

THE SEARCH FOR A WORKABLE STANDARD FOR WHEN FAIR LABOR STANDARDS ACT COVERAGE SHOULD BE EXTENDED TO PRISONER WORKERS

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This Comment examines the variety of decisions that courts have opined regarding the coverage of prisoner-laborers under the Fair Labor Standards Act (FLSA) (29 U.S.C.A. §§ 201 et. seq.). There has been little guidance from Congress and the Supreme Court regarding whether or not the FLSA covers working prisoners. This has resulted in disparate treatment of prison laborers from state to state as lower courts have interpreted the scope of the federal statute in different ways.

To resolve the inconsistencies that exist among the states, lower courts need clear guidance from Congress or the Supreme Court to aid the determination of whether certain types of prison labor are covered under the FLSA. To help resolve this issue, a number of questions must be addressed: In general, did Congress intend that FLSA be extended to cover prisoner workers? If yes, does the coverage extend to all types of inmate employment, or is it limited to certain kinds of prison work? If coverage is limited, how should the courts determine what kind of work is covered and what kind is not? Finally, if the FLSA is not generally applicable to prisoner workers, is there any situation when working inmates should be paid the minimum wage regardless of the question of applicability?

Part I of the Comment examines the resulting confusion spurned by the refusal of Congress or the Supreme Court to address the issue of the coverage of prison labor under the FLSA. By examining this confusion, Part I focuses on the way in which circuit and district courts have analyzed the coverage question. Part II of the Comment evaluates the different “economic reality tests” that courts have applied to determine the validity of prison FLSA claims and the types of working situations that have triggered coverage. Part III outlines the distinctions that courts have drawn regarding “inside” and “outside” labor cases and “public” and “private” employers. Finally, Part IV of the Comment outlines and supports a new

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test to determine when prison labor should be covered by the FLSA and calls for the Supreme Court or Congress to rectify the confusion among the circuits.

I. THE "PLAIN MEANING" OF THE FLSA

The FLSA, as enacted in 1938, requires employers to compensate their employees at the rate of the current Congressionally-mandated minimum wage.¹ Since its enactment, a variety of amendments to the FLSA have been passed, primarily to broaden the Act's coverage to employees who had previously been excluded from coverage.² Over time, Congress has also exempted certain classes of workers from coverage.³ Prison laborers have never been included on any list that specifically grants or exempts them from coverage.

Some courts have held that the FLSA may cover *all* employees unless Congress has specifically exempted them in another section of the Act.⁴ In keeping with this rationale, these courts have held that since Congress has not specifically exempted prisoners, they must be included within the FLSA's coverage.⁵ To support this holding, these courts have cited the various amendments to the list of exempted workers and concluded that Congress' choice not to list inmate workers indicates its desire to extend FLSA coverage to inmate laborers.⁶

1. 29 U.S.C. § 206(a)(1)(2002). Since September 1, 1997, the federal hourly minimum wage has been \$5.15. *Id.*

2. The most substantial amendment was enacted in 1974 when Congress extended FLSA coverage to all state and local government employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 59-60 (codified at 29 U.S.C. § 203). The amendment was reenacted after a number of suits were brought challenging its constitutionality. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that states are not immune from federal regulations such as the minimum wage provisions of the FLSA for their "traditional state functions").

3. Congress has expressly exempted many groups of employees from coverage. *See* 29 U.S.C. § 213 (2002) (exempting school teachers, outdoor salesmen, babysitters); 29 U.S.C. § 214(a)(2002) (exempting "learners, apprentices, messengers").

4. *See* Patel v. Quality Inn S., 846 F.2d 700, 702 (11th Cir. 1988) (stating that the framework of the FLSA "strongly suggests that Congress intended . . . [to] include all workers not specifically excepted.").

5. *See* Hale v. Ariz., 967 F.2d 1356, 1363 (9th Cir. 1992) (hereinafter *Hale I*) (holding that the general definition of "employee" followed by several specific exemptions suggested that Congress intended an all-encompassing definition of the term "employee" to include all workers not specifically exempted, including prisoner workers), *rev'd in part en banc on other grounds*, 993 F.2d 1387 (9th Cir. 1993), (hereinafter *Hale II*); Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 13 (2d Cir. 1984) (supporting argument that prisoners are not on the extensive list of workers expressly exempted from FLSA coverage).

6. *Hale I*, 967 F.2d at 1363 ("[I]t would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act"),

The Supreme Court has also lent credence to the proposition that listed exemptions are exhaustive. In *Powell v. United States Cartridge Co.*,⁷ the Court reasoned that Congressional “specificity in stating exemptions strengthens the implication that employees not thus exempted. . . remain within the Act.”⁸ Under this rationale, since prisoners are not a group that has been specifically exempted from the Act, this omission indicates that they are covered.

