prison Factories Kept Running as Coronavirus Spread*, Marshall Project (Apr. 10, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/10/federal-prison-factories-kept-running-as-coronavirus-spread [perma.cc/YW4P-CMPV]; Samantha Michaels, *New York State Has Prisoners Making Hand Sanitizer. It's Unclear if Prisoners Can Use It*, Mother Jones (Mar. 9, 2020), https://www.motherjones.com/crime-justice/2020/03/new-york-state-has-prisoners-making-hand-sanitizer-its-unclear-if-prisoners-can-use-it [perma.cc/6DG6-PK2M]; Julia Ainsley & Jacob Soboroff, *Detained Migrants Say They Were Forced to Clean COVID-Infected ICE Facility*, NBC News (June 10, 2020, 7:58 AM), https://www.nbcnews.com/politics/immigration/detained-migrants-say-they-were-forced-clean-covid-infected-ice-n1228831[perma.cc/S2SM-ZWAN].

protective equipment (PPE), and social distancing.[5] But many incarcerated workers with concerns about the risk of COVID-19 infection from their work conditions were reluctant to miss days of work because they feared disciplinary action that could jeopardize a release date or result in placement in solitary confinement.[6]

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

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

In Part I, this article provides a brief overview of the history of prison labor and current practices, focusing on the coercive and unsafe conditions that incarcerated workers often face. In Part II, this article reviews the function of the Occupational Health and Safety Administration (OSHA) and its various enforcement mechanisms and then discusses which workers are considered to be "employees" covered under OSH Act's protections. Part III unpacks the term "employee" as it has been applied to incarcerated workers, looking at how courts have carved out a "prisoner exception" from federal protective legislation. In Part IV, the article provides an overview of how OSH Act and other health and safety regulations currently operate in the prison work

5. *See, e.g.*, Agence France-Presse, *US Prisons Called a Coronavirus "Tinderbox,"* Courthouse News Serv. (Mar. 19, 2020), https://www.courthousenews.com/us-prisons-called-a-coronavirus-tinderbox [perma.cc/S35U-DGG5]; *see also A State-by-State Look at Coronavirus in Prisons*, Marshall Project (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [perma.cc/HLK5-5CY7] (documenting the disproportionately high rates of COVID infection in detention facilities).

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

setting, detailing how agency interpretations have excluded most incarcerated workers from health and safety protections. The article then presents a normative argument for why incarcerated workers should be included in OSHA coverage, suggests ideas for how this coverage could be achieved, and engages with how courts might distinguish the question of who qualifies as an employee under the OSH Act from more restrictive interpretations of other federal protective legislation. This article concludes by discussing some of the potential ramifications of extending OSHA coverage to incarcerated workers.

I. Prison Labor

Prison labor has served as a linchpin of the American carceral system since the nation's inception. Colonial penitentiaries promoted prison labor programs as a crucial element of the reformation of the prisoner, who would develop the skills to contribute to the economy upon release.[7] Hard labor performed in public—primarily in the form of the chain gang—was intended to serve as a strong deterrent to the public.[8] Prison labor (and the accordant practice of convict leasing) expanded rapidly in the wake of the abolition of chattel slavery, as Southern states enacted laws to criminalize and incarcerate emancipated Black men and women and then leased their labor out to plantation owners and private companies.[9] These convict leasing programs served as a source of profit for both private companies and the state lessors, as prisoners were paid little to no wages and worked long hours, under unsafe and often deadly work conditions.[10] Northern states did not lease out prisoners in the same manner, but instead built out a "contract" system, in which prisoners worked at factories within the prisons' walls.[11] The system was overseen by private firms who provided the raw materials and sold the prison-produced goods.[12] The lack of wages, long hours, and unregulated working conditions made for a profitable system—a system that was opposed both by prison reformers and labor unions because it sanctioned poor working conditions and fostered unfair

7. *See* Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 J. Lab. & Soc'y 327, 332 (2012); Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. Civ. Rts. & Econ. Dev. 679, 685–86 (2015); Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 Stan. L. Rev. 339, 348 (1998).

8. LeBaron, *supra* note 7, at 332.

9. *Id.* at 337; *see also* Michelle Alexander, the New Jim Crow 28 (2010); Garvey, *supra* note 7, at 355–56.

10. *See* LeBaron, *supra* note 7, at 337–40 (detailing how convict laborers were frequently worked for fifteen to seventeen hours daily, fed below subsistence amounts, whipped for falling behind in work, and often died before their sentence was completed).

11. *Id.* at 336; Fulcher, *supra* note 7, at 685.

12. Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 Idaho L. Rev. 953, 957–58 (2019).

competition with free labor.[13] In response to pressure from organized labor, most states had phased out their contract and convict-lease systems by the mid-1900s, moving to a "state-use system" in which the state was the only authorized buyer of prison-made goods.[14]

Today, most prisoners work in some capacity, in either voluntary or mandated jobs.[15] The majority are engaged in "prison housework," performing institutional jobs within the prison, including maintenance, food service, custodial, and grounds work.[16] A much smaller number of prisoners work in "prison industries," that is, prison factories or labor programs that produce goods and services for government agencies and private corporations.[17] Some states also provide opportunities for prisoners near the end of their sentence to work for outside employers through prison work-release programs.[18]

Incarcerated workers today are paid almost nothing for their work, even when that work is dangerous and life-threatening. For example, prisoners who work for the state of California fighting wildfires are paid between two and five dollars per day, plus one dollar per hour when they are actively fighting fires.[19] Incarcerated workers in New York made sixty-five cents per hour bottling hand sanitizer in a congregate factory setting in response to the COVID-19 shortage,[20] while women in a California prison made thirty-five cents to one dollar per hour making masks that they were not allowed to wear.[21] In

13. Fulcher, *supra* note 7, at 686.

14. *Id.* This transition was advanced by the 1929 Hawes-Cooper Act, which prevented states from selling goods made by state prisoners in other states. *Id.* at 688.

15. This article focuses on work performed by sentenced prisoners, who comprise the majority of incarcerated workers. However, in most pretrial facilities (jails) and immigration detention centers, many detainees work in "prison housework" positions. *See, e.g.*, Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. Times (May 24, 2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html [perma.cc/4ZNW-9YLW]. The majority of the cases below pertain to sentenced prisoners; when cases discuss labor protections as they apply to pretrial and immigration detainees, I will note that in the footnotes.

16. *See* Fink, *supra* note 12, at 953; Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 Vand. L. Rev. 857, 868–69 (2008).

