Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms

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MINIMUM WAGES FOR PRISONERS:
LEGAL OBSTACLES AND SUGGESTED REFORMS

The growing literature on prisoners’ rights has not yet focused on inmates’ demands for minimum wages and the justification for such demands. This article explains why statutory minimum wage coverage should be extended to inmates, discusses the judicial treatment of prison labor and the minimum wage question, advocates adoption of legislation now pending in Congress, and suggests further legislative reform necessary to implement the minimum wage proposal. Many conditions in our prison system are undoubtedly more harmful and degrading than lack of meaningful wages.¹ This article focuses on only one feasible reform, not on the priorities of prison reform in general.

The question of minimum wages for inmates should be viewed against the backdrop of the rapid expansion of prisoners’ legal


The hope and future of corrections may well lie in community-based corrections, a concept which has wide support. See, e.g., Challenge of Crime, supra at 171, 173; President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 4-11, 38-44 (1967) [hereinafter cited as Task Force Report]; Recommendation 33 of the Advisory Commission on Intergovernmental Relations (1971), and Part IV, Toward Community-Based Corrections, of the President’s Task Force on Prisoner Rehabilitation (1970), both appearing in Part VIII. American Bar Association Commission on Correctional Facilities and Services and Council of State Governments, Compendium of Model Correctional Legislation and Standards VIII 19, 26 (1972) [hereinafter cited as ABA Compendium].
rights and the growing realization that inmates must be treated as human beings. Prisons have won important legal victories in the areas of due process, mail rights, access to the courts, right to medical care, freedom of religion, political rights, freedom from racial discrimination, fairness of parole revocation, and elimination of cruel and unusual punishment. This expansion of prisoners' theoretical rights is due to a new judicial interest in and willingness to deal with inmate rights, representing a departure from the strict "hands-off" doctrine.

Prisoners are no longer regarded as "slaves of the state"; now

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4 See, e.g., Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).


6 See, e.g., Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970); Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970).

7 See, e.g., Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), aff'd, 443 F.2d 1266 (9th Cir. 1971)


13 In Ruffin v. Virginia, 62 Va. (21 Gratt.) 790 (1871), the court said that:
the question is which of two more enlightened views of prisoners' rights should govern. Courts often cite the Supreme Court's statement that "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." But many believe the better view is found in the dictum of the Sixth Circuit in Coffin v. Reichard: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken away from him by law." These two views are not mutually exclusive. They do, however, represent different starting points, and one's thinking concerning the minimum wage proposal largely depends upon how the matter is approached. The Coffin rationale has been accepted and reinforced by commentators and legislators, and it is submitted that this philosophy should govern the analysis of all prison conditions as well as prisoners' legal rights.

I. THE CASE FOR MINIMUM WAGES FOR PRISONERS

A. Prison Labor, Working Conditions, and Wages

Almost all penologists agree that productive work activity is central to inmates' rehabilitation. The importance of work in the prison program lies in its role in preventing idleness, boosting
morale, easing tension, and reducing discipline problems, and in its contribution to effective and economical prison administration. The most important attribute of prison labor is its ability to impart healthy work attitudes, productive habits, and useful skills—all important elements in offenders' rehabilitation.

The importance of work activity has been recognized since institutional prisons were established in the United States during the late eighteenth and early nineteenth centuries. The Pennsylvania or Quaker system emphasized solitary work in individual cells, while the Auburn design, developed in New York, provided for joint labor with solitary confinement during nonworking hours. The Auburn prison was established in 1821 and rapidly became a profit-making venture. Because of its success, it became the prototype American prison. The Auburn model always featured a prison shop or collective labor, but four distinct organizational systems developed: lease, contract, piece-price, and state or public account. The lease and contract systems lent themselves to prisoner abuse and exploitation. Under all four systems prisoners competed with nonconvict labor.


20 On the history of American prison labor see HOUSE REPORT, supra note 1. at 25-28; M. RICHMOND, supra note 18. at 1-5. An excellent description and appraisal of prison labor as of 1831 is found in G. DE BEAUMONT & A. DE TOCQUEVILLE, supra note 1.

21 Under the lease system convicts were turned over to an entrepreneur for a specified time, while in the contract system the state sold the inmate's labor, but retained control and custody over him. From 1830-1870 these systems provided most of the inmate employment in state penal systems. The piece-price system was a form of the contract system in which the entrepreneur furnished raw materials and machinery and paid a price for each finished product. Under the state or public account system the state manufactured and sold goods on the open market. ACA MANUAL, supra note 18. at 393-94; E. JOHNSON, CRIME, CORRECTION, AND SOCIETY 560 (1968); Goldart, supra note 18. at 28. See also G. DE BEAUMONT & A. DE TOCQUEVILLE, supra note 1. at 68.

22 ACA MANUAL, supra note 18. at 12; E. JOHNSON, supra note 22. at 562; M. RICHMOND, supra note 18. at 6.
During the late nineteenth and the first half of the twentieth century, private industry and organized labor secured the passage of restrictive legislation that required labeling of convict-made goods, prevented contracting-out of convict labor, and prohibited sale of prison-made goods on the open market. In 1929, the Hawes-Cooper Act authorized state regulation of commerce in convict-made goods, thereby subjecting prison products to restrictive state legislation. The Ashurst-Sumners Act made it a crime to transport prison-made goods in interstate commerce in violation of state law and required that such goods be labeled. This Act was amended in 1940 to place a flat ban on interstate transportation of prison-made goods and remains law today. These statutes delivered a death blow to the contract and lease systems, which had provided steady employment in prisons, at a time when their objectionable features were being removed. The state-use system, in which the state employs prisoners to make goods for use by state and local government or to construct and repair public works, became and remains the predominant prison labor model. The development of serious legislative restrictions on prison labor and the attendant shift to the state-use system has had disastrous effects on the employment rate in prisons.

Idleness is the rule in prison today; as many as one-third of

24 House Report, supra note 1. at 26-27. For a more thorough discussion of this legislation and suggestions for reform, see notes 224-43 and accompanying text infra.
29 E. Johnson, supra note 22. at 561.
31 For a discussion of the detrimental effects of the Hawes-Cooper and Ashurst-Sumners Acts on prisons in the 1930's see J. Bennett, American Prisons—Houses of Idleness (1935). The Passing of the Industrial Prison (1937). Horse Collars and Prisons (1937), and Economics of Prisons (1938). in Of Prisons and Justice—a Selection of the Writings of James V. Bennett, S. Doc. No. 70. 88th Cong., 2d Sess., at 1-5, 6-9, 10-13. 28-30 (1964). See also Singer. supra note 1, at 381-82. In 1885. 75 percent of prison inmates were productively employed; by 1940 the percentage had dropped to 44 percent. The drop in employment corresponded with the shift in prison employment patterns from 74 percent lease, contract, and piece-price labor and 26 percent state-use employment in 1885 to almost 100 percent state-use labor in 1940. House Report, supra note 1. at 27.
32 Challenge of Crime, supra note 1. at 176; M. Richmond, supra note 18. at 6.
all prison inmates either are assigned to overmanned positions or do not work at all.\textsuperscript{33} Much of the available work is unproductive, boring, and meaningless.\textsuperscript{34} Inmates who are able to work are frequently assigned tasks designed only to keep them busy.\textsuperscript{35} Prison industry jobs, when available, usually have little in common with jobs outside the walls, since prison industries are generally antiquated and inefficient.\textsuperscript{36} Despite the agreement on the importance of meaningful work in the rehabilitation process, prison work programs and industries fail to realize their rehabilitative potential.