In spite of this argument, most courts have held that the FLSA is inapplicable to prisoner workers.⁹ Some of these courts argue that it makes no fundamental difference that prisoners are not specifically exempted from FLSA coverage. These “non-coverage” courts argue that Congress need not exempt prisoners from the FLSA because they cannot be defined as a class of “employees” to which the Act applies in the first place.¹⁰

Under this rationale, because inmate laborers cannot be considered “employees” under the Act, they cannot be subject to any of the provisions of the FLSA. These “non-coverage” courts hold that the lists of exempted workers were promulgated to address certain classes of workers that normally would be considered “employees” but for the exemption. Therefore, because prisoners are a class of workers that cannot be considered “employees,” there is no presumption of coverage to begin with and no exemption is needed to exclude them.

A. *Whether Inmates are “Employees” for FLSA Purposes*

The first question that courts need to address, therefore, is whether Congress intended inmate workers to be considered “employees” for FLSA purposes. If they find that prison laborers are not “employees,” then there is no need for further analysis. However, if they find that inmate workers can be considered “employees,” then the courts must make a determination of whether or not Congress meant them to be covered.

To make the “employee” determination, courts have looked first to the

quoting *Carter*, 735 F.2d at 13.

7. 339 U.S. 497 (1950).

8. *Id.* at 517.

9. See, e.g., *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters. Inc.*, 112 F.3d 1119 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996); *Reimonenq v. Foti*, 72 F.3d 472, 475 (5th Cir. 1996); *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 684-87 (D.C. Cir. 1994); *McMaster v. Minn.*, 30 F.3d 976, 980 (8th Cir. 1994); *Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993); *Franks v. Okla. State Indus.*, 7 F.3d 971, 972 (10th Cir. 1993); *Miller v. Dukakis*, 961 F.2d 7, 8-9 (1st Cir. 1992); *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991).

10. See, e.g., *Vanskike*, 974 F.2d at 807 n.2 (arguing that pointing to a list of exemptions offers nothing “because it assumes that prisoners plainly come within the meaning of the term ‘employees,’” which is not the case).

language of the Act itself. The FLSA defines an employee as “any individual employed by an employer.”¹¹ Furthermore, the FLSA defines “[e]mploy” as “to suffer or permit to work.”¹² Not surprisingly, the generic nature of these definitions has rendered them unhelpful to courts looking for guidance in determining whether prisoner workers are “employees”.

Because the plain meaning of the Act has added little to the FLSA analysis, courts have had to look to other theories of statutory construction for help. Some have looked to the purposes underlying the FLSA to determine whether Congress would have wanted prisoner workers to be covered.¹³ Sections 202(a) and (b) of 29 U.S.C. set forth that the general purpose of the FLSA was to eliminate substandard labor conditions throughout the nation.¹⁴ To do so, Congress wanted to enable workers to maintain a “minimum standard of living necessary for health, efficiency, and general well-being . . .”¹⁵ As such, the FLSA-covered worker was guaranteed at least a minimum wage, with the assumption that these funds would be used to provide the necessities of life for employees and their families. Those opposing FLSA coverage for prisoner workers have argued that because prisons provide inmates with these necessities in life — food, shelter and clothing — that the minimum wage is not required.¹⁶ Even courts that are more responsive to the coverage question acknowledge that “the problem of substandard living conditions, which is the primary concern of the FLSA, does not apply to prisoners.”¹⁷

Therefore, proponents of coverage must grapple with the argument that prisoners automatically enjoy the necessities that the FLSA was passed to guarantee. Proponents may argue that the livelihood of the inmates’ families must be considered. They may also cite the reoccurrence of crime among poor ex-convicts, arguing that these non-compensated ex-prisoners will be more likely to commit future crimes upon release because they have no money to re-establish themselves in their communities.

One federal project that has taken these concerns and tried to resolve them is the Prison Industry Enhancement (“PIE”) program.¹⁸ The PIE

11. 29 U.S.C. § 203(e)(1)(2002).

12. 29 U.S.C. § 203(g)(2002).

13. See, e.g., *Vanskike*, 974 F.2d at 812; *Hale II*, 993 F.2d at 1397.

14. 29 U.S.C. §§ 202(a)-(b)(2002).

15. 29 U.S.C. § 202(a)(2002).

16. See, e.g., *Hale II*, 993 F.2d at 1396 (holding that the problem of substandard living conditions does not apply to prisoners); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993) (holding that there is no need to protect the standard of living for prisoners because they do not have to purchase food, shelter or clothing); *Vanskike*, 974 F.2d at 810 (holding that paying prisoners minimum wage “would not further the policy of ensuring a ‘minimum standard of living’”).

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

18. Crime Control Act of 1990, Pub. L. No. 101-647, § 2906, 104 Stat. 4789, 4914 (1990) (codified at 18 U.S.C. § 1761(c)).

project created fifty prison work pilot programs in which prisoners are paid at prevailing local rates for voluntarily producing goods. Wages earned by the inmates are subject to deductions for taxes, room and board, family support payments, and contributions to victim compensation funds.¹⁹ The program has been lauded as a success because “[it] has been successful in teaching inmates marketable skills, reducing the need for their families to receive public assistance, decreasing the net cost of operating correctional facilities, and breaking the recidivist cycle.”²⁰ Under this program, the necessities of life that the FLSA was passed to guarantee have been made applicable to prisoner workers by changing the way that the government treats their work and living arrangements.