17. *See* Fink, *supra* note 12, at 953; Zatz, *supra* note 16, at 869–70. In recent years, a privatized "contract system" has reemerged, in which private sector entities operate prison factories and/or purchase prison-produced goods. *See* Zatz, *supra* note 16, at 869–70.

18. *See* Stanley E. Grupp, *Work Release in the United States*, 54 J. Crim. L. & Criminology 267, 267–68 (1963) (describing the history of work release in the United States).

19. Maanvi Singh, *Pandemic Sidelines More Than 1,000 Incarcerated Wildfire Fighters in California,* Guardian (July 10, 2020, 4:35 PM EDT), https://www.theguardian.com/us-news/2020/jul/10/california-wildfire-coronavirus-prison-incarcerated-firefighters [perma.cc/4KGM-VLZP].

20. *See* Michaels, *supra* note 4.

21. *See* Feldman, *supra* note 1. As of 2017, the wage for a prisoner working in a "prison housework" position ranged from nothing to two dollars per hour. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Pol'y Initiative (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages [perma.cc/9HAU-HYXR].

all of these low-paid positions, workers are subject to the supervision of prison authorities, who wield almost absolute control over their charges. Incarcerated workers recount that prison authorities often threaten disciplinary sanctions—such as solitary confinement, loss of good time credits, or immediate termination—to coerce workers into working against their consent.[22] Despite increasing media coverage of these issues, workers have little legal recourse to challenge their low pay, dangerous working conditions, or any retaliation they might face for raising concerns to supervisors.

II. The Occupational Safety and Health Act

A. The Statute and Its Enforcement

The preamble of the OSH Act (or the Act), passed in 1970, declares the statute's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[23] The OSH Act authorizes the Department of Labor to effectuate this goal by both implementing explicit statutory protections and promulgating complementary regulations and standards.[24] The Supreme Court has held that the OSH Act, along with other health and safety legislation, should be "liberally construed to effectuate the congressional purpose" of providing safe working conditions and protecting public health.[25] In line with this principle, the Court has upheld interpretive regulations that create additional rights for workers when those regulations "conform to the fundamental objective of the Act" and are not contradicted by the Act's language or legislative history.[26]

The average wage across the states was sixty-three cents per hour. For prison industry jobs, workers were paid slightly more: up to $5.15 per hour, with an average hourly wage of $1.41 across the states. *Id.* None of these wages come close to the federally mandated minimum wage of $7.25, a complaint that was central to prison work strikes in 2016 and 2018. *See* German Lopez, *America's Prisoners Are Going on Strike in at Least 17 States*, Vox (Aug. 22, 2018), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018; Tom Kutsch, *Inmates Strike in Prisons Nationwide over "Slave Labor" Working Conditions*, Guardian (Sep. 9, 2016), https://www.theguardian.com/us-news/2016/sep/09/us-nationwide-prison-strike-alabama-south-carolina-texas. These wages are possible because courts have overwhelmingly interpreted FLSA to exclude prison workers from the statute's protections, which is discussed in Section III.A, *infra*.

22. *See, e.g.*, Feldman, *supra* note 1 (workers were threatened with losing their factory jobs or facing discipline if they refused to work because of COVID fears); Ainsley & Soboroff, *supra* note 4 (workers threatened with solitary confinement for refusal to work); *The Uncounted Workforce*, NPR (Jun. 29, 2020), https://www.npr.org/transcripts/884989263 [https://perma.cc/46FG-VZPC] (recounting use of disciplinary sanctions and solitary confinement to coerce people to work even when they were sick).

23. Whirlpool Corp. v. Marshall, 445 U.S. 1, 11–12 (1980) (citing the OSH Act's preamble at 29 U.S.C. § 651(b)).

24. *Id.* at 11–13.

25. *Id.* at 13 (citing United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969)).

26. *Id.* at 11.

The Occupational Safety and Health Administration (OSHA) sets workplace safety standards and provides education and training to ensure that those standards are met.[27] In addition to standard-setting, OSHA has enforcement powers to receive worker complaints, conduct inspections, and issue citations to employers for safety violations.[28] Importantly, the Act's remedial orientation is "prophylactic in nature," which means that the Act does not require that an injury occur before the agency is authorized to promulgate health and safety standards and issue citations.[29] The Secretary of Labor has broad enforcement discretion to decline to promulgate standards,[30] conduct inspections,[31] and issue citations.[32]

The OSH Act provides no private right of action for workers to bring suit against their employers in court.[33] Instead, the OSH Act allows employees to file complaints with the agency when they believe that their workplace is in violation of a health or safety standard, or that working conditions present an imminent danger.[34] If OSHA determines that there are reasonable grounds to believe that a violation or danger exists, the agency "must initiate an inspection 'as soon as practicable, to determine if such violation or danger exists.'"[35] If the agency believes that the employer has violated OSHA requirements, it will issue a citation, which is reviewable by the Occupational Safety and Health Review Commission (OSHRC).[36] OSHRC's decisions are then reviewable by a federal court of appeals via a petition for review.[37] If the agency is concerned that an employer is engaged in dangerous practices that could "reasonably be expected to cause death or serious physical harm" before the danger can be eliminated through the OSHA enforcement procedures outlined above, the agency can petition

27. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 368 (E.D.N.Y. 2020).

28. *Id.* at 369.

29. *Whirlpool Corp.*, 445 U.S at 12.

30. *See, e.g.*, *In re* Am. Fed. of Lab. & Cong. of Indus. Orgs., 2020 WL 3125324 (D.C. Cir. June 11, 2020) (OSHA's decision not to issue an emergency temporary standard for COVID-19 workplace standards entitled to deference).

31. *See* 29 U.S.C.§ 658; *see also Federal OSHA Complaint Handling Process,* OSHA, https://www.osha.gov/as/opa/worker/handling.html [https://perma.cc/BS63-AJER].

32. *See, e.g*, Patrick Kapust & Scott Ketcham, *Memorandum for Regional Administrators State Plan Designees*, OSHA (Apr. 16, 2020), https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during [https://perma.cc/P7JX-3F2L]. *But see* 29 U.S.C. § 659 (if the Secretary believes an employment has violated the OSH Act, he "shall" issue a citation to the employer).

33. *See* Michael C. Duff, Thomas O. McGarity, Sidney Shapiro, Rena Steinzor & Katie Tracy, *OSHA's Next 50 Years: Legislating a Private Right of Action to Empower Workers,* Ctr. for Progressive Reform 5 (2020), https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf [https://perma.cc/LG8Y-PB25].

34. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 369 (E.D.N.Y. 2020) (citing 29 U.S.C. § 657(f)(1)).