The costs of the failures of the prison work system are enormous. Idle inmates do nothing to offset the cost of keeping them in prison, and untrained convicts are unable to support themselves upon release.\textsuperscript{37} The federal prison industry system is generally acknowledged as the best in this country,\textsuperscript{38} yet approximately 85 percent of the inmates leaving federal prisons have no marketable skill.\textsuperscript{39} Beyond the economic costs of the present system is its human toll. Inmates, like other workers, rebel at being forced to do useless work.\textsuperscript{40} The present prison labor system breeds apathy, contempt, cynicism, and hostility.\textsuperscript{41}

\begin{quote}
\textsuperscript{33} Singer. supra note 1, at 381.
\textsuperscript{35} Leopold. \textit{supra} note 20, at 51; \textsc{House Report}. \textit{supra} note 1, at 28.
\textsuperscript{36} \textsc{ACA Manual}. \textit{supra} note 18, at 16; \textsc{House Report}. \textit{supra} note 1, at 27–28; \textsc{Task Force Report}. \textit{supra} note 1, at 55; Leopold. \textit{supra} note 20, at 51. But cf. 18 U.S.C. § 4123 (1970):
\begin{quote}
Such forms of employment shall be provided as will give inmates of all Federal penal and correctional institutions a maximum opportunity to acquire a knowledge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release.
\end{quote}
\textsuperscript{37} See \textsc{House Report}. \textit{supra} note 1, at 29; \textsc{Challenge of Crime}. \textit{supra} note 1, at 176.
\textsuperscript{38} \textsc{Challenge of Crime}. \textit{supra} note 1, at 176.
\textsuperscript{39} \textit{Oversight Hearings} on the Nature and Effectiveness of the Rehabilitation Programs of the Bureau of Prisons Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., at 5 (1972) [hereinafter cited as \textit{Oversight Hearings}]. Cf. de Beaumont and de Tocqueville's description of the nineteenth century prison:
\begin{quote}
Perhaps, leaving the prison he is not an honest man, but he has contracted honest habits. He was an idler; now he knows how to work. His ignorance prevented him from pursuing a useful occupation; now he knows how to read and to write; and the trade which he has learnt in the prison. furnishes him the means of existence which formerly he had not.
\end{quote}
G. DE BEAUMONT & A. DE TOCQUEVILLE. \textit{supra} note 1, at 90.
\textsuperscript{40} Leopold. \textit{supra} note 20, at 51; Singer. \textit{supra} note 1, at 382.
\textsuperscript{41} \textsc{ACA Manual}. \textit{supra} note 18, at 391; Leopold. \textit{supra} note 20, at 51; R. Singer. \textit{supra} note 1, at 381–82. The shortcomings of the state-use system are described in Lopez-Rey. \textit{supra} note 18, at 15; and N. Singer. \textit{Incentives and the Use of Prison Labor}, 19 CRIME AND DELINQUENCY 200, 202 (1973).
Wages paid to working inmates do not compensate for unsatisfactory working conditions; indeed, they have been characterized as a joke and absurd. In 1972, inmates in federal prisons were paid between seventeen and forty-nine cents per hour for work performed in the Federal Prison Industries. The states, on the whole, are not as generous as the federal government. In 1957, daily wages in state prisons ranged from $0.04 to $1.30 and the average was $0.34 per day. These shockingly low wages reflect an overall spending pattern in which 95 percent of all prison expenditures are for "custody—iron bars, stone walls, guards," and only 5 percent is spent for "hope—health services, education, developing employment skills."

B. Why the Minimum Wage?

The adverse effects of present wage levels provide perhaps the best reason for paying inmates the minimum wage. A sense of dignity and self-respect is important to inmates. Experts in cor-

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42 Oversight Hearings, supra note 39, at 54 (testimony of F. Lee Bailey).
43 N. Singer, supra note 41. at 201.
44 118 Cong. Rec. S5952 (daily ed. Apr. 12, 1972) (remarks of Senator Mathias). Wages on this scale ranged from $10 to $75 per month in 1967; the average in 1960 was $31.36 per month and in 1965 it was $38.00. Task Force Report, supra note 1. at 183; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and its Impact—An Assessment 59, n.147 (1967). Under 18 U.S.C. § 4126 (1970), the Federal Prison Industries corporation is authorized to pay compensation to inmates under rules and regulations promulgated by the Attorney General. The Attorney General's authority to prescribe rules and regulations for inmate compensation has been transferred to the Board of Directors of the Federal Prison Industries or such officer as the Board designates. 28 C.F.R. § 0.99 (1972).
45 Task Force Report, supra note 1. at 183. The wages at Attica in September, 1971, ranged from $0.20 to $1.00 per day, but until October of 1970 the range was $0.06 to $0.29 per day. Attica Report, supra note 1. at 49, n.35. The monthly range in September, 1971, was $4.40 to $22.00 per month and the average was $7.00 to $7.50. Attica Report, supra note 1. at 50. Almost all states delegate the power to set wages to the Department of Corrections, its director, or a similar body or officer, but some statutes set limits within which the wages must fall. See, e.g., Cal. Penal Code § 2700 (West 1970) (not less than 2 cents nor more than 35 cents per hour); Ill. Rev. Stat. ch. 38, §§ 1003-12-5 (Supp. 1972); Mass. Ann. Laws, ch. 127, §§ 48, 48A (1972), as amended, (Supp. 1973); Mich. Comp. Laws Ann. § 800.332 (Supp. 1973). See also id. § 800.101 (1968), as amended, (Supp. 1973) (convicts working on roads to be paid a fair and just compensation); N.Y. Correc. Law § 187 (McKinney 1968), as amended, (McKinney Supp. 1972); Ohio Rev. Code Ann. § 5147.22 (Page 1970); Pa. Stat. Ann. tit. 61, § 256 (1964) and tit. 71, § 305 (1962) (minimum of 10 cents per day). See also Model Penal Code §§ 303.7(3), 304.8(3) (Proposed Official Draft 1962) and National Council on Crime and Delinquency, Standard Act for State Correctional Services, § 15 (1966). For a survey of state wage-authorizing statutes and the deductions and distributions that are authorized under them see State Correctional Law Chart 6. in H. Perlman & W. Rudolph, Handbook for Correctional Law Reform (1972), reprinted in ABA Compendium, supra note 1. at X-102-106.
46 R. Clark, supra note 34, at 193; Oversight Hearings, supra note 39, at 5.
47 This was clearly demonstrated by the rebellion at Attica. See N.Y. Times, Sept. 19, 1971, at 58, col. 2.
reictions and judges realize that a successful rehabilitation program must restore dignity, integrity and self-confidence. It is recognized that wages in prisons can do much to further this goal, yet present wages have the opposite effect. Today’s prison wages lend neither dignity nor significance to prison jobs or the inmates holding them.

Although removal of the negative effects of the present wage system substantially justifies minimum wages for prisoners, reform would have other benefits as well. Equitable pay for work performed in prison would allow inmates to support their families, thereby reducing the welfare rolls, improving the economic lot of prisoners’ families, and enabling inmates to maintain strong family ties. Receipt of the minimum wage would also help inmates learn to handle finances and would allow them to pay into and qualify for social security. Finally, if the minimum wage were paid to prisoners, they would have a greater incentive to work efficiently and to develop improved work habits.

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49 Mr. Justice Brennan, in his concurring opinion in Furman v. Georgia, 408 U.S. 238, 281 (1972), indicated that the effect on dignity is a measure of cruel and unusual punishment. See also Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

50 ACA Manual, supra note 18, at 393; E. Johnson, supra note 22, at 567; Task Force Report, supra note 1, at 55; Lopez-Rey, supra note 18, at 25.


54 Attica Report, supra note 1, at 51.


Another reason for paying the minimum wage for prison labor is that inmates feel equitable wages are important.\textsuperscript{57} Convicts regard their wages as degrading\textsuperscript{58} and feel that they are exploited by prison industries.\textsuperscript{59} Application of the New York minimum wage laws to prison labor was demanded by the rebellious prisoners at Attica and was one of the twenty-eight concessions offered by Commissioner Russell G. Oswald.\textsuperscript{60} Minimum wages have been an issue in many prison strikes or disturbances in state and federal prisons,\textsuperscript{61} and they are a goal of several prisoner unions.\textsuperscript{62} In view of widespread prisoner agitation for minimum wages,\textsuperscript{63} maintenance of prison order alone may indicate that the proposal should be given serious consideration.