Courts have also examined adjunct goals of the FLSA to determine whether prisoner workers should be covered. One such goal was to eliminate the competitive advantages that were caused by the prevalence of substandard working conditions and the usage of cheap labor.²¹ Congress recognized that the employers utilizing substandard labor conditions were enabled to charge lower prices for their goods. This resulted in these employers gaining an unfair competitive advantage over other employers and in the spreading of the substandard conditions to all labor in the same industry. Employers who were paying more for labor and providing employees with adequate working conditions could not compete with the cheaper alternative. In *Powell*, the Supreme Court acknowledged this problem, explaining that the allowance of any group of workers to work below the minimum wage tends to depress wages in general and threaten the standard of living of other workers in competing industries.²²

Some inmate claimants seeking coverage have argued that this theory is equally applicable to prison labor.²³ They have argued that the allowance of lower wages in industries that utilize prison labor can also affect living and labor conditions of other employees in similar industries because employers who can utilize prisoner workers will always do so to save money and gain a competitive advantage. This results in all employers in the industry having to seek the cheap alternative of prison labor or suffer the consequences of higher operating costs. The courts that have agreed with this argument hold that “the absence of a level playing field between

19. 18 U.S.C. § 1761(c)(2002).

20. S. Rep. No. 225, 98th Cong., 2d Sess. (1984).

21. 29 U.S.C. § 202(a)(3)(2002).

22. See *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509-10 (1950). Cf. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945) (warning that allowing any group of worker to work below the minimum wage tends to depress wages and threaten the standard of living of other workers in competing industries).

23. See *Hale II*, 993 F.2d at 1401-02 (Norris, J. dissenting) (arguing that an increase in the supply of goods produced by cheap inmate labor inevitably undercuts the bargaining power of the free workers whom Congress designed the FLSA to protect).

prison and private sector . . . will 'spread and perpetuate' unemployment and substandard labor conditions among workers"²⁴ Thus, the issue of prisoner compensation cannot be limited to the inmates themselves; the issue affects all laborers.

Most courts, however, have not been swayed by the unfair competition argument. One circuit that has a particular problem with the unfair competition argument has held that this rationale would result in problematic situations if taken to its natural end.²⁵ In *Vanskike v. Peters*,²⁶ the Seventh Circuit argued that if applied to this end, every service that a prisoner performed, whether it be sweeping floors, cleaning bathrooms, or washing dishes, would need to be compensated by the minimum wage because the prisoners were taking the jobs away from legitimate non-prisoner employees.²⁷ The court rejected the notion that Congress would have approved of paying the minimum wage for anything done in the prison that could be considered "work."²⁸

Other courts have rejected the unfair competition argument on the grounds that the primary goal of prison labor is not for profit.²⁹ Under this rationale, prison labor is viewed as part of inmate rehabilitation and punishment and cannot be seen as "employment" in the FLSA sense of the word.³⁰ Other courts have held that the unfair competition argument fails because of the small size of the prison labor industry. These courts argue that few prison programs compete with the private market and that this results in a de minimis effect of cheaper prison labor on the general employment market.³¹

B. *The Ashurst-Sumners Act*

A final argument that courts have cited to refute the unfair competition claim rests on the terms of the Ashurst-Sumners Act.³² Passed three years prior to the FLSA, Congress sought to eliminate the problem of unfair competition from prisoner-made goods by criminalizing their knowing interstate transportation.³³ One circuit has argued that a 'logical

24. *Id.* at 1402.

25. *See, e.g., Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).

26. *Id.*

27. *Id.* at 811.

28. *Id.* *See also* discussion on inside versus outside prison work *infra* pp. 27-30.

29. *See, e.g., Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1326 (9th Cir. 1991) (holding that the purposes of prison labor are to provide vocational training and to develop effective work habits).

30. *Id.* (listing the purposes of prison programs in Arizona).

31. *Id.*

32. Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified as amended at 18 U.S.C. §§ 1761-1762).

33. Section (a) of the Act provides:

inconsistency' would be created between the FLSA and the Ashurst-Sumners Act, if the FLSA was applicable to prisoners.³⁴ In *Vanskike*, the Seventh Circuit held that it would have been superfluous for Congress to criminalize the transportation of prison goods produced by a group of workers that were mandated to be properly compensated under the FLSA.³⁵ For if prisoners were covered by the FLSA, there would be no need for the Ashurst-Sumners Act because the FLSA would eliminate the "low-labor-cost-advantage" by making prison labor just as expensive as similar work in the free market.³⁶ Thus, the problem that the Ashurst-Sumners Act was designed to remedy would be non-existent.

II. THE ECONOMIC REALITY ANALYSES

Although the plain meaning of the word "employee" and the legislative intent of the FLSA provide some insight as to whether prisoner workers should be covered, most courts have considered a number of other factors before reaching a conclusion. The Supreme Court, although silent on prison labor and the FLSA in general, has held that coverage by the FLSA hinges on the "economic reality" of the employment situation.³⁷ To determine whether a type of working relationship is covered, the Court has indicated that this test should be applied with the totality of the circumstances of the economic reality in mind.³⁸

The "economic reality" analysis of prison labor has gone through three distinct phases marked by benchmark cases that have established different standards for evaluating prisoner FLSA claims. The first two periods can be distinguished by cases brought before and after the Ninth Circuit decided *Bonnette v. California Health & Welfare Agency*³⁹ in 1983. The third period can be distinguished by the cases brought after the Seventh Circuit decided *Vanskike v. Peters* in 1992.