35. *Id.*

36. *Id.*

37. *Id.* (citing 29 U.S.C. §§ 660–661).

a federal district court and request a temporary restraining order or injunction against the employer.[38] If the agency "arbitrary or capriciously" fails to seek injunctive relief against an imminent danger, a worker can file a writ of mandamus to compel the agency to seek such an order.[39] This mandamus procedure is the only explicit statutory mechanism for an individual to invoke the protections of OSHA in court without first exhausting the administrative enforcement process.

The failure by OSHA to promulgate standards or enforce existent standards has significant implications for workers' ability to seek judicial remedies for workplace safety violations. In the COVID-19 context, where OSHA repeatedly refused to issue binding health and safety standards,[40] workers sought to remedy workplace safety issues by bringing common law breach-of-duty and public nuisance claims against their employers in court, asking the courts to order employers to comply with public health guidance.[41] In several of these cases, federal district courts dismissed workers' claims in part based on the doctrine of primary jurisdiction, noting that OSHA's expertise on workplace safety issues and an interest in uniform decisions requires that the agency make the primary determination on these issues before a plaintiff is able to bring any claim for relief to a court.[42] As discussed previously, the OSHA enforcement process is lengthy: the agency must respond to a complaint, conduct an investigation, make findings, and issue a citation before any possibility of administrative or judicial review is available.[43] In addition, OSHA has broad enforcement discretion in deciding to respond to complaints, conduct investigations, and issue citations.[44] The delays inherent in this administrative process—exacerbated by former President Trump's recalcitrant administration[45]—combined with the primary jurisdiction doctrine left vulnerable workers without a means of seeking timely relief for COVID workplace safety violations.

38. Rural Cmty. Workers Alliance v. Smithfield Foods, 459 F. Supp. 3d 1228, 1241 (W.D. Miss. 2020) (citing 29 U.S.C. § 662).

39. *Id.* (citing 29 U.S.C. § 662(d)).

40. *See, e.g.*, Kate Gibson, *OSHA Has Failed to Protect Workers from COVID-19, Unions Say*, CBS News (Oct. 9, 2020), https://www.cbsnews.com/news/osha-covid-19-guidlines-protection-failed-unions-accuse [https://perma.cc/4E6X-T8Z3]; *In re* Am. Fed. of Lab. & Cong. of Indus. Orgs., 2020 WL 3125324 (D.C. Cir. June 11, 2020).

41. *See Palmer*, 498 F. Supp. 3d at 359; *Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1241.

42. *Palmer*, at *5–6; *Rural Cmty. Workers Alliance*, at 1240–41.

43. *See supra* notes 34–39 and accompanying text.

44. *See supra* notes 30–32 and accompanying text.

45. Eyal Press, *Trump's Labor Secretary Is a Wrecking Ball Aimed at Workers*, New Yorker (Oct. 26, 2020), https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers [https://perma.cc/L86B-3J77].

B. OSHA's Applicability to State Employees

Though the OSH Act federalized workplace safety and health regulations and purports to offer broad coverage to employees across the country, state and local government employees are statutorily exempted from coverage under the federal act.[46] Further, the OSH Act provides that states can opt out of any regulation by federal OSHA by designing their own state health and safety plans, as long as the state plan is at least as effective as the federal program.[47] In the twenty-seven states that have opted to create a state health and safety administration to cover public employees, state workers receive the benefits of standard-setting and access to government enforcement of said standards. [48] However, this gap in mandated OSHA coverage in the twenty-three other states has raised concerns that public-sector employees who witness or experience workplace safety hazards are left without recourse to file complaints and pressure employers to improve their workplace safety, resulting in higher workplace injury rates.[49] In response to these concerns, members of Congress have repeatedly introduced the Protecting America's Workers Act, which, among other expansions of OSHA's coverage, would include state employees in the Act's purview.[50]

III. The Prisoner Exception to Federal Protective Legislation

Importantly, the standards promulgated by OSHA and the enforcement mechanisms available under OSH Act only cover workers who are classified as "employees."[51] The term "employee" is defined by the Act in self-referential and circular terms: an employee is "an employee of an employer who is employed in a business of his employer which affects

46. 29 U.S.C. § 652(5); *see also Standard Interpretation: Federal OSHA Has No Jurisdiction over State, Municipal, or Volunteer Fire Departments*, OSHA (Oct. 11, 2006), https://www.osha.gov/laws-regs/standardinterpretations/2006-10-11-1[https://perma.cc/6B3W-WFY4] (stating that federal OSHA has no authority over state and local government employees).

47. 29 U.S.C. § 667(b)–(c).

48. *See State Plans*, OSHA, https://www.osha.gov/stateplans [https://perma.cc/D9SH-FP7Q].

49. *See Protecting America's Workers Act: Modernizing OSHA Penalties: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 111th Cong. 12 (2010) (statement of Hon. David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor), https://www.govinfo.gov/content/pkg/CHRG-111hhrg55302/pdf/CHRG-111hhrg55302.pdf (state government and local government injury and illness incident rates were twenty-one percent and seventy-nine percent higher than injury rates in the private sector).

50. *Id.*; *see also House Lawmakers Reintroduce Protecting America's Workers Act*, Safety & Health Mag. (Feb. 13, 2019), https://www.safetyandhealthmagazine.com/articles/18039-house-lawmakers-reintroduce-protecting-americas-workers-act [https://perma.cc/8WDA-VNTX].

51. 29 U.S.C. § 645(5)(a)(1) ("Each employer shall furnish to each of his *employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.") (emphasis added).

commerce."[52] This definition, similar to definitions of employee in many other federal statutes, gives little clear guidance on who the statute is intended to cover. The question of which workers qualify as employees and thus receive the panoply of statutory work protections is a controversial and important threshold question in most areas of employment and labor law.[53] Employers have an incentive to misclassify employees as independent contractors to avoid liability under protective legislation, including minimum wage laws, overtime requirements, and payroll taxes for Social Security and workers compensation.[54]

Though much scholarship and case law has focused on the "independent contractor" exemption to legislation intended to protect workers, misclassified independent contractors are not the only workers who are excluded from protective legislation. Congress has amended federal protective legislation to exempt certain classes of workers from coverage.[55] Even where Congress has not explicitly exempted certain classes of workers from coverage under protective legislation, courts have interpreted the term "employee" to exclude certain workers based on a determination that Congress could not have intended such coverage.