Objections to the minimum wage proposal have been and will be raised. The most important of these objections is the cost of such a program.\textsuperscript{64} It costs an estimated $11,000 per year to keep a married man in prison, based on the prisoner's loss of earnings, the cost of keeping him, the loss of taxes, and the cost of providing relief to his family.\textsuperscript{65} If the prisoner is paid the minimum wage, charged for his room and board, and obliged to support his family, part of this cost would be recouped. Some estimate that, if prisoners were to receive the minimum wage, the costs of maintaining inmates would not be greater than they are now;\textsuperscript{66} but even if

\textsuperscript{57} Taylor, The Correctional Institution As a Rehabilitation Center—A Former Inmate's View, 16 VILL. L. REV. 1077, 1078 (1971).

\textsuperscript{58} ATTICA REPORT, supra note 1, at 50–51.

\textsuperscript{59} ATTICA REPORT, supra note 1, at 39; NCCD Policy Statement, supra note 53, at 333.

\textsuperscript{60} ATTICA REPORT, supra note 1, at 253; Prisons: The Way to Reform, TIME, Sept. 27 1971, at 31.


\textsuperscript{63} The prisoners' desire for minimum wages is discussed in Browning, Organizing Behind Bars, RAMPARTS, Feb., 1972, at 40–45, reprinted in PRISONS, PROTEST, AND POLITICS, supra note 1, at 132–39 and Goldfarb, The Voices Inside, JURIS DOCTOR, Dec., 1971, at 48–49.

\textsuperscript{64} J. BASALO, supra note 53, at 44, and E. JOHNSON, supra note 22, at 568.

\textsuperscript{65} Oversight Hearings, supra note 39, at 39. This estimate is by the American Correctional Association. The cost of keeping prisoners was set at $10.24 per day in federal prisons and $5.24 per day in state institutions.

\textsuperscript{66} Lopez-Rey, supra note 18, at 26.
costs increase, they must be measured against the benefits of the minimum wage and the social costs of the present system.

Some will assert that minimum wages could lead to even more unemployment in prisons. Others will argue that loss of earning capacity is a part of punishment and that minimum wages will reduce the deterrent effect of potential incarceration. Still others will maintain that it is unfair to pay the minimum wage to prisoners when some nonconvict labor is not covered. These concerns have some justification, but it must be remembered that 95 percent of the nation's inmates return to society. It has been pointed out that:

The experience of these inmates while in prison will largely determine their chances of becoming productive and law-abiding citizens after release. Thus, what happens in prison is of critical importance not only to the relatively few offenders who are caught and convicted of crimes but also the nation, which faces a general crisis of crime control.

The issue is not whether minimum wages will amount to "coddling" criminals; the question is whether, when the long-run societal and economic costs of the present system are considered,

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For a survey of state statutory provisions dealing with work-release or furlough programs see State Correctional Law Chart 5, in H. Perlman & W. Rudolph, Handbook for Correctional Law Reform (1972), reprinted in ABA Compendium, supra note 1, at X-98-101. As early as 1967 it was recommended that such programs be expanded. Challenge of Crime, supra note 1, at 177, and similar recommendations have been made since. See e.g., Recommendation 33 of the Advisory Commission on Intergovernmental Relations (1971), reprinted in ABA Compendium, supra note 1, at VIII-19; N. Singer, supra note 41, at 206-11; American Friends Service Committee, Struggle for Justice 168 (1971). Prisoners in work-release programs are generally paid going wage rates. Zalba, supra at 509, and many of the advantages of work-release would also be provided by minimum wages. Prison authorities cite the ability of the prisoner to reimburse the state for room and board, to support his family, to retain a greater measure of self-respect, and to accumulate savings by the time for release, as major advantages of work-release programs. ACA Manual, supra note 18, at 17; Carpenter, supra at 691-92; Grupp, supra at 517-18; House Report, supra note 1, at 38; Zalba, supra at 506.

68 It is argued that minimum wages increase unemployment and cause noneconomic factors such as racial discrimination to play a larger role in the job market. See Campbell & Campbell, State Minimum Wage Laws As a Cause of Unemployment, 35 S. Econ. J. 323 (1969); Demsetz, Minorities in the Market Place, 43 N.C.L. Rev. 271 (1965). Cf. G. Becker, The Economics of Discrimination (1957). These economic analyses assume a free market and thus are not strictly applicable to the prison labor situation.

69 J. Basalo, supra note 53, at 44; E. Johnson, supra note 22, at 586.

70 Turner, supra note 2, at 473.

71 Id. at 473-74.
the short-run costs of paying minimum wages to prisoners are justified.\textsuperscript{72}

The answer seems to be that the extra costs, if any, of minimum wages are justified. The National Council on Crime and Delinquency issued a policy statement in 1972 calling for minimum wages in prisons.\textsuperscript{73} The United Nations Standard Minimum Rules for the Treatment of Offenders and other United Nations documents support the concept.\textsuperscript{74} A host of writers have recommended that the minimum wage should be paid to inmates in American prisons.\textsuperscript{75} The experts in corrections seem unanimously to support the proposal; the logic behind the idea is compelling\textsuperscript{76} and objections have yet to be made convincingly. If prisoners are not entitled to the minimum wage under present law, the law should be changed.

\section{II. The Judicial Response}

Although relatively few cases have considered the issue, several different theories have been employed in attempts to secure minimum wage protection for inmates. Prisoners have asserted claims under federal and state statutes, common law theories, and the Constitution. For a variety of reasons, all these attempts have failed. A discussion of the precedents is useful, however, in evaluating the need for legislative action. The courts have also indicated that there may be circumstances in which a prisoner wage

\textsuperscript{72} See Task Force Report, supra note 1, at 16.

\textsuperscript{73} NCCD Policy Statement, supra note 53, at 333–34.


\textsuperscript{76} Morris & Hawkins, supra note 75, at 14.
claim could be successful. In order to understand the judicial treatment of the minimum wage issue, a brief discussion of the law surrounding prison labor is necessary. Many of the cases discussed below were decided before the decline of the “hands-off” doctrine, but courts are not likely to modify the law in this area of prisoners’ rights.

A. The Legal Status of Prisoners and Prison Labor

An inmate does not have to work until convicted,\(^7\) but once convicted, he has no federally protected right not to work.\(^8\) The courts have unanimously held that prisoners can be required to work\(^9\) and many states dictate this requirement by statute.\(^8\) If individual inmates refuse to work, they may be placed in solitary confinement.\(^8\) Inmates may also be collectively punished following a work stoppage protesting prison conditions.\(^8\) Courts have said that the labor of convicts belongs to the state,\(^8\) and any wages for inmate labor are paid as a matter of grace.\(^8\) Where wages are earned, a percentage may be withheld by the state in a


\(^{8}\) Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963), cert. denied, 375 U.S. 915 (1963), rehearing denied, 375 U.S. 982 (1964). See also Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915 (1964); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963).


It is one thing for the State not to pay a convict for his labor; it is something else to subject him to a situation in which he has to sell his blood to obtain money to pay for his own safety, or for adequate food, or for access to needed medical attention.

309 F. Supp. at 381.
savings account;\textsuperscript{85} items purchased with wages may be taken away;\textsuperscript{86} and a prisoner’s pay may be canceled to reimburse the state for the costs of returning him to prison after his escape.\textsuperscript{87}

Prisoners have not fared well in litigation concerning other working conditions. Inmates injured while working on prison jobs are sometimes unable to obtain injury compensation. Prior to 1966, federal prisoners were able to sue under the Federal Tort Claims Act for injuries caused by the government’s negligence,\textsuperscript{88} but the Federal Prison Industries inmate compensation system\textsuperscript{89} now provides the exclusive remedy for work-related injuries.\textsuperscript{90} Almost all state prisoner claims under workmen’s compensation laws have failed,\textsuperscript{91} usually because inmates are not included within the statutory definition of “employee.”\textsuperscript{92} A few claimants have

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\item \textsuperscript{87} Sigler v. Lowrie. 404 F.2d 659 (8th Cir. 1968). cert. denied. 395 U.S. 940 (1969).

\item \textsuperscript{88} United States v. Muniz. 374 U.S. 150 (1963).