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1761(a)(1)(2002).

34. See *Vanskike v. Peters*, 974 F.2d 806, 812 (7th Cir. 1992).

35. *Id.*

36. *Id.*

37. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (holding that the 'economic reality' rather than any 'technical concept' shall be the test of whether a worker is an 'employee' under the FLSA); citing *United States v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

38. See, e.g., *Goldberg*, 366 U.S. at 33; *Rutherford Food Corp.*, 331 U.S. at 722.

39. 704 F.2d 1465 (9th Cir. 1983).

A. *The First Period: Pre-Bonnette Economic Reality*

Before 1983, courts generally considered three factors when examining the economic reality of the working relationship to which prisoners are subjected: (1) whether the labor was performed inside or outside the prison walls; (2) whether the labor was compelled or voluntary; and (3) whether the employing agency was the state or a private company.⁴⁰

Without any clear guidance from Congress or the Supreme Court, each circuit chose to give more weight to some factors, ignore certain factors, or add new factors to the test. A summary of the pertinent pre-*Bonnette* case law follows:

1. *Huntley v. Gunn Furniture Co.*:⁴¹ In 1948, the federal district court in Western Michigan became the first court to address prisoner workers' rights under the FLSA. Prisoners in a Michigan penitentiary were assigned to work on the assembly of shell casings that the Gunn Furniture Company supplied to the United States War Division.⁴² The inmates sued to recover minimum wages and overtime pay. In denying the prisoners' claim, the court held that the definition of "employment" under the FLSA did not apply to inmate workers who had no contractual relationship with their supposed employer, the prison.⁴³ The court also rejected the inmates' claim that they were "employees" of the private business, Gunn Furniture, holding that they were prisoners confined by the Michigan state prison industry, and could not be considered "employees" of Gunn Furniture under the FLSA.⁴⁴

2. *Sims v. Parke Davis & Co.*:⁴⁵ In 1971, the Sixth Circuit affirmed a lower court's denial of FLSA claims by prisoners who performed janitorial, clerical, and cooking services for two companies which conducted clinical research on the prison premises. In their analysis of the "economic reality" of the working situation, the court gave special attention to factor (3) (whether the employing agency was a public or private entity), stating that although the inmates were working for a private entity, the corporations had relinquished their rights to hire, fire, or control the working conditions

40. Each circuit has used any combination of the three factors. Without any clear guidance from Congress or the Supreme Court, the circuits conducted the "economic reality" test on a case by case basis. *See generally*, *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1330 (9th Cir. 1991) (summarizing the variety of "economic reality" findings of the circuit courts).

41. 79 F. Supp. 110 (W.D. Mich. 1948).

42. *Id.* at 111.

43. *Id.* at 115.

44. *Id.* at 113 ("It is clear that the labor of the plaintiffs as inmates of the State prison belonged to the State of Michigan . . .").

45. 334 F. Supp. 774 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971).

of the inmates.⁴⁶ The court emphasized the fact that the State had established the terms of employment and the rate of pay that the prisoners were to receive, making the inmates employees of the State and not the corporations.⁴⁷ In holding against the inmates, the court also concluded under factors (1) and (2) that all of the work was performed on prison grounds and that the prisoners were assigned to perform the work by prison officials as part of their sentences.⁴⁸

3. *Alexander v. Sara, Inc.*:⁴⁹ In 1983, the Fifth Circuit joined the prevailing mentality of its sister circuits when it held that inmates who were compelled to work for a private blood-plasma corporation were not entitled to the minimum wage.⁵⁰ In examining all three factors, the court concluded that the work was on prison grounds; that the prisoners were compelled to work for the companies as part of their sentences; and 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.”⁵¹ The court also stated that “the Congressional concern in enacting the [FLSA] was with the standard of living and the general well-being of the worker in American industry, so that the extension to the prison inmate was not legislatively contemplated.”⁵²

*B. Prisoner Worker FLSA Claims After Bonnette v. California & Welfare Agency*⁵³

Thus, before 1983, the circuit courts were generally anti-coverage, typically applying their “economic reality” tests stringently and then expounding dicta proclaiming doubt that Congress had ever intended inmate workers to be covered by the FLSA. However, after 1983, some courts began to apply different tests for determining the “economic reality” of a prison work situation. One such test that proved much more favorable to inmate claims was established in the benchmark case, *Bonnette v.*

46. *Id.* at 787.

47. *Id.* (“[T]he private corporations have relinquished their normal rights: (1) to determine when, and whether, their enterprises need additional help; (2) to select the members of their work force; (3) to remove from their work force members with whom they are dissatisfied; (4) to control that labor force except in the most routine matters.”).

48. The *Sims* court, in dicta, indicated a strong opposition to inmate rights under the FLSA. The court stated that it was unlikely that Congress had considered any of the variables unique to the prison work as rehabilitation when it adopted general labor legislation. *Id.*

49. 721 F.2d 149 (5th Cir. 1983).