Most relevantly to this article, courts have repeatedly read a judicially created "prisoner exception" into statutes to exclude incarcerated workers from coverage by federal protective legislation.[56] Instead of applying the traditional "economic realities" test,[57] courts have fashioned new, often convoluted analyses specifically for determining the applicability of employment protections to incarcerated workers, utilizing inferred legislative intent, contract theory, and penological concepts

52. 29 U.S.C. § 652(5). The OSH Act, along with many other federal statutes, uses the "right-to-control test" to determine if an employee has been misclassified as an "independent contractor" by their employer. Kenneth Dau-Schmidt, *The Problem of "Misclassification," or How to Define Who Is an "Employee" Under Protective Legislation in the Information Age*, *in* The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century 140, 143 (Richard Bales & Charlotte Garden eds., 2020).

53. Dau-Schmidt, *supra* note 52, at 141–42.

54. *Id.* at 146.

55. *See, e.g.*, 29 U.S.C. § 213 (amended in 2002) (exempting school teachers, outdoor salesmen, and babysitters from coverage under FLSA).

56. *See, e.g.*, Bennett v. Frank, 395 F.3d 409, 409 (7th Cir. 2005) ("[P]risoners are not employees of their prison . . . . Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA."); *see also* Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992) (inferring congressional intent to exclude prisoners from FLSA coverage from the passage of other legislation, not from discussions of FLSA itself). The conclusion of the *Vanskike* court runs counter to Supreme Court precedent, where the Court took the position that all individuals within the general category of "employees," if not specifically excluded, are presumed to be covered by protective legislation. *See, e.g.*, Powell v. U.S. Cartridge Co., 339 U.S. 497, 516–17 (1950).

57. *See Vanskike*, 974 F.2d at 809 (conceding that an application of the economic reality test might result in a finding of employee status and choosing not to apply it); Hale v. Arizona, 993 F.2d 1387, 1393–94 (9th Cir. 1993) (stating that the economic reality test is inappropriate in the prison-work context).

to categorize incarcerated laborers as not-employees and remove them from the reach of protective legislation.[58]

A. The Fair Labor Standards Act

The "prisoner exception" has developed primarily in the context of Fair Labor Standards Act (FLSA) litigation. Most courts have denied incarcerated workers coverage under FLSA at the threshold inquiry by determining that they are not employees for purposes of the statute.[59] There is no statutory exemption of prisoners and no demonstrated congressional intent to exclude people working in prison from FLSA's protections, so courts have had to engage in more in-depth analysis of how employee status maps onto those working in prison.[60]

A handful of courts have determined prison workers can be classified as employees,[61] but only in certain work arrangements: when they are performing non-compulsory labor for private employers on work release in locations outside the prison.[62] When a prisoners' work is compelled, the prisoner is not covered by FLSA because he is "truly an involuntary servant to whom *no* compensation is actually owed."[63]

The vast majority of incarcerated worker claims for protection under FLSA fail because courts find that incarcerated workers are not part of the economy and cannot engage in true economic or market relationships with their employers.[64] Imprisonment "take[s] [workers]

58. *See* Zatz, *supra* note 16, at 885 (discussing how courts have excluded incarcerated laborers from FLSA protections in part by relying on contract theory and a "penological justification" for prison labor that obviates an employment relationship).

59. *See* Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 193–97 (2002) (detailing how courts have evaluated whether prison workers are employees for the purpose of coverage under the FLSA); *see also Vanskike*, 974 F.2d at 807 n.2 ("FLSA lists specific exceptions to its coverage of "employees" but does not list prisoners as an exception. This framework does suggest that all individuals within the general category of "employees," if not specifically excluded, come within the statute's scope. . . . The argument does not take us anywhere, however, because it assumes that prisoners plainly come within the meaning of the term 'employees.'").

60. *See, e.g.*, *Bennett*, 395 F.3d at 409 ("[P]risoners are not employees of their prison. . . . Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA."); *Vanskike,* 974 F.2d at 807 (inferring Congressional intent from the passage of other legislation, not from discussions of FLSA itself). The conclusion of the *Vanskike* court runs counter to Supreme Court precedent, where the court has taken the position all individuals within the general category of "employees," if not specifically excluded, are presumed to be covered by protective legislation. *See Powell*, 339 U.S. at 516–17.

61. *See* Zatz, *supra* note 16, at 883 n.103 (collecting only seven cases in which courts found that there *could* be an employment relationship at the motion to dismiss or summary judgment stage; no reported cases have ever been decided for the incarcerated worker at the final judgment stage).

62. *See, e.g.*, Watson v. Graves, 909 F.2d 1549, 1556 (5th Cir. 1990); Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984); Henthorn v. Dep't of Navy, 29 F.3d 682, 686–87 (D.C. Cir. 1994).

63. *Henthorn*, 29 F.3d at 686 (emphasis in original).

64. *Id.*

out of the national economy" and places them in "a separate world of the prison."[65] When courts segregate prisons from the economy, it then becomes easy to presume that Congress intended to exclude those incarcerated from statutory coverage: since incarcerated workers are "removed from American industry," they "are not within the group that Congress sought to protect."[66]

Further, courts' reasoning in denying incarcerated workers protection under FLSA hinges on their characterization of the principal-agent relationship as fundamentally different than a traditional employment relationship. The analysis of whether incarcerated workers are employees by necessity turns both the "economic realities" and "right to control" tests upside down. As put by one court: "[T]he problematic point is that there is *too much* control to classify the relationship as one of employment."[67] As such, the economic reality test elucidates only one "boundary of the definition of 'employee'"; in the prison context, courts "are concerned with a different boundary."[68]

Courts further demarcate the separate world of the prison from the economic realm of employment by highlighting the lack of contractual freedom in the penal labor sphere.[69] As Professor Noah Zatz explains, the penal sphere's inherent "inhospitab[ility] to contract" consists of three components: there is no free contract when prison labor is involuntary; there cannot be a contract when there is no exchange between the parties; and any exchange that does exist lacks the "bargained-for exchange of labor for consideration."[70] Courts treat incarcerated workers' inability to engage in freely formed contractual relationships as obviating any possibility of workers engaging in economic or market relationships.[71]

Assumptions about the experiences of incarcerated workers characterize courts' reasoning and determination that FLSA should not be read to cover incarcerated laborers. When a court opines that FLSA's goal to ensure a minimum standard of living for workers is inapplicable because "prisoners' basic needs are met in prison, irrespective of their ability to pay,"[72] the court is defining basic needs narrowly and ignoring

65. *Vanskike,* 974 F.2d at 810, 812 & n.5; *see also* Zatz, *supra* note 16, at 885.