\item \textsuperscript{89} Under 18 U.S.C. § 4126 (1970), the Federal Prison Industries Corporation is authorized, under rules and regulations promulgated by the Attorney General, to pay compensation to inmates or their dependents for injuries sustained in any industry or work activity in connection with maintenance or operation of the institution. The Attorney General’s authority to prescribe rules and regulations in this area has been transferred to the Board of Directors of the Federal Prison Industries or such officers as the Board designates. 28 C.F.R. § 0.99 (1972). The current regulations governing inmate accident compensation appear at 37 Fed. Reg. 138, §§ 301.1-.18 (1972).

\item \textsuperscript{90} United States v. Demko. 385 U.S. 149 (1966); Granade v. United States. 356 F.2d 837 (2d Cir. 1966).


\item \textsuperscript{92} The term “employee” is usually defined as “every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied.” A. \textsc{Larson}. \textit{Workmen’s Compensation for Occupational Injuries and Death}. § 43.00 (Desk ed. 1972). \textit{See, e.g.,} \textsc{Cal. Labor Code} § 3351 (West 1971). The common law definition of employee or servant is used in workmen’s compensation cases and right to control is the primary test. A. \textsc{Larson}. \textit{supra} at §§ 43.00-30. \textit{See Restatement (Second) of Agency} § 220 (1958).
been successful, however. One court held that, while inmates working inside prison walls were not covered by workmen's compensation, prisoners working upon state highways were "employees."93 Other courts have held that there is an employment relation when inmates work outside the prison on a voluntary basis under the control of third parties.94

Inmates’ outside business interests may be curtailed by prison authorities. A warden may prohibit both registration of prisoner inventions with the patent office and their consignment to manufacturers.95 Prison officials may restrict correspondence relating to efforts to publish a book96 and can forbid the removal of a manuscript from the prison.97 It has been held, however, that an inmate’s writing is not the property of the state,98 and a 25 percent charge on payments received for inmate manuscripts and paintings was held impermissible under the California prisoner rights law.99

Prisoners’ right to organize unions has not yet been fully recognized. The first prisoners union was formed at Green Haven State Prison in Stormville, New York,100 and similar organizing attempts have been made at Jackson, Michigan,101 and else-

93 California Highway Comm’n v. Industrial Accident Comm’n. 200 Cal. 44. 251 P. 808 (1926). After this decision, convicts were specifically excluded from the definition of “employees” in the California Workmen’s Compensation Statute. CAL. LABOR CODE § 3352(e) (West 1971), and the Penal Code was also amended to state that prisoners were not to be considered “employees” and did not fall under workmen’s compensation coverage. See CAL. PENAL CODE. §§2700. 2766. 2791 (West 1970). This exclusion applies only to state prisoners. Jail inmates working under circumstances similar to those present in California Highway Comm’n, supra, have been held to be entitled to workmen's compensation. See note 94 infra.


100 10 CRIM. L. REP. 2364 (1972); N.Y. Times, Feb. 8, 1972, at 1, col. 2.

where. The movement at Green Haven stalled when the State of New York ruled that prisoners could not form unions because they are not "state employees." Some suggest that unions would have positive rehabilitative effects and would reduce tension and administrative problems. Pending federal legislation would guarantee prisoners' right to unionize.

The courts have not squarely dealt with the right to form unions, but they have accorded some protection for organizational activities. The Second Circuit ruled that prison officials had to deliver letters concerning the organization campaign at Green Haven, and a federal district court in Rhode Island enjoined prison officials from interfering with organizational activities of the National Prisoners Union. It has been suggested that at least a limited right to organize exists; the protection afforded first amendment rights, coupled with the Coffin rationale, indicates that the courts might well recognize this right.

The prison labor system has been challenged occasionally on constitutional grounds, but these suits have been unsuccessful. One constitutional argument is that forced labor without compensation constitutes cruel and unusual punishment prohibited by the eighth amendment. Courts have rejected this contention.

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103 N.Y. Times, Dec. 20, 1972, at 28, col. 5.  
106 Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972).  
108 Comment, supra note 104, at 964.  
110 See notes 15-16 and accompanying text supra.  
111 A full discussion of the right of inmates to form unions is, of course, beyond the scope of this article. Regarding the right of convicts in work-release programs to join unions where they work, compare National Welders Supply Co., 145 NLRB 948, 1964 CCH NLRB ¶ 12,845, 55 LRRM 1072 (1964) (convict held to have insufficient continuity of interest with other employees) with Winsett-Simmonds Engineers, Inc., 164 NLRB 611, 1967 CCH NLRB ¶ 21,349.65 LRRM 1164 (1967) (convict allowed to join union).  
112 See Goldfarb & Singer, supra note 2, at 208.  
To put it another way, while confinement, even at hard labor and without compensation, is not considered to be necessarily a cruel and unusual punishment it may be so in certain circumstances and by reason of the conditions of the confinement.  
309 F. Supp. at 373.
It has been held, however, that forcing convicts to perform labor beyond their strength, dangerous to life or health, or unduly painful violates the eighth amendment.\footnote{Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965). See also Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950). rev’d on other grounds sub nom. Ross v. Middlebrooks, 188 F.2d 308 (9th Cir. 1951). cert. denied, 342 U.S. 862 (1951).}


These results are compelled by the amendment’s specific exemption of convict labor:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.\footnote{U.S. CONST. amend. XII. § 1 (emphasis added). Under this language “There can be no doubt that the State has authority to impose involuntary servitude as a punishment for a crime.” United States v. Reynolds, 235 U.S. 133, 149 (1914), but the conclusion of one court that the exception clause manifested a specific congressional intent to leave the prison labor system alone is not warranted by the legislative history. Holt v. Sarver, 309 F. Supp. 362, 372 (E.D. Ark. 1970), aff’d, 442 F.2d 304 (8th Cir. 1971). In fact, it is likely that Congress did not really consider the amendment’s effect on prison labor; the concern in 1864 was the slavery question. See CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866) (remarks of Senator Cowan). The language of the amendment, including the exception clause, comes from Jefferson’s draft of the Ordinance of 1784, which later served as the basis for the Northwest Ordinance of 1789. The 1784 draft was presented to Congress on March 1, 1784, by a committee headed by Jefferson. It included the following language: 5. That after the year 1800 of the Christian aera, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty, Merriam, The Legislative History of the Ordinance of 1787, 5 PROCEEDINGS OF THE AM. ANTIQUARIAN SOC’Y n.s. 303, 309 (1889). This clause was deleted by Congress on April 19, 1784. After other amendments the Ordinance was adopted, but it was never put into effect. In 1787, the Ordinance was altered and Jefferson’s slavery clause was resurrected by Nathan Dane. On July 13, 1787, the Northwest Ordinance was passed by Congress and it was enacted as part of Statute I. Ch. VIII. on August 7, 1789. Article VI provided that: There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: Provided always, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid. 1 Stat. 51 n.a. at 53 (1789). This language was later used as the basis for the thirteenth amendment. Thus, the convict labor exception in the thirteenth amendment is a direct descendant of Jefferson’s language. It was only natural that the anti-slavery amendment would borrow
The thirteenth amendment has been a useful basis for some claims, but the convict labor exception is fatal to constitutional wage claims and severely cripples any suit for inmate wages.

B. Wage Claims Under the Federal Minimum Wage Law

The Fair Labor Standards Act requires every "employer" to pay the statutory minimum wage to each "employee" who, in any work week, is engaged in (1) commerce or (2) the production of goods for commerce, or (3) is employed in an "enterprise" which is engaged in commerce or the production of goods for commerce. The Act defines an "employer" as "any person acting directly or in the interest of an employer in relation to an employee," but excludes federal, state, and local governments, for the most part, and labor organizations. "Employee" means "any individual employed by an employer," with exceptions such as agricultural workers and family members. "Employ" simply means "to suffer or permit to work."

language from the Ordinance; it is unfortunate that more consideration was not given to the implications for prison labor. Senator Sumner called the exception "surplusage" and urged that it be deleted, but Congress was not concerned with the effects of that language. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864).