50. *Id.* at 150.

51. *Id.*

52. *Id.*

53. 704 F.2d 1465 (9th Cir. 1983).

California Health & Welfare Agency.⁵⁴

In *Bonnette*, the Ninth Circuit created a more refined “economic reality” test to try to solve the confusion and arbitrariness of the prevailing case-by-case analyses of whether certain working conditions constituted “employment” under the FLSA. The court’s four-factor standard considered “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.”⁵⁵ The court cautioned that the factors were not exclusive, and that the determination of whether an employer-employee relationship existed could not depend on isolated factors and must be based “upon the circumstances of the whole activity.”⁵⁶

Although the factual situation in *Bonnette* did not involve prison workers,⁵⁷ within a year many circuit courts began applying the *Bonnette* Factors to prison labor cases. Some of the more influential cases are set forth below:

1. *Carter v. Dutchess Community College*:⁵⁸ After applying the four *Bonnette* Factors, the Second Circuit overturned and remanded the district court’s summary judgment order against an inmate who had served as a tutor for a private community college that offered classes to inmates inside the prison. The court admonished the lower court’s holding that the FLSA is inapplicable to prison work programs simply because the state exercised “occasional control” over the employer in decisions about the inmates’ working situation.⁵⁹ Instead, the court held 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.”⁶⁰

2. *Watson v. Graves*:⁶¹ In 1990, the Fifth Circuit became the first court to grant prisoners “employee” status under the FLSA. The court determined that inmates who had voluntarily worked for a private construction company outside the jail must be paid the minimum wage.⁶²

54. *Id.*

55. *Id.* at 1470.

56. *Id.* quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 772, 730 (1947).

57. The case involved the FLSA claims of individuals who provided in home care to disabled public assistance recipients against the state and county agencies which employed them. *Id.* at 1467.

58. 735 F.2d 8 (2d Cir. 1984).

59. “It runs counter to the breadth of the statute and to the Congressional intent to impose a qualification which permits an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party’s veto, to escape compliance with the Act.” *Id.* at 12.

60. *Id.* at 14.

61. 909 F.2d 1549 (5th Cir. 1990).

62. *Id.* at 1555-56.

The court came to this conclusion as a result of the *Bonnette* Factors, finding that the private employer had both supervisory powers and the ability to hire and fire the inmates, as well as the ability to set the rate and method of payment.⁶³ The court ignored the record-keeping prong since no records were kept.

After *Watson*, courts became more hesitant to apply the seemingly pro-inmate *Bonnette* Factors. In *Gilbreath v. Cutter Biological, Inc.*,⁶⁴ the Ninth Circuit refused to apply the *Bonnette* Factors and reached the opposite result from *Watson*.⁶⁵ The *Gilbreath* court held that inmates voluntarily working for a private plasma treatment center that operated inside the prison were not employees under the FLSA.⁶⁶ The court reverted back to the pre-*Bonnette* “economic reality” test, and relying solely on the third “agency” prong held that the state had more control over the working relationship than did the private company.⁶⁷ In keeping with the pre-*Bonnette* precedent, the *Gilbreath* court, in dicta, expounded its opinion that Congress never intended the FLSA to cover prisoner workers:

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 me 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 servitude.⁶⁸

The *Bonnette* Factors received their most scathing criticism in *Vanskike v. Peters* in which the Seventh Circuit held that the test failed to realize the true nature of compelled labor performed in state penitentiaries.⁶⁹ The court admonished the factors, stating that they presupposed a free labor system and were not applicable to the involuntary servitude that is the reality of prison labor.⁷⁰

63. *Id.* at 1555. The court also took note of the fact that the inmates were not required to work as part of their sentences. Consequently, their labor did not “belong” to the jail. *Id.* at 1556.

64. 931 F.2d 1320 (9th Cir. 1991).

65. *Id.*

66. *Id.* at 1326-27.

67. Judge Trott concluded that the state’s “complete control” over its inmates was inconsistent with the “economic reality” of a true employer-employee relationship. *Id.* at 1325.

68. *Id.* at 1324-25. The Seventh and Fourth Circuits have decided cases under the same rationale as *Gilbreath* without using the *Bonnette* Factors. See *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992); *Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993).

69. 974 F.2d at 806.

70. *Id.* at 809. “The control that the DOC exercises over a prisoner is nearly total, and

The court was also concerned that the *Bonnette* test, when applied to the prison context, would lead to the “radical result” that all prison labor inside penal institutions, from laundry to janitorial work would be subject to the minimum wage laws. The court noted that no court had ever suggested that the FLSA applied to such labor.⁷¹ Notably, however, the *Vanskike* court limited its holding to state employed work, as opposed to inmate work for private companies. This distinction provides the framework for most current inmate labor cases, described in Part IV.