66. Alvarado Guevara v. INS, 902 F.2d 394, 396 (5th Cir. 1990) (discussing immigration detainees).

67. *Vanskike*, 974 F.2d at 810 (denying coverage to incarcerated workers under FLSA) (emphasis in original)

68. *Id.*

69. Zatz, *supra* note 16, at 885.

70. *Id.*

71. *Id.* at 882

72. *Vanskike*, 974 F.2d at 810–11; *see also* Hale v. Arizona, 993 F.2d 1387, 1396 (9th Cir. 1993) (holding that the problem of substandard living conditions does not apply to prisoners); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (stating no need to protect the standard of living for prisoners because they do not have to purchase food, shelter, or clothing).

the reality of day-to-day life inside a prison. Prisons often contract with private vendors to provide daily meals to inmates; these private vendors often seek to cut costs by eliminating fresh fruits and vegetables and serving low quality food that does not meet individuals' nutritional needs.[73] Individuals can supplement the food the prison provides by buying food from the commissary; the average amount of money spent on commissary purchases far surpasses the typical amount a prisoner can earn from an in-prison job.[74] Prisons are often poorly heated and cooled, and individuals have to buy additional clothes at their own expense to stay warm, or fans to keep cool.[75] People incarcerated may have previously been the sole provider for family members who are left without support upon the person's incarceration.[76] Phone calls from prison—also handled by private contractors—are often prohibitively expensive, making staying in touch with family difficult for those with fewer outside resources.[77] Basic nutrition, warmth, support, and connection with family are necessary to a minimum standard of living, and courts' disregard of the true economic reality of incarceration is illustrative of a larger devaluation of those incarcerated as both workers and people.

B. Title VII

Though courts have consistently found that incarcerated workers are not employees for purposes of FLSA, some courts are open to the idea that Title VII non-discrimination protections should apply to incarcerated workers because of the different policy motivations behind each act.[78] Specifically, some courts have allowed for the possibility of Title

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

74. *See* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Pol'y Initiative (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/5QPM-CRKQ].

75. Roxanna Asgarian, *Why People Are Freezing in America's Prisons*, Vox (Dec. 13, 2019, 9:20 AM), https://www.vox.com/identities/2019/12/13/21012730/cold-prison-incarcerated-winter [https://perma.cc/J97P-YBXP]; Feldman, *supra* note 1.

76. *See* Lang, *supra* note 59, at 194–95.

77. Bonita Tenneriello & Elizabeth Matos, *The Telephone Is a Lifeline for Prison Families. And Calls Are Outrageously Expensive*, WBUR (Jan. 27, 2020), https://www.wbur.org/cognoscenti/2020/01/27/cost-of-phone-calls-prison-bonita-tenneriello-elizabeth-matos [https://perma.cc/E7WK-28L9].

78. Vanskike v. Peters, 974 F.2d 806, 810 n.5 (7th Cir. 1992) ("Prison is in many ways a society separate from the outside world. Discrimination, however, maintains the same invidious character within the world of the prison and outside it. Given the broad policies behind Title VII, there would appear to be no reason to withhold Title VII's protections from extending inside the prison walls. The policies underlying the FLSA, in contrast, are tied to the national economy, and those policies have limited application in the separate world of the prison.").

VII claims by incarcerated workers, but have limited coverage to only incarcerated individuals who engage in voluntary (rather than prison-mandated) work.[79]

Contrary to this slightly more prisoner-friendly approach, the Equal Employment Opportunity Commission (EEOC) has interpreted Title VII to preclude a finding of employee status for prisoners based on the idea that the "primary purpose" of the relationship between prisoner and prison is "incarceration, not employment."[80] Some courts have relied on the EEOC's "primary purpose" reasoning to establish a per se ban on Title VII coverage for incarcerated workers."[81] This "primary purpose" analysis presupposes a mutual exclusivity between being a prisoner and being an employee.[82] Under this reasoning, the indicia of employment relationship as considered under the traditional employee tests are irrelevant.[83]

As courts carved out a prisoner exception to FLSA, some courts have asserted that a prison's high level of control over its workers operates as a definitionally limiting factor, necessitating a unique analysis of employee status that diverges from the traditional coverage tests.[84] In contrast, at least one court in the Title VII context has focused on the fact that a prison's near-total ability to control "the means and manners of the worker's performance" may in-and-of-itself justify the application of statutory non-discrimination protections, even if other traditional indicia of an employment relationships are lacking.[85]

Courts' tests to determine when prisoners are employees for purposes of protective legislation are convoluted and contradictory. In most of these cases, courts have drawn lines between compelled and voluntary labor, and work inside the prison versus work for outside

79. Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons,* 111 COLUM. L. REV. 1048, 1068 (2011); *see also, e.g.*, Castle v. Eurofresh, Inc., 731 F.3d 901, 907 (9th Cir. 2013).

80. EEOC Dec. No. 86-7 (1986), 1986 WL 38836, at *3. This initial guidance has since been interpreted by the EEOC to permit individuals employed on work release to be covered under Title VII. *See* EEOC, Informal Discussion Ltr. (Mar. 26, 2016), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-315 [https://perma.cc/2ESD-SSBS]; *see also* Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 128 (9th Cir. 1988) (citing 1986 EEOC guidance).

81. Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991). One Ninth Circuit case has also utilized this "primary purpose" analysis, contravening clear circuit precedent. *See* Kirklin, *supra* note 79 at 1073–74 (discussing Wade v. Cal. Dep't of Corrs., 171 F. App'x 601 (9th Cir. 2006)).

82. This "primary purpose" analysis has also been operationalized in the FLSA context. *See, e.g.*, Wilks v. District of Columbia, 721 F. Supp. 1383, 1384 (D.D.C. 1989) ("[I]nmate labor belongs to the penal institution and inmates do not lose their primary status as inmates just because they perform work."); Burleson v. California, 83 F.3d 311, 314 (9th Cir. 1996) (holding that "fundamentally penological character" of prison work arrangements precludes the finding of an employment relationship).

83. *Meese,* 926 F.2d at 997.

84. *See supra* notes 68–69 and accompanying text.

85. *Baker*, 859 F.2d at 128.

entities, finding that voluntary workers—especially those in work release positions—most resemble "free employees," and thus are more likely to merit the benefits of protective employment legislation. These attempts to reason through the employee status of incarcerated workers have resulted in counterintuitive categorizations that leave out the workers most vulnerable to discrimination and abuses: those compelled to work within the prison walls.