117 The amendment has been used to strike down peonage laws, which made it a crime to induce advances of money by promising to perform services with intent to defraud, i.e., with no intent to perform the services. Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); United States v. Reynolds, 235 U.S. 133 (1914). See Brodie, The Federally-Secured Right to Be Free from Bondage, 40 GEO. L.J. 367 (1952); Howe, The Peonage Cases, 4 COLUM. L. REV. 279 (1904). It has also been held that persons committed to mental institutions cannot be forced to work unless their tasks are reasonably related to a therapeutic program or are of a normal housekeeping nature. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Stone v. City of Paducah, 120 Ky. 322, 86 S.W. 531 (Ky. App. 1905). Cf. Ex parte Lloyd, 13 F. Supp. 1005 (E.D.Ky. 1936) (held that holding an inmate on a federal narcotic farm after the expiration of the period within which the Surgeon General has estimated a cure would take place would violate the fifth and thirteenth amendments).

118 At least one organization, the National Prisoners Coalition, advocates repeal of the convict labor exception. The Freeworld Times, June, 1972, at 9, col. 3.


The courts recognize that indiscriminate application of the definitions of the Act would result in coverage of "all employed humanity"; they look at the circumstances in each case to determine if, in economic reality, an employer-employee relationship exists. The economic reality test was first applied under the National Labor Relations Act and was later applied in Fair Labor Standards Act cases. The common law tests of agency, with their emphasis of control, are not conclusive under the Act. Most of the cases dealing with the economic reality test discuss whether a person is an employee (hence covered by the Act) or an independent contractor (not covered by the Act), and the criteria developed in those cases are not particularly helpful in the prison labor situation. There are no simple and uniform tests which can be used in determining the scope of the Act. It is clear that the definitions in the Act must be considered in light of the purpose of the legislation and that the total factual situation, rather than isolated factors or technical concepts, governs. When these vague criteria have been applied in the context of convict labor, courts have found that, in economic reality, no employment relationship exists.

124 Walling v. Sanders, 136 F.2d 78, 81 (6th Cir. 1943).
128 See Restatement (Second) of Agency § 220 (1958):

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performances of the servant is subject to the other's control or right to control.

129 Walling v. Wabash Radio Corp., 65 F. Supp. 969 (W.D. Mich. 1946), aff'd, 162 F.2d 391 (6th Cir. 1947). This means that the cases in which prisoners have been held not to be "employees" under workmen's compensation laws are not determinative of prisoners' status under the Fair Labor Standards Act. See notes 91-94 supra.
133 Presently the Fair Labor Standards Act is relevant to the inmate worker only if he does not work in the prison, i.e., he must have a job in an "outside" industry which has located facilities within the prison walls or be involved in some sort of work-release program. However, the Fair Labor Standards Amendments of 1973, which were passed by Congress in August and vetoed by President Nixon on September 6, 1973, would have expanded the coverage of the Act to include federal, state, and local governments. See H.R. 7935, 93d Cong., 1st Sess. (1973). The basic change in this area would have amended the definition of "employer" at 29 U.S.C. § 203(d) (1970), to include the "United States or any State or political subdivision of a State." H.R. 7935. 93d Cong. 1st Sess., tit. II, § 201 (1973). See H.R. Rep. No. 93-232, 93d Cong., 1st Sess. (1973); 31
Inmates have attempted to secure minimum wage protection under the Fair Labor Standards Act in three cases, all of which have been decided on motions prior to trial. In the first of these, *Huntley v. Gunn Furniture Co.*, plaintiff-inmates worked in the prison stamping plant at Jackson, Michigan, producing shell casings for the defendant. The defendant company furnished the necessary materials and paid Michigan Prison Industries a fixed sum per day for each inmate’s work. The critical issue was whether the inmates were “employees” of the manufacturer.

The court held that inmate labor belonged to the State of Michigan and that only the state could employ it. This holding, combined with the finding that the plaintiffs were under the sole control and direction of prison officials, was determinative. The “economic reality” test was not well-developed in 1948 when *Huntley* was decided, but the court realized that the common law tests of employment relationships were not determinative. The judge pointed out that control is still a factor and noted that one does not become an employer merely because he receives benefit from the services of an individual. The court’s holding that the inmates were employees of Michigan Prison Industries rather than the defendant companies meant that the Fair Labor Standards Act did not apply.

The decision in *Huntley* was heavily relied upon in *Sims v. Parke Davis Co.*, which also involved inmates in the state prison at Jackson, Michigan. Plaintiff inmates worked in chemical research clinics built within the prison by defendants, Parke...
Davis and Upjohn, and used for testing drugs on other inmates. They claimed the difference between the wages they were paid ($0.35 to $1.25 per day) and the federal minimum wage. As in *Huntley*, the central issue was whether the inmates were employees of the defendant drug companies. The economic reality test was applied and no employment relation was found.

The parties and the court agreed that the defendants' power to hire, fire, and control the inmates was critical. After reviewing the facts, the judge concluded that although the defendants supervised the day-to-day activity of the inmates, prison officials determined who would work and when, and had overall control of the inmates. The court also found that the inmates were actually paid by the Department of Corrections at rates it had established.

Predictably, the court found *Huntley* largely determinative of the federal minimum wage claim. It concluded that the economic reality was that the plaintiffs were convicted criminals assigned to work for the drug companies, which had forgone an employer's normal rights of control in order to use inmate workers. In such circumstances the court found no employment relation. Perhaps more important was the conclusion that Congress had not intended the Fair Labor Standards Act to cover prisoners. This conclusion is probably correct, and, when combined with the exception clause of the thirteenth amendment, will probably prove fatal to inmate claims, even in cases where an employment relation exists in economic reality.

The only other case dealing with a federal minimum wage claim was also decided on motions for summary judgment. The plaintiff in *Hudgins v. Hart* helped the defendants extract blood plasma from other prisoners and alleged that he was their "employee." The court found that all contractual arrangements were between the defendants and the prison officials, and that there was no employer-employee relation. The chief judge noted that the

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140 334 F. Supp. at 783.
141 334 F. Supp. at 786. Since the case was disposed of on motions for summary judgment, the court examined affidavits, which were filed with the motions, for the facts. The court found that there was no conflict between the affidavits submitted by the parties and thus no need for a trial. Id. at 784.
142 334 F. Supp. at 786.
143 334 F. Supp. at 787.
144 Id.
145 See S. REP. No. 884, 75th Cong., 1st Sess. 3-4 (1937); H.R. REP. No. 1452, 75th Cong., 1st Sess. 9 (1937); 81 CONG. REC. 7652, 7672, 7885 (1937); 82 CONG. REC. 1386, 1395, 1491, 1505, 1507 (1937); 83 CONG. REC. 7283, 7298, 9260, 9265 (1938).
147 323 F. Supp. at 899.
labor of the plaintiff belonged to the penitentiary, and that it was merely assigned to the defendants.\textsuperscript{148} \textit{Huntley} was treated as dispositive; the defendants' motions for summary judgment were granted.\textsuperscript{149}

The decisions in \textit{Huntley}, \textit{Sims}, and \textit{Hudgins} clearly indicate that inmates are not likely to be successful in pressing wage claims under the Fair Labor Standards Act. The \textit{Sims} court left room for finding coverage of prisoners under certain circumstances,\textsuperscript{150} but not many inmates will be able to establish an employer-employee relation under the economic reality test. In the absence of new legislation, only an inmate involved in a work-release program has a reasonable chance for success. This conclusion is compelled not only by the economic reality test and congressional intent underlying the Fair Labor Standards Act, but by the thirteenth amendment as well.