C. *The Hale Cases*

Post-*Vanskike*, the most influential cases dealing with inmate FLSA claims arose out of the Ninth Circuit. In *Hale v. Arizona* (hereinafter *Hale I*)⁷², two groups of inmates (the Fuller and Hale inmates)⁷³ brought FLSA claims against the state of Arizona. In Arizona, as opposed to many other states, all prisoners were compelled, as part of their prison sentences, to perform hard labor for the state. Furthermore, under Arizona law, the state agencies that utilized prison labor were considered “private enterprises.”⁷⁴ This proved to be a major setback for state interests, since this law required inmates to forgo any argument that the state and not a private entity was employing them.

The Fuller inmates performed a variety of jobs for a private employer, ARCOR Enterprises, inside of the prison walls. In applying the *Bonnette* Factors, the panel found that the private company was responsible for (1) hiring and firing the inmates; (2) supervising and controlling the work; (3) determining the rate and method of pay; and (4) maintaining any existing employment records.⁷⁵

The single appellant from the Hale inmate group had worked as an office manager for a business which participated in an Inmate-Operated Business Enterprise (IOBE) program.⁷⁶ The court assessed the economic reality of the Hale inmate by utilizing the *Bonnette* Factors and concluded similarly that the private enterprise hired and fired the inmates and paid

control over his work is merely incidental to that general control. [This] supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment.” *Id.*

71. See *id.* at 809-810.

72. 967 F.2d 1356 (9th Cir. 1992).

73. Named for the claims that the two groups of inmates brought against the state of Arizona: *Fuller v. Arizona* and *Hale v. Arizona*. The claims were consolidated and were given the case name *Hale v. Arizona*.

74. See Ariz. Rev. Stat. Ann. 41-1623(D)(3) (2001).

75. *Hale I*, 967 F.2d at 1366.

76. *Id.* at 1360.

their wages.⁷⁷ The panel also harked back to a previous concern, concluding that the inmates had produced goods that were introduced into the outside commerce and therefore posited an unfair competitive advantage to the private enterprises involved in the buying of the inmates labor.⁷⁸

The *Hale I* decision did not sit well within the Ninth Circuit, especially in light of the fact that the same court had decided *Gilbreath* in 1991, a case which presented a complete conflict in reasoning to *Hale I*. The court, therefore, reheard the case en banc and issued a new opinion, *Hale II*, in 1993.⁷⁹ In *Hale II*, the court reversed the panel and held that prisoners who had worked inside the prison, in a prison structured program, pursuant to the state's requirement of "hard labor," were not employees within the purview of the FLSA.⁸⁰ The *Hale II* court also joined the Seventh Circuit's *Vanskike* opinion in holding that the *Bonnette* Factors were inapplicable to inmate labor since the relationship between the state and the inmates was custodial.⁸¹

The court also acknowledged that its decision was consistent with the purpose of the FLSA, in that the concerns with substandard living conditions and unfair competition were not applicable to prison labor.⁸²

D. The "Inside Work" Issue Resolved

The Seventh Circuit's decision in *Vanskike* and the Ninth Circuit's decision in *Hale II* became influential in settling the debate over coverage for inmate work conducted within prison walls. Each subsequent circuit that addressed the question of inside prison work concluded that inmates should not be considered employees under the FLSA.⁸³

The oft-cited opinion of the Second Circuit in *Danneskjold v. Hausrath*⁸⁴ summarized the reasoning in *Vanskike* and *Hale II* when it held

77. *Id.* at 1367.

78. *Id.*

79. *Hale v. Arizona* (hereinafter *Hale II*), 993 F.2d 1387 (9th Cir. 1993) (en banc).

80. *Id.* at 1395.

81. *Id.* at 1394.

82. *Id.* at 1396 ("We agree with Arizona that the problem of substandard living conditions, which is the primary concern of the FLSA, does not apply to prisoners, for whom clothing, shelter, and food are provided by the prison"), citing *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992) (quotation not included).

83. *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters. Inc.*, 112 F.3d 1119 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996); *Reimonenq v. Foti*, 72 F.3d 472, 475 (5th Cir. 1996); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 684-87 (D.C. Cir. 1994); *McMaster v. Minn.*, 30 F.3d 976, 980 (8th Cir. 1994); *Franks v. Okla. State Indus.*, 7 F.3d 971, 972 (10th Cir. 1993); *Miller v. Dukakis*, 961 F.2d 7, 8-9 (1st Cir. 1992).

84. 82 F.3d 37 (2d Cir. 1996).

that:

The relationship [between prisoner and prison] is not one of employment; prisoners are taken out of the national economy; prison work is often designed to train and rehabilitate . . . and most such labor does not compete with private employers As a result, no Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying the minimum wage. Prisoners may thus be ordered to cook, staff the library, perform janitorial services, work in the laundry. . . . Such work occupies prisoners' time that might otherwise be filled by mischief, it trains prisoners in discipline and skills of work; and is a method of seeing that prisoners bear a cost of their incarceration.⁸⁵

A major reason that courts have held the FLSA inapplicable to inside prison labor is because it has been established that courts hearing such cases should not apply the "economic reality" tests set forth in *Bonnette* and *Carter*. In *Reimonenq v. Foti*,⁸⁶ the Fifth Circuit summarized why the *Bonnette* test was "unserviceable" in the jailer-inmate context:

The test has a natural bias that favors a finding that the prison custodian is the inmate's "employer" because of the considerable control a jailer must exercise over inmates. . . . [T]he factors fail to capture the true nature of the relationship between an inmate and prison custodian for essentially they presuppose a free labor situation. Put simply, the control over the inmate does not stem from any remunerative relationship bargained-for exchange of labor for consideration, but from incarceration itself.⁸⁷

The test has been held inapplicable whether or not the labor is voluntary and regardless of whether a private contractor is involved.⁸⁸

Thus, although the Supreme Court or Congress has not grappled the issue, the circuits are in agreement that all inside prison work is not covered by the FLSA and thus inmate workers may be paid less than the minimum wage. However, the issue of whether inmate workers are covered for work outside of the prison walls has been a much more contentious issue for the circuits, with no overriding precedent guiding the few cases which have been decided.

85. *Id.* at 42-43.

86. 72 F.2d 472 (5th Cir. 1996).

87. *Id.* at 475, citing *Vanskike*, 974 F.2d at 809-810.

88. *Danneskjold*, 82 F.3d at 44.

III. WORK EXCHANGE PROGRAMS AND OTHER FORMS OF OUTSIDE WORK

Watson and *Carter* remain the two seminal cases that have granted coverage to prisoner workers. The inmates in these cases voluntarily contracted with private companies that directly paid and supervised them. This section examines the variety of claims that have been brought under the purview of *Watson* and how the circuits have dealt with outside prison work in general.

Circuits that have agreed with the prevailing reasoning for inside prison work have often been wary not to make a per se ruling that prisoners may never be considered employees for purposes of the FLSA.⁸⁹ Many of these same courts have made statements consistent with the holdings in *Watson* and *Carter*; that certain prison work should be covered under the FLSA.⁹⁰ Problems arise because there are a variety of situations that fall in between *Watson* and a simple inside prison FLSA claim.

The circuits have struggled to try to identify a clear standard to govern these difficult cases. The most prevalent cases are set forth below:

1. *Henthorn v. Department of Navy*.⁹¹ In 1994 the D.C. Circuit was presented with a coverage claim by an inmate who worked at the U.S. Naval Air Station as a janitor and “ranchhand.”⁹² Henthorn was assigned to the position and paid by the Bureau of Prisons, which also controlled his terms of employment. In attempting to construct a test to identify cognizable prisoner claims, the court rejected both an inside/outside the prison distinction and a public/private employer distinction.⁹³ Instead, the court issued a comprehensive burden-shifting approach. First, the inmate must meet a two-pronged requirement to survive a motion to dismiss. The inmate worker must prove that (1) the work performed was done without legal compulsion (i.e., that it was not part of a hard-labor requirement in the prisoner’s sentence); and (2) that the compensation received was set and paid by a non-prison source.⁹⁴ If the inmate’s claim passes this test, the court would then run the “economic reality” test set forth in *Bonnette*.

89. See, e.g., *id.* at 40 (“[W]e do not disturb *Carter*’s rejection of a rule that a prisoner’s labor is at all times and in all circumstances exempt from the FLSA”); *Hale II*, 967 F.2d at 1393 (finding that the FLSA may be applicable to prisoners in certain circumstances); *Vanskike*, 974 F.2d at 808 (“prisoners are not categorically excluded from the FLSA’s coverage simply because they are prisoners”).

90. See, e.g., *Villarreal v. Woodman*, 113 F.3d 202, 207 (11th Cir. 1997) quoting *Henthorn* 29 F.3d at 686 (“[T]he more indicia of traditional free-market employment the prisoner and his putative employer bears, the more likely it is that FLSA will govern the employment relationship.”).

91. 29 F.3d 682 (D.C. Cir. 1994).

92. *Id.* at 683.

93. *Id.* at 685.

94. *Id.* at 687.

In this way, the court purported to avoid the concerns that *Vanskike* and the other circuits had with the *Bonnette* test. By mandating “pre-*Bonnette* factor” test, the D.C. Circuit made it a requirement that a free labor situation existed (and not the penological nature of the relationship that usually exists between jailer and inmate), before the economic nature of the relationship was put at issue.

When applied to the facts of the case, the court concluded that because Henthorn’s sentence required hard labor and since he was assigned and paid by the Bureau of Prisons and not by any private employer, he failed the test to survive the motion for dismissal. This test has been applied to all prison labor cases that have arisen in the District of Columbia.⁹⁵

2. *Barnett v. Young Men’s Christian Ass’n*:⁹⁶ In 1999, in a case that may prove seminal, the Eighth Circuit overturned a district court’s dismissal of a coverage claim by an inmate who had worked for the YMCA in a work-release program. Inmate Barnett was picked up by YMCA employees each morning and brought to work where he provided maintenance functions for the facility without any supervision or “spot-checks” by prison officials.⁹⁷ The YMCA had the power to hire and fire Barnett, controlled his terms of employment and rate of pay and maintained employment records.