IV. OSHA in Prisons

Incarcerated workers are regularly subject to coercive, unsafe, and unhealthy workplaces and have little recourse to raise complaints and improve their work conditions. This Part analyzes how health and safety regulations currently apply in the prison setting, identify concerning gaps in coverage, and argues that federal and state OSHA agencies should provide more substantial coverage to those working in prisons. The prisoner exception courts have carved out from other protective statutes should not be repeated in the health and safety context.

A. OSHA's Current Coverage of Prisoners

Though there is no statutory exemption for prisoners, OSHA has long interpreted its authorizing statute to exclude most incarcerated workers from its protections. This exclusion has been achieved primarily through agency interpretations of the term "employee." The question of whether and which incarcerated workers the OSH Act covers does not appear to have ever been considered in any depth by a court.[86] This subpart provides a descriptive account of how OSHA and its state analogues fail to include incarcerated workers in their purview and catalogues the deficiencies of prisons' existing health and safety oversight mechanisms.

First, OSHA has issued an agency directive interpreting the OSH Act to exclude federal prisoners from employee status.[87] In the same directive, OSHA advised that, although no prisoners are statutorily protected as "employees," incarcerated workers working in prison industry positions are entitled to OSHA's applicable protections, including the

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

87. OSHA Dir. FAP 01-00-002 (1995), https://www.osha.gov/enforcement/directives/fap-01-00-002 [https://perma.cc/A6T7-FVD8].

right to file hazard reports.[88] This directive suggests that the agency's jurisdiction categorically does not extend to the large number of workers who perform "prison housework," such as cooking, serving food, and janitorial duties. Complicating the coverage question, at least one court has found that OSHA safety standards in the federal prison industries context are advisory, rather than mandatory.[89]

Though federal prison industry jobs are ostensibly subject to OSHA supervision, the agency directive also sets significant limitations on OSHA's supervisory powers. For instance, OSHA must give prison administrators advance notice of any inspections and get approval from Board of Prison (BOP) officials before talking to any prisoners, measures which threaten to severely minimize the effectiveness of the inspections.[90] Additionally, prison industries workers facing reprisals by prison authorities for reporting safety violations are not covered by whistleblower protections but rather must submit administrative grievances complaining of staff retaliation directly to prison authorities, raising concerns about further retaliation.[91]

Second, OSHA has interpreted the statute's exclusion of state employers and employees from OSHA's jurisdiction to include state prisoners and detainees.[92] In its interpretation letter on this matter, OSHA appears to presume that incarcerated workers are covered under state health and safety regulations, to the extent that said regulations exist for state employees.[93] Since twenty-three states do not fill the state and local government gap in federal OSHA's coverage with their

88. *Id.* OSHA appears to have conducted some investigations into federal BOP prison industries. *See* Office of the Inspector General, *A Review of Federal Prison Industries' Electronic-Waste Recycling Program*, Dep't of Justice (Oct. 2010), https://oig.justice.gov/reports/BOP/o1010_appendix.pdf [https://perma.cc/67U8-Z8ML] (cataloguing a number of OSHA inspections conducted of BOP prison industry sites). Additionally, a search of the OSHA Establishment database returned five cases involving the federal prison industries. *See Establishment Search Results for "Federal Prison Industries,"* OSHA, https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=federal+prison+industries&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020 [https://perma.cc/5Z5W-EMW3].

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

90. OSHA Dir. FAP 01-00-002, *supra* note 87.

91. *Id.*

92. OSHA Std. Interp. No. 1975 (Dec. 16, 1992), https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1 [https://perma.cc/EN34-ZHJ7]. OSHA has also issued a non-binding legal opinion stating that courts would likely find a non-profit private corporation that manages Florida's prison labor system to be a "political subdivision" of the state and thus exempted from OSHA. *See* Memorandum from Jaylynn K. Fortney, Regional Solicitor to Davis Layne, RA/OSHA (May 15, 1996), https://www.osha.gov/laws-regs/standardinterpretations/1996-07-18 [https://perma.cc/D9GA-YX5Z].

93. Memorandum from Jaylynn K. Fortney, *supra* note 92.

own health and safety plan,[94] state prisoners and detainees in those states are presumably also not covered by any state-issued health and safety standards. For states that do cover public sector workers, correctional officers and staff are covered,[95] but most state agencies do not appear to directly respond to complaints by incarcerated workers.[96] Some state agencies offer limited coverage to incarcerated workers in prison industry positions,[97] or cover only individuals on work release.[98]

Some states have devised intermediary regulatory mechanisms to channel incarcerated workers' health and safety complaints through the correctional facilities themselves. California's state agency (Cal/OSHA) has created a specific committee and procedure to review

94. *See State Plans Frequently Asked Questions*, OSHA, https://www.osha.gov/stateplans/faq [https://perma.cc/A876-JPYH].

95. *See, e.g.*, *Establishment Search Results for "correctional,"* OSHA, https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=correctional&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020 [https://perma.cc/8SDU-MURX] (collecting 116 OSHA incident records for correctional facilities). Almost all of the pending investigation notices by state agencies that reviewed through OSHA's establishment database noted that the workers were unionized, a status that would only be applicable to outside staff.

96. Arizona and Wyoming legislatively exempt incarcerated workers from coverage under state protective statutes, including health and safety regulation. *See* ARIZ. GEN. STAT. 23-615(B)(6) (2022) (work performed by inmates of custodial and penal institution is not employment); WYO. STAT. ANN. 27-3-105(b)(xii) (2022) (same).

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

One state agency—Oregon—conditions its coverage of incarcerated workers on the extent of prisoners' coverage under a given city or states' workers compensation insurance policies. *See* Letter from Donald Arnold, Chief Counsel for Ore. Dep't of Justice to Barry Jones, Manager of Enforcement for Ore. Occupational Safety & Health Div. (Jan. 5, 2004), https://www.doj.state.or.us/wp-content/uploads/2017/06/op2004-1.pdf [https://perma.cc/TBF3-RCV7].

97. California, Michigan, and Washington's state agencies cover incarcerated workers when working in "prison industry" positions. *See* Cal. Occupational Safety & Health Reg. ch. 3.2, art. 9, § 344.42; Michigan Dep't of Corrs. Pol'y Dir. 04.03.101 (2016), https://www.michigan.gov/documents/corrections/04_03_101_Final_538901_7.pdf [https://perma.cc/RG5F-XYGW]; Wash. Indus. Safety & Health Act, Reg'l Dir. 1.40, 2-3 (2006), https://www.lni.wa.gov/dA/e7f0fac8e3/DD140.pdf [https://perma.cc/4PDC-W9MX] (incarcerated workers in industry positions are covered by WISHA but institutional support positions not covered).