\textbf{C. Claims Under State Minimum Wage Legislation}

The plaintiffs in \textit{Sims v. Parke Davis Co.}\textsuperscript{151} also set forth a claim under the Michigan Minimum Wage Law of 1964.\textsuperscript{152} The Michigan Act exempts employers subject to the Federal Fair Labor Standards Act unless the application of the Federal Act would result in a lower wage than that set by the Michigan law.\textsuperscript{153} The court accepted plaintiffs' argument that this exemption did not preclude application of the Michigan Act to the defendant drug companies, even though they were jurisdictionally subject to the Federal Act, since they were excused from paying the federal minimum wage.\textsuperscript{154}

The Michigan Act defines "employ," "employer," and "employee" in almost the same terms as the Federal Act,\textsuperscript{155} and although these definitions had never been construed by a Michigan court, the federal court in \textit{Sims} concluded that the economic reality test was applicable under the state law since that test was

\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} 334 F. Supp. at 788.
\textsuperscript{153} \textsc{Mich. Comp. Laws Ann.} § 408.394 (Supp. 1973).
\textsuperscript{154} 334 F. Supp. at 788.
\textsuperscript{155} The Michigan definitions are found in \textsc{Mich. Comp. Laws Ann.} § 408.382 (1967). Cf. notes 119-23 supra, the definitions under the Federal Act.
used in Michigan in connection with other remedial legislation. Therefore, the decision that the inmates were not "employees" under the Fair Labor Standards Act also determined their state law claim, and the motion for summary judgment was granted. The same result is likely in other states. Most state minimum wage legislation defines "employ," "employer," and "employee" in language similar to or the same as that of the Federal Act, and the same considerations will probably be taken into account when looking for an employment relation. Many state acts specifically exclude the state from coverage as an employer; even where the state is included, as it is under the Michigan Act, inmates working in the prison will not be covered since they are not "employees." Thus, state minimum wage laws will not provide a remedy for most inmates, whether they work for the prison system or for private industry located within prison walls.

Inmates working on state highways or public buildings might raise wage claims under state laws that provide that not less than the prevailing wage shall be paid to laborers working on public works projects. The plaintiff in the only case involving such a claim was permitted, at his own request, to do carpentry work on public buildings for $2.00 a day while he was confined in the county jail. After his release, he claimed the difference between what he was paid and the prevailing wage rate in the area for similar work ($2.00 per hour) under the Kansas public works law. The court noted that the plaintiff could have been forced to

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160 MICH. COMP. LAWS ANN. § 408.382(c) (1967).

161 At least two states expressly provide that inmates are not "employees." See ARIZ. REV. STAT. ANN. §31–254 (Supp. 1970); CAL. PENAL CODE §§2700. 2766. 2791 (West 1970).


164 KAN. STAT. ANN. §§44-201 (1964).
to work without any pay at all and simply held that the wage law was not applicable in such a case.\textsuperscript{165} It is likely that claims by inmates who work on public works projects in other states will receive the same summary treatment.

\textit{D. Claims Under a Quantum Meruit or Assumpsit Theory}

The third count of the complaint in \textit{Sims v. Parke Davis Co.}\textsuperscript{166} made an ingenious claim for damages based, in part, on the alleged illegality of the contract between the state and the defendant drug companies. Plaintiff inmates asserted that the arrangement with the drug companies\textsuperscript{167} violated Section 6 of the Michigan Correctional Industries Act\textsuperscript{168} which provides in part:

\begin{quote}
The labor of inmates shall not be sold, hired, leased, loaned, contracted for or otherwise used for private or corporate profit or for any purpose other than the construction, maintenance or operation of public works, ways or property as directed by the governor.\textsuperscript{169}
\end{quote}

For purposes of the civil suit, it was assumed that the agreement violated the law and the question was whether such a violation provided a foundation for a damage claim. A similar allegation was made in \textit{Huntley,}\textsuperscript{170} but the court found it unnecessary to discuss the validity of the contract.\textsuperscript{171}

The inmates acknowledged that the state had the right to use their labor, but they maintained that their labor belonged to them except to the extent that it was legally taken away by the state.\textsuperscript{172} From this premise they argued that, since the use of their labor by the drug companies violated Michigan law, the labor used by the companies belonged to the inmates, and that, therefore, the law should imply a promise to pay a reasonable wage for work performed at another’s request or with his knowledge.\textsuperscript{173} The court rejected this argument and followed \textit{Huntley}\textsuperscript{174} and other prece-

\textsuperscript{165} 178 Kan. at 524–25, 289 P.2d at 784.
\textsuperscript{167} See notes 138–39 supra.
\textsuperscript{168} MICH. COMP. LAWS ANN. § 800.321–.335 (Supp. 1973).
\textsuperscript{169} MICH. COMP. LAWS ANN. § 800.326 (Supp. 1973). Many states have similar statutes which prohibit the contracting out of prison labor. See notes 230–32 and accompanying text infra.
\textsuperscript{171} Id. at 116.
\textsuperscript{172} Brief for Plaintiff-Appellants at 31, Sims v. Parke Davis & Co., 453 F.2d 1259 (6th Cir. 1971) [hereinafter cited as Brief for Plaintiffs].
\textsuperscript{173} Brief for Plaintiffs, supra note 172, at 32.
which indicate that the labor of inmates belongs to the state, no matter how it is used. The court held that there could be no quantum meruit recovery since the inmates had not been deprived of any labor which belonged to them.\textsuperscript{176}

A second aspect of this argument was based on a few cases which hold that, if an inmate is illegally compelled to work for an individual, he has suffered a tort, which he may waive and follow with a suit in assumpsit. The theory is that the defendant has been unjustly enriched through his tortious act and that the plaintiff may sue to recover the benefits received by the wrongdoer.\textsuperscript{177} Most of the cases employing this theory involve situations where the contract for the convict's labor was illegal because the contract was made without authority,\textsuperscript{178} the inmate was sentenced by a court without jurisdiction,\textsuperscript{179} or the convict was required to work after his sentence had expired.\textsuperscript{180} Each of these cases involved a situation in which compelling any labor at all was illegal. Even in these circumstances, the cases are not in complete accord as to whether a claim can be maintained.\textsuperscript{181}

In \textit{Sims} the inmates were legally incarcerated and could be compelled to work. Consequently, they had to rely on the Correctional Industries Act to provide a basis for their claim. Their argument was that tort liability may be inferred from a violation of the criminal statute.\textsuperscript{182} The court rejected this argument because the inmates were not within the class of persons meant to be protected by the statute, and therefore a civil remedy could not be implied in their favor.\textsuperscript{183} This holding was probably correct since

\textsuperscript{175} See notes 77-87 and accompanying text supra.
\textsuperscript{176} 334 F. Supp. at 791.
\textsuperscript{177} This theory is closely related to the \textit{quantum meruit} aspect of this claim. Under the \textit{quantum meruit} theory the inmates asked for the reasonable value of their work. In "waiving" the tort and suing in assumpsit the plaintiffs sought to recover the amount by which the drug companies had been unjustly enriched through their tortious conduct. This latter remedy is an alternative to traditional tort damages where the tort has resulted in unjust enrichment. For a general discussion of this theory, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 94 (4th ed. 1971).
\textsuperscript{178} Greer v. Critz, 53 Ark. 247, 13 S.W. 764 (1890).
\textsuperscript{179} Patterson & Another v. Prior, 18 Ind. 440 (1862); Patterson v. Crawford, 12 Ind. 241 (1859).
\textsuperscript{182} See generally W. PROSSER, supra note 177, at §36. There is dictum in one case which supports the theory that an illegal contract will support an assumpsit action in favor of an inmate. See Anderson v. Salant, 38 R.I. 463, 96 A. 425 (1916). But see Sloss Iron & Steel Co. v. Harvey, 116 Ala. 656, 22 So. 994 (1897), where the defendants violated a statute by forcing plaintiff convicts to work on Sundays. The court held that the defendant's action was tortious, but denied a \textit{quantum meruit} remedy on the ground that the plaintiffs were properly held in custody and that, therefore, no promise to pay them could be implied.
\textsuperscript{183} 334 F. Supp. at 791.
the Michigan Act was not intended to protect inmates, and generally accepted tort rules indicate that, where plaintiffs are not within the class of persons intended to be protected by the statute, they do not have any statutorily protected interest and they may not recover in an implied civil action.