The Eighth Circuit, which had joined the other circuits in refusing to extend coverage to inside prison labor,⁹⁸ cited *Henthorn* when it held that Barnett had “‘freely contracted with the YMCA’ to sell his labor”.⁹⁹ The court held that the facts in the case were similar to those in *Carter and Watson*, in that (1) the suit was being brought against a private entity and not against a branch or representative of the state government; (2) that Barnett had volunteered his labor and was not compelled to perform hard labor through his sentence; and (3) that he was supervised and paid directly by the private entity with little or no involvement by the prison industry.¹⁰⁰

95. See *Nicastro v. Reno*, 84 F.3d 1446 (D.C. Cir. 1996) (denying coverage to inmates who had worked for the Federal Prison Industries because they failed the *Henthorn* test’s requirement that the prisoner must freely contract with a non-prison employer to sell his labor, and the FPI was controlled by the government).

96. 1999 U.S. App. LEXIS 3412 (8th Cir. Mar. 4, 1999).

97. *Id.* at *2.

98. See *McMaster v. Minn.*, 30 F.3d 976, 980 (8th Cir. 1994) (“Inmates who are required to work as part of their sentences and perform labor within a correctional facility as part of a state-run prison industries program are not ‘employees’ under the FLSA.”).

99. *Barnett*, 1999 U.S. App. LEXIS 3412, at *2.

100. *Id.* at *8.

IV. A WORKABLE NEW STANDARD AND A CALL FOR HELP FROM THE SUPREME COURT

As evidenced above, a firm standard on when prisoner workers may be covered under the FLSA has eluded the circuits. Although unsettled by the Supreme Court, it seems clear that that inside prison work is not subject to the minimum wage. Many of the courts which are staunch advocates of this holding, however, caution that this per se rule cannot and should not be applied to all prison labor situations. A new standard is necessary to guide courts in their determination of when certain kinds of labor must be compensated through the minimum wage laws. The standard set forth in *Henthorn* seems to be the most comprehensive set forth to date and so I work from the D.C. Circuit's approach, with a few adjustments.

The first test should be whether or not the inmate is able to survive a motion to dismiss. This will help maximize judicial economy by alleviating the adjudication of frivolous claims. To survive this first standard, the inmate laborer must prove that (1) his labor is not compelled by his sentence and therefore not done out of legal compulsion, and (2) that his "employer" is a private entity and not a representative of the state or federal government. If the inmate can prove these two facts, he has established that there may be an "indicia of [a] traditional, free-market employment relationship between the prisoner and his putative 'employer.'"¹⁰¹

Furthermore, by mandating that these minimum requirements be met, the new standard allows correctional institutions to compel inmates to perform the variety of tasks that serve the institutional missions of the prison. These duties such as cooking, cleaning and laundry ensure that prisoners bear a cost of their incarceration and trains prisoners in the discipline and skills of work.

The two-pronged dismissal test also avoids all "economic reality" analysis. The Seventh and Ninth Circuits correctly held that these economic tests "fail to capture the true nature of [most prison employment] relationship[s] for essentially they presuppose a free labor situation."¹⁰²

However, if the prison laborer can establish that he is working for a private employer and that his work is not legally compelled by his sentence, then some form of "economic reality" test is warranted. As the *Henthorn* court stated:

In cases such as *Watson* and *Carter* where the prisoner is voluntarily selling his labor in exchange for a wage paid by an employer other than the prison itself, the Fair Labor Standards

101. *Henthorn v. Dept. of Navy*, 29 F.2d 682, 686 (D.C. Cir. 1994).

102. *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992).

Act may apply. In such cases, it makes sense to apply the four-factor "economic reality" test to determine the extent to which the prisoner's relationship with his putative employer bears indicia of traditional employment concepts.¹⁰³

Thus, when an inmate participates in a non-obligatory work release program, where he is paid by an outside employer, he should be able to state a claim under the FLSA for compensation at the minimum wage. The Ninth Circuit's *Bonnette* Factor test is comprehensive enough to determine if the employer-prisoner relationship is similar to traditional employment arrangements. The test should therefore be adopted with a few adjustments.

The test focuses on whether the employer (1) had the power to hire and fire the employee; (2) supervised and controlled the employees work schedules and conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. The first three factors go to the heart of whether or not there exists a traditional employment relationship. The fourth should be removed, for even if comprehensive records are not kept, there may still be an employment relationship. The absence of such records should not be fatal to an FLSA claim. This "economic reality" test should also be based upon the totality of circumstances so that no one factor is given undue weight over any other.

This framework serves both to protect the interests of the prison laborers and to keep with Congress's motivations for passing the FLSA in the first place. By implementing a preliminary barrier requiring inmates to show that their labor situation is similar to that of the norm, the standard does not allow for over-inclusive claims. In this way, the state is free to compel inmates to perform all inside prison work and most outside prison work if controlled by the state. In the rare circumstances where prisoners work for outside employers, the "economic reality" test serves to separate state controlled labor from freely contracted labor which is deserving of the minimum wage.

The numerous standards that have been espoused by circuit courts and academics, however, are not controlling and there is much disagreement on the precise answer to this difficult question. This results in a federal statute being implemented differently from state to state. The Supreme Court or Congress must take up this issue in order to dispel the confusion and to guarantee that the FLSA is consistently applied to prison laborers no matter which state they are serving.

103. *Henthorn*, 29 F.3d at 686.