98. North Carolina and Virginia's agencies cover incarcerated workers on work release only. *See* N.C. GEN. STAT. 148, art. 3, § 18-33.1 (2022) (Department of Labor shall exercise same supervision over conditions of employment for prisoners on work release as the department does over conditions of employment for free persons.); Va. Occupational Safety & Health, VOSH Program Dir. 02-009B (2014), https://townhall.virginia.gov/l/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs%5C181%5CGDoc_DOLI_5491_v1.pdf [https://perma.cc/PT2C-LD7A] (VOSH only has jurisdiction over prisoners employed by public employers on work release).

complaints by incarcerated workers in prison industry jobs.[99] This procedure first requires the committee to issue a notice to the facility recommending changes and give the facility time to comply before the complaint is passed on to the relevant agency division for further action.[100] In addition, prisoner complaints can be dismissed outright if filed anonymously.[101] Other states, such as Indiana, ostensibly require correctional agencies to comply with federal and state health and safety regulations but provide no real enforcement mechanisms, placing full supervisory power in the hands of the state department of corrections, rather than with the state's health and safety agency.[102] This compliance arrangement is made even more toothless by exempting facilities from annual inspections by the state department of health if they are accredited by a nationally recognized accrediting organization.[103]

Other state, federal, and private prisons also point to accreditation by outside, private organizations as establishing that their correctional facilities comply with health and safety standards.[104] The primary accreditation agency is the American Correctional Association (ACA), which publishes authoritative standards for correctional operations and conducts triennial reaccreditations of state, federal, and

99. Cal. Occupational Safety & Health Reg. ch. 3.2, art. 9, § 344.42. Recently, detained workers incarcerated at a privatized immigration detention facility in California successfully utilized this process to obtain a Cal/OSHA investigation and fines against private prison-behemoth Geo Group for unsafe working conditions. In December 2022, Cal/OSHA issued six citations and assessed $104,500 in fines against Geo Group for unsafe working conditions for detained workers. *See Inspection Detail 1609228.015—The Geo Group, Inc. Dba Golden State Annex*, OSHA, https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1609228.015 [https://perma.cc/994G-YWCG]; *see also* Farida Jhabvala Romero, *Immigrant Detainees Strike over Working Conditions, California Regulators Investigate,* KQED (Jun. 22, 2022), https://www.kqed.org/news/11917597/immigrant-detainees-strike-over-working-conditions-california-regulators-investigate [https://perma.cc/2LRN-67MG].

Michigan has established a similar procedure, in which incarcerated workers are covered under health and safety standards but complaints are submitted to and handled by an internal prison committee. *See* Mich. Dep't of Corrs. Pol'y Dir. 04.03.101.

100. Cal. Occupational Safety & Health Reg. ch. 3.2, art. 9, § 344.42.

101. *Id.*

102. *See, e.g.*, Ind. Code Ann. § 11-11-6-2 (West 2022) (no mechanism for prisoners to file complaints); *see also* French v. Owens, 538 F. Supp. 910, 921 (S.D. Ind. 1982), *affirming in part, vacating in part on other grounds*, 777 F.2d 1250 (7th Cir. 1985) (discussing this statute in the context of a challenge to a prison's double-celling practices).

103. Ind. Code Ann. § 11-11-6-2.

104. *See, e.g.*, N.Y. Assemb., Public Hearing on Healthcare in New York Correctional Facilities 74–75 (Oct. 30, 2017), https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_ddfafda03ce23b2164f9bfb016dd70f1.pdf&view=1 [https://perma.cc/D25F-X7SZ] (discussing ACA accreditation standards regarding healthcare); Letter from Elizabeth Warren to James A. Gondles Jr., Exec. Dir. of Am. Correctional Ass'n 2 (May 31, 2019), https://www.warren.senate.gov/imo/media/doc/2019-05-30%20Letter%20to%20ACA%20on%20Accreditation.pdf [https://perma.cc/2E8M-W9CT] (accreditation by ACA presented by private prisons as a stamp of legitimacy that they are complying with federal health and safety standards).

privately operated correctional and detention facilities.[105] For a facility to become accredited, it must comply (at the time of accreditation) with a certain percentage of ACA's mandatory and non-mandatory standards.[106] Though the ACA standards may overlap at times with federal OSHA standards, the ACA accreditation system is not a sufficient stopgap for the absence of coverage by state and federal agencies. The ACA accreditation system relies on self-evaluation, paper audits, and on-site inspections for which the facility is given three months' notice to prepare.[107] Critics of the accreditation system cite the deficiency of the accreditation process, the lack of more frequent compliance investigations, and the "perverse incentives" arising from ACA's attempts to serve as both an objective accreditor and the primary trade association for the corrections industry.[108]

In addition to these critiques of the ACA accreditation as a "rubber-stamping process" that fails to provide actual oversight and prevent unsafe conditions, the standards are toothless when it comes to enforcement. ACA's most powerful sanction is denying accreditation to a facility, an action it has not taken in over six years, even when government investigation has revealed serious health and safety issues at accredited facilities.[109] There is also no mechanism for those incarcerated to raise health and safety concerns and file complaints about non-compliance with the accreditation standards.

B. Incarcerated Workers Should Be Covered under the OSH Act

The statutory purpose of the OSH Act—to protect working men and women—is a broad mandate. Furthermore, the Supreme Court has held the Act should be "liberally construed to effectuate the congressional purpose" of ensuring safe working conditions and protecting public health.[110] Despite the absence of a statutory exemption for prisoners, OSHA and its state corollaries have interpreted the Act to not cover most prison workers.[111] Even for the small number of incarcerated workers covered by federal OSHA—federal workers in prison industry

105. *See History of Standards & Accreditation*, Am. Correctional Ass'n, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us [https://perma.cc/AL3Y-AP83].

106. *See What Are ACA's Standards*, Am. Correctional Ass'n, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?New_ContentCollectionOrganizerCommon=1#New_ContentCollectionOrganizerCommon [https://perma.cc/2FNV-2KKT].

107. Letter from Elizabeth Warren, *supra* note 104, at 4–6.

108. *Id.* at 3, 4–6.

109. *Id.* at 6–8; Dan Spinelli, *Elizabeth Warren Grills Pentagon About "Toothless" Oversight of Military Prisons*, Mother Jones (June 10, 2020), https://www.motherjones.com/crime-justice/2020/06/elizabeth-warren-grills-pentagon-about-toothless-oversight-of-military-prisons [https://perma.cc/5T2X-9UTW].

110. Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980) (citing United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969)).