The quantum meruit and assumpsit arguments are both novel and interesting, but they are technical and based on cases which are old and contradictory. These theories might be used in a wage action by a plaintiff who was illegally incarcerated or by one who was convicted and had won reversal on appeal. Given the problems inherent in any implied remedy and the courts' general view of the legal status of prisoners, the quantum meruit and assumpsit theories will be of little use in a wage action by an inmate who has been duly convicted and sentenced.

E. The Constitutional Claim

The plaintiffs in Sims also argued that their thirteenth and fourteenth amendment rights were violated by treatment allegedly at variance with the Michigan Correctional Industries Act and the state and federal minimum wage laws. This claim was based on the premise that the plaintiffs retained the right to dispose of their labor except to the extent that the state has lawfully taken it away from them. The Sims court rejected this position under the quantum meruit argument and also refused to accept it as a basis for a constitutional claim. Following Draper v. Rhay, Sigler v. Lowrie, and the exception clause of the thirteenth amendment, the court held that the inmates had no right not to work and that there had been no violation of thirteenth amendment rights, implying that the plaintiffs had no rights to their own labor.

A full-blown constitutional attack against the prison wage system is probably impossible. The Supreme Court has pointed out that "the Constitution does not provide judicial remedies for

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184 The purpose and intent of the act is set out in Mich. Comp. Laws Ann. § 800.331 (Supp. 1970) which declares that one of the purposes is "[to eliminate all competitive relationships between inmate labor or correctional industries products and free labor or private industry."

185 See Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201-02 (1967); W. Prosser, supra note 177, at § 36; Restatement (Second) of Torts §§ 286, 288 (1965).

186 See notes 77-117 and accompanying text supra.

187 Brief for Plaintiffs, supra note 172, at 46.

188 Brief for Plaintiffs, supra note 172, at 48.


191 334 F. Supp. at 792-93.
every social and economic ill."\textsuperscript{192} There is no constitutional right to the minimum wage for anyone. The only ground for constitutional attack is that exclusion of prisoners from coverage of state and federal minimum wage laws is a denial of equal protection.\textsuperscript{193}

Exclusion from state law coverage could be attacked on equal protection grounds, but under the current analysis the courts examine legislation that discriminates among classes of persons and generally require only that there be a rational relationship between the purpose of the legislation and the classifications it draws. Legislation is presumed to be valid in these cases and the plaintiff must demonstrate that no set of facts can justify the statutory scheme or that the statutory objectives are beyond the state's power. The fact that a law affects various groups differently does not mean that it violates the fourteenth amendment.\textsuperscript{194}

Where a constitutional right is at stake, a "fundamental" interest is involved, or a "suspect" classification is used, however, the state bears the burden of showing that the classifications used are necessary to advance a compelling state interest and that the same purpose cannot be accomplished by less drastic means.\textsuperscript{195} The \textit{Coffin} rationale\textsuperscript{196} and the recent expansion of inmate rights indicate that there is no reason to alter these tests when examining the constitutional claims of prisoners.\textsuperscript{197} This discussion

\textsuperscript{192} Lindsey \textit{v.} Normet, 405 U.S. 56, 74 (1972).

\textsuperscript{193} It might be argued that the exception clause of the thirteenth amendment means only that a prisoner loses the right to choose whether to work or not. The condition of involuntary servitude, or the loss of the right not to work, does not necessarily mean that a prisoner is not entitled to compensation for forced labor. There does not seem to be any support in the cases for drawing a distinction between the right to choose not to work and the right to be paid for labor, and even if such a distinction could be drawn, it might be difficult to establish a right to compensation.


\textsuperscript{196} See notes 15-17 and accompanying text supra.

assumes that the traditional tests apply, although there is some reason to suspect that they might not be applied in the prison context by all courts.198

The Supreme Court has made it clear that in the areas of social welfare and economics, the constitutionality of legislation will be measured by the less stringent rational relationship standard.199 A claim for minimum wage protection would clearly fall into this category. The Court has indicated that a statute does not violate the equal protection clause because it might have gone further or done more.200 "The legislature may select one phase of one field and apply a remedy there, neglecting the others."201 This is what the states have done in minimum wage legislation, and it seems unlikely that the omission of prisoners from coverage amounts to a denial of equal protection of the laws.

Although the equal protection clause does not apply to the federal government,202 the analysis employed by the Court in testing federal statutes under the due process clause of the fifth amendment is very similar to that used in equal protection cases.203 This similarity and the application of traditional substantive due process standards204 probably mean that inmates cannot successfully attack exclusion from coverage under the Fair Labor Standards Act as a violation of the fifth amendment.205


F. Right to Rehabilitation and the Minimum Wage

A final basis for arguing that inmates are entitled to the minimum wage could be found by tying minimum wages to a right to rehabilitation. There is general agreement that the primary purpose of prison is rehabilitation, but it is conceded that any rehabilitation of prisoners today occurs in spite of the prisons. No court has held that there is a right to rehabilitation, but a growing number of commentators have suggested that such a right may exist. The arguments for the right to rehabilitation are usually based on statutory language indicating that the purpose of the prison system is rehabilitation or on analogies to such judicially recognized rights as a prisoner's right to medical treatment, juveniles' right to rehabilitation, and mental patients' right to treatment. Courts have thus far rejected inmate claims

206 See Landman v. Royster, 333 F. Supp. 621, 643-45 (E.D. Va. 1971); In re Harrell, 2 Cal. 3d 675, 693, 470 P.2d 640 (1970), cert. denied, 401 U.S. 914 (1971); ACA MANUAL, supra note 18, at 10; Principle VII of the Declaration of Principles of the American Correctional Association (1970), reprinted in ABA COMPENDIUM, supra note 1, at X-76; HOUSE REPORT, supra note 1, at 56-57; R. CLARK, supra note 34, at 200; CHALLENGE OF CRIME, supra note 1, at 12; TASK FORCE REPORT, supra note 1, at 16; Hamilton, Criminal Rehabilitation Should Be Our Top Priority, 7 CRIM. L. BULL. 225 (1971); Leopold, supra note 20, at 34; Singer, supra note 1, at 387; MODEL PENAL CODE § 1.02(2) (b) (1962); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD ACT FOR STATE CORRECTIONAL SERVICES § 14 (1966). See also ON THE PENITENTIARY SYSTEM, supra note 1, at 77.


207 ATTICA REPORT, supra note 1, at 4; Leopold, supra note 320, at 42.


209 Comment, supra note 208, at 236-37. See Comment, A Statutory Right to Treatment for Prisoners: Society's Right of Self-Defense, 50 NEB. L. REV. 543 (1971) (discusses various state statutes which might give rise to a right to rehabilitation).


to a right to rehabilitation based on the eighth amendment\textsuperscript{213} and on statutory grounds,\textsuperscript{214} but one court has indicated that the absence of a program of rehabilitation is one factor in evaluating the constitutionality of a prison system.\textsuperscript{215}

If courts are persuaded that there is a right to rehabilitation, either statutory or constitutional, inmates might argue that, given the acknowledged benefits of the minimum wage for prisoners and the harmful effects of the present system, the minimum wage must be a part of any adequate rehabilitation program. Whether future courts would accept this argument and hold that there is a derivative right to minimum wages is unclear; it is certainly not a viable basis for an inmate minimum wage claim today.

### III. Suggestions for Legislative Reform

#### A. Providing the Minimum Wage for Inmates

The foregoing discussion indicates that there is presently no judicially cognizable right of prisoners to receive the minimum wage. If, as a policy matter, the minimum wage proposal is to be implemented, it must be done by new legislation. Two bills currently before Congress would accomplish this purpose. The Omnibus Penal Reform Act of 1972,\textsuperscript{216} introduced by Representative Dellums,\textsuperscript{217} contains a comprehensive penal reform package. Title II of the bill would amend Title 18 of the United States Code by providing that not less than the minimum wage under the Fair Labor Standards Act shall be paid to federal prisoners.

A more sweeping attack on the problem is made by a bill introduced by Representative Roybal.\textsuperscript{218} This legislation provides that all persons confined in penal or mental institutions in the United States, the District of Columbia, the states, and political subdivisions of the states, shall be paid not less than the minimum wage under the Fair Labor Standards Act shall be paid to federal prisoners.