111. *See supra* Section III.A.

jobs—the enforcement regime is whittled down by restrictions on surprise inspections and a lack of protection from reprisals for submitting complaints. This significant gap in coverage under the OSH Act leaves some of the most vulnerable workers—often working in dangerous settings with little agency—at high risk for workplace accidents, illness, and death.

It is important to note that there is no other effective mechanism for incarcerated workers to raise concerns about dangerous workplace conditions and hold prison administrations accountable, which also means there is little incentive for prisons to take incarcerated worker safety seriously. The ACA accreditation standards that some states accept as a substitute for state health and safety inspections do not provide a mechanism for prisoners to raise complaints. Any grievances filed with the prison must go through layers of bureaucracy and can result in unlawful retaliation against a complainant by staff.[112] Prisoners are excluded from most state workers' compensation statutes,[113] and prison worker injuries are often not found to reach the level of a constitutional violation.[114] Finally, sovereign immunity and other doctrinal hurdles preclude most tort claims against prison administrators.[115]

Given this concerning gap in coverage, OSHA should interpret its authorizing statute more broadly to cover all incarcerated laborers, including those that work in institutional "prison housework" assignments. The regulatory interpretation exempting state prisoners should be reconsidered—or congressionally amended—in light of states' failure to fill in this large gap in coverage. OSHA standards should be mandatory in the prison context, with additional standards specific to prison work promulgated as necessary. Importantly, a mechanism should be designed so incarcerated workers can file complaints directly with an outside agency (rather than going through the prison administration), and an anti-retaliation provision should be introduced to protect workers from internal prison discipline for filing complaints.

This expansion in coverage could be achieved in part administratively: OSHA could issue new federal directives and interpretations that cover prison housework and make clear the mandatory nature of the regulations. States that already operate state OSHA plans could incorporate detainees and prisoners (including those performing prison

112. *See, e.g.*, Brunson v. Nichols, 975 F.3d 275, 276 (5th Cir. 2017) (prison retaliated against prisoner with disciplinary action when he filed complaint about safety concerns).

113. *See* Colleen Dougherty, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States*, 10 U. Pa. J. Bus. & Emp. L. 483, 502–07 (2008).

114. *Id.* at 491–501.

115. *See* Alexander Volokh, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 Akron L. Rev. 287, 299–311 (2013) (outlining the difficulties inherent in suing prisons).

housework) explicitly into their regulations.[116] Both federal and state agencies should devise grievance mechanisms to make it easy for incarcerated workers to file complaints and requests for inspections directly with an outside body, without prison oversight. In addition, members of Congress have repeatedly introduced the Protecting America's Workers Act which would expand OSHA coverage to state and municipal employees;[117] this bill could be amended to incorporate protections for workers incarcerated in state and local correctional facilities.

A possible counterargument is that prisons are already subject to health and safety regulation and supervision by departments of correction and the ACA and that the unique challenges correctional management support deference to this specialized regulatory regime. But allowing correctional departments to manage their own compliance with safety standards inhibits transparency and accountability and leaves incarcerated workers vulnerable to retaliation for raising complaints. In addition, the ACA's privatized accreditation scheme is insufficiently independent, as explained above.[118]

An explicit expansion of OSHA standards to incarcerated workers might prompt more extensive legal debate about whether incarcerated workers are "employees" for the purpose of the OSH Act. First, the rationale for carving out a prisoner exception under FLSA and Title VII is inconsistent with statutory language and purpose, creates concerning policy outcomes, and should be reconsidered.[119] However, even if one accepts the logic of the courts' exclusion of prisoners from coverage under FLSA and Title VII, this precedent does not translate well into the occupational health and safety context. The OSH Act's purpose—to ensure safe and healthful working conditions for all workers—should neither hinge on whether that labor is voluntary, nor on where the labor is performed.

To claim that safety regulations should not apply to penologically useful labor suggests that unsafe conditions, injuries, or death suffered by incarcerated workers should be regarded as part-and-parcel of an individual's punishment. Further, the mandatory nature of many prison labor programs counsels in favor of external regulation: if workers cannot opt out, prison employers exercise almost total control over their workers. This control is particularly concerning in the health and safety context, where prisoners are liable to be subject to disciplinary sanctions for refusing to work based on perceived safety risks.

116. This could be modeled after the CAL/OSHA provisions, ideally with a more streamlined review process and anti-retaliation provisions.

117. *See supra* note 50.

118. *See supra* notes 105–10 and accompanying text.

119. *See generally* Zatz, *supra* note 16; Kirklin, *supra* note 79; Lang, *supra* note 59; *see also* Fink, *supra* note 12 (discussing applicability of NLRA to incarcerated workers).

Finally, courts examining the reach of other protective legislation have been preoccupied with the distinction between work done inside the prison and work done outside the prison for private employers. This distinction rests on the idea that work done inside a prison, for the prison, should remain within the exclusive purview of the prison administration. This insulating rationale reflects remnants of the "hands-off" approach to prison administration that courts utilized through the 1960s.[120] The distinction between inside and outside work does not hold up in the health and safety context: an individual should enjoy safe working conditions, no matter whether they work in the prison kitchen, in a prison factory, or for an outside employer through work release. Indeed, prisoners who work for the prison directly are more likely to face disciplinary sanctions for refusing to work because of safety concerns, and these safety concerns are most fully obscured from any outside scrutiny by the insularity of the prison.

C. Ramifications of OSH Act Coverage for Prisoners' Rights Litigation

In addition to increasing independent oversight of dangerous workplaces, an increased OSHA presence in correctional facilities could assist prisoners in seeking damages or other judicial remedies for egregious health and safety violations. Though courts have been clear that a violation of an OSHA regulation in a prison factory does not establish a constitutional violation,[121] OSHA inspections and citations could still provide a useful support for Eighth Amendment deliberate indifference claims for incarcerated workers who experience sickness or injury based on poor working conditions.[122] Deliberate indifference claims under the Eighth Amendment require both an objective component (an objectively substantial risk of serious harm) and a subjective component (a demonstration that officials knew of and disregarded an excessive risk to inmate health or safety).[123] It is often extremely challenging for prisoners to adequately document the objective risk component and to show that prison officials knew of and disregarded the risk.[124] More regular OSHA inspections and possible citations would

120. *See* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 Ala. L. Rev. 100, 104–05 (2020).

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

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

123. Farmer v. Brennan, 511 U.S. 825, 834, 837–38 (1994).

124. *See* Dougherty, *supra* note 113, at 491–501.

provide objective proof of excessive risk and would serve as a type of notice to prison officials to establish knowledge of risk for the subjective inquiry.

Conclusion

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

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