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\textsuperscript{213} Smith v. Schneckloth, 414 F.2d 680, 682 (9th Cir. 1969).
\textsuperscript{216} H.R. 2583, 93d Cong., 1st Sess. (1973).
\textsuperscript{217} See 118 CONG. REC. H8128 (daily ed. Sept. 6, 1972) (remarks of Representative Dellums).
\textsuperscript{218} H.R. 6745, 93d Cong., 1st Sess. (1973).
were based on the commerce clause. The breadth of the commerce clause has been demonstrated time and again. The federal government may regulate the states when they engage in economic activities, and the interstate character of prison-made goods was demonstrated when the Court held that Congress could exclude them from interstate commerce. The Roybal proposal merits serious consideration by Congress, and the policy considerations behind the minimum wage for prisoners justify its enactment. If the bill is not passed by Congress, the states should consider enacting similar legislation of their own.

B. Removal of Restrictive Legislation

The feasibility of the minimum wage proposal depends on a number of other legislative reforms. At the present time both federal and state laws restrict the market for and the sale of prison-made goods and the use of convict labor. Federal legislation divests inmate-made goods of their interstate character; prohibits the transportation of inmate-made goods in interstate commerce and requires labeling such goods as convict-made; prohibits the purchase of inmate-made goods by the postal service; prohibits the use of convict labor on airport development projects and federal-aid highways, and by contractors dealing with the federal government; prohibits the contracting-out of convict labor; provides that the Federal Prison Industries shall not compete with private enterprise; and provides that federal prisoners in state institutions shall be employed only in the manufacture of state-use goods or on public works projects.

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222 See part I supra.
223 Representative Roybal also introduced H.R. 6747, 93d Cong., 1st Sess. (1973), which would authorize social security coverage for prisoners and make it possible for inmates to receive credit for social security as if they were receiving the federal minimum wage.
Typical state legislation prevents the sale of prison-made goods in the open market\textsuperscript{233} and prohibits contracting-out of prison labor.\textsuperscript{234} Some states have added their own labeling requirements.\textsuperscript{235}

These statutory restrictions have had substantial adverse effects on prison labor.\textsuperscript{236} Many prisoners are idle and those fortunate enough to have work are often saddled with meaningless tasks.\textsuperscript{237} There is general agreement that the present prison labor system, forced by law into the state-use model, is a failure.\textsuperscript{238} Prison labor should be integrated into the national economy, rather than isolated in the state-use market,\textsuperscript{239} and if prison industries are to be effective rehabilitative tools and viable economic entities, they must be modernized and expanded.\textsuperscript{240} Statutory restrictions on prison labor and markets for prison-made goods prevent this kind of meaningful reform and should be repealed.\textsuperscript{241}

Repeal of the Hawes-Cooper Act,\textsuperscript{242} which divests prison-made

\textsuperscript{233}See, e.g., CAL. PENAL CODE §§ 2709, 2880 (West 1970); ILL. REV. STAT. ch. 38, § 1003-12-7 (Supp. 1972); MICH. COMP. LAWS ANN. § 800.326 (Supp. 1973); N.Y. CORREC. LAW § 170 (McKinney 1968) and N.Y. GEN. BUS. LAW § 69 (McKinney 1968); OHIO REV. CODE ANN. §§ 5147.01-.02 (Page Supp. 1970); CORREC. LAW § 170 (McKinney 1968) and OHIO REV. CODE ANN. §§ 5147.01-.02 (Page Supp. 1970).

\textsuperscript{234}See, e.g., ILL. REV. STAT. ch. 38, § 1003-12-2 (Supp. 1972); MASS. ANN. LAWS ch. 127, § 51 (1972); MICH. COMP. LAWS ANN. §§ 800.326, 800.331(c) (Supp. 1973); N.Y. CORREC. LAW § 170 (McKinney 1968); OHIO REV. CODE ANN. §§ 5147.01-.02 (Page 1970).\textsuperscript{235} See Model Penal Code §§ 303.7(4)-(5), 304.8(4)-(5) (1962); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD ACT FOR STATE CORRECTIONAL SERVICES § 15 (1966).

\textsuperscript{236}See, e.g., CAL. PENAL CODE §§ 2870. 2881-83. 2885. 2895. 2896 (West 1970); PA. STAT. ANN. tit. 61, § 251 (1964); TEX. REV. CIV. STAT. ANN. art. 6166a (1970).


\textsuperscript{238}See notes 32–41 and accompanying text supra.

\textsuperscript{239}See notes 29–41 and accompanying text supra.

\textsuperscript{239}J. BASALO, supra note 53; Lopez-Rey, supra note 18; Report Prepared by the Secretariat. supra note 56; Report Prepared by the Secretariat. supra note 53.

\textsuperscript{240}See ACA MANUAL, supra note 18. at 387–400; HOUSE REPORT, supra note 1. at 28–30, 60; M. RICHMOND, supra note 18. at 50–51; N. Singer, supra note 41; J. STRATTON & J. WEST, supra note 236; Struvante, Goals of Correctional Industries in PROCEEDINGS OF THE NINETY-NINTH ANNUAL CONGRESS OF CORRECTIONS OF THE AMERICAN CORRECTIONAL ASSOCIATION 56 (1969); Taggart, MANPOWER PROGRAMS FOR CRIMINAL OFFENDERS, 95 MONTHLY LAB. REV. 17 (1972).

\textsuperscript{241}CHALLENGE OF CRIME, supra note 1. at 176; Goldart, supra note 18. at 29; Morris & Hawkins, supra note 75. at 14; J. STRATTON & J. WEST, supra note 236. at 26–27; Taggart, supra note 237. at 20. Cf. Lopez-Rey, supra note 18. at 20. But see Rodli, Revolution in Prison Industries, 6 CRIME AND DELINQUENCY 146, 151 (1960); Williams & Fish, REHABILITATION AND ECONOMIC SELF-INTEREST, 17 CRIME AND DELINQUENCY 406, 410 (1971). H.R. 5353. 93d Cong., 1st Sess. (1973) would make federal restrictive legislation inapplicable to prisoners on work-release.

goods of their interstate character, would be a step in this direc-
tion, since many state laws would constitute unconstitutional re-
strictions on commerce in its absence.243

It is not clear whether it is politically possible to enact legisla-
tion requiring payment of minimum wages to prisoners and re-
moving restrictions on convict labor and inmate-made goods. 
Some sources suggest that organized labor and business are now
willing to cooperate with prison reform,244 but these groups are
responsible for the legislative restrictions which exist today.245 As
a practical matter, convict labor is no longer a threat to labor or
business246 and the implementation of the minimum wage propo-
sal would eliminate labor's traditional complaint about competition
from cheap convict labor. The reforms suggested in this article
would not cost immense sums; they would provide immediate and
tangible benefits for prisoners and their families and would make
further reform possible. The legislation discussed here should be
given prompt attention by Congress, and existing laws which
restrict the use of prison labor should be repealed.

—James J. and Wendy S. Maiwurm

243Before passage of the Hawes-Cooper Act, many statutes restricting the sale of
prison-made goods were found unconstitutional. See, e.g., Hessick v. Moynihan, 83 Colo.
43, 262 P. 907 (1927); Opinion of Justices, 211 Mass. 605, 98 N.E. 334 (1912); People v.

244Chall enge of Crime, supra note 1, at 289; Peris, Labor's Position on the Employ-
ment of Offenders, 6 Crime and Delinquency 138 (1960); J. Stratton & J. West,
supra note 236, at 24. Cf. Oversight Hearings, supra note 39, at 3–20 (testimony of
James R. Hoffa).

245H. Hawes, Power of Congress to Protect State Laws 2 (1939); Lopez-Rey,
App. 3d 112, 92 Cal. Rptr. 27 (1971) (AFL-CIO sued for injunction to prevent use of
convict labor to harvest private crops.).

246Task Force Report, supra note 1, at 55; M. Richmond, supra note 18, at 50;
Lopez-Rey, supra note 18, at 19; J. Stratton & J. West, supra note 236, at 26.