

Prison Labor as a Lawful Form of Race Discrimination

Katherine E. Leung*

ABSTRACT

In this paper, I argue that exceptions to the Fair Labor Standards Act permitting the use of prison labor at sub-minimum wages are a form of legalized race discrimination. This discrimination is the result of: firmly entrenched structures of oppression that lead to the incarceration of people of color, particularly men of color, at markedly higher rates than white people; prison job training programs that exploit prisoners' labor for the benefit of corporations without noticeably improving prisoners' job prospects upon their release; and hiring trends outside of prison that clearly disfavor formerly incarcerated and non-white workers. Corporations that choose to use prison labor generally compartmentalize tasks performed by prison workers and those performed by civilian workers along the same lines used to classify "white" and "non-white" jobs prior to the enactment of Title VII. The tasks reserved for prisoners under this system are generally lower wage, lower skilled manufacturing jobs, while those reserved for civilian workers come with higher wages, more skilled tasks, and are more likely to be customer-facing. The result is that companies frequently choose to assign the least desirable, most menial tasks to prison workers, a group primarily made up of people of color, while these same companies hire predominantly white civilian workers to perform higher-skill jobs. This trend is actually magnified in jurisdictions that have "banned the box,"¹ where employers are hiring fewer Black and Latinx workers than they hired when permitted to ask about criminal records on application paperwork. This amplifies the discriminatory effects of this statutory loophole.² This counterintuitive outcome

* Katherine E. Leung is a field attorney with the National Labor Relations Board. The views expressed in this article are her views alone and are not those of the National Labor Relations Board or the United States Government. She holds an A.B. from Wellesley College and a J.D. from Harvard Law School. Thank you to Professor Benjamin Sachs for his support and guidance in this project, and to Monica Wilk for being a sounding board and source of encouragement.

¹ "Ban the Box" is a social justice campaign that gained momentum in the 2010s and pushes for state and local legislation prohibiting employers from asking prospective employees to check a box if they have ever been convicted of a crime. Proponents of the campaign argue that, while some jobs require a so-called "clean" criminal background check, many jobs that use this type of application screen do not. In a majority of cases, they argue, the "box" fails to filter for a bona fide job requirement and instead acts as a barrier to the reintegration of formerly incarcerated individuals into society. For more information on "ban the box" policies, see generally Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences Of "Ban The Box": Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden* (October 2017) (working paper), http://jenniferdoleac.com/wp-content/uploads/2015/03/Doleac_Hansen_BanTheBox.pdf [<https://perma.cc/3LYR-ZCKR>]; see also Michelle Natividad Rodriguez & Peter Leasure, *Do 'Ban-the-Box' Laws Help Expand Employers' Candidate Pools?* HR MAGAZINE (May 25, 2017), <https://www.shrm.org/hr-today/news/hr-magazine/0617/pages/do-ban-the-box-laws-help-expand-employers-candidate-pools.aspx> [<https://perma.cc/D48K-CE5K>].

² See Doleac & Hansen, *supra* note 1, at 5; see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008); WAKE UP DEAD MAN: HARD LABOR AND SOUTHERN BLUES (Bruce

suggests that, rather than providing additional opportunities for formerly incarcerated workers, employers are reacting to these laws by treating race as a proxy for criminal history.

INTRODUCTION

Prisoners in the United States have historically been required to perform manual labor as a component of their punishment.³ When Congress drafted the Thirteenth Amendment, banning the use of involuntary servitude and slave labor, it established a clear and specific exception for the continued use of forced labor as a punishment for a criminal offense.⁴ Early versions of this practice, including indentured servitude and the chain gang, à la *Cool Hand Luke*,⁵ ultimately evolved into the modern prison labor system, which uses prisoners to produce goods within the prison, particularly in the manufacturing and garment industries.⁶

While the modern prison labor system is often described as job training or skills building,⁷ the vast majority of prisoner-workers are employed in positions that have little growth potential and do not teach them marketable skills.⁸ The media have focused on stories about prisoners who develop marketable skills that allow them more opportunities for success upon their release.⁹ For those prisoner-workers who do gain marketable skills like carpentry, plumbing, or computer coding, work programs can significantly reduce recidivism and help individuals find stable employment after leaving prison.¹⁰ However, those jobs, which are generally available through pro-

Jackson ed., 1999); Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, (Univ. of Mich. Law & Econ. Research Paper No. 16-012, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795 [<https://perma.cc/Q9PC-JNBA>].

³ See generally 70 CONG. REC. 656 (1928–1929).

⁴ U.S. CONST. amend. XIII.

⁵ COOL HAND LUKE (Warner Bros. Pictures 1967) (depicting the use of chain gangs as a form of punishment for convicted criminals in the United States in the early- to mid-twentieth century).

⁶ See *Prison Labour is a Billion-Dollar Industry, With Uncertain Returns for Inmates*, ECONOMIST (Mar. 16, 2017), <http://www.economist.com/news/united-states/21718897-idaho-prisoners-roast-potatoes-kentucky-they-sell-cattle-prison-labour> [<http://perma.cc/32Q5-MHJ8>] [hereinafter *Prison Labour is a Billion-Dollar Industry*].

⁷ See *id.*; see also Emily Galvin, *Let Them Work: Prisoners Need Jobs While Still in Prison to Break America's Epidemic of Recidivism*, SLATE (Apr. 21, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/04/a_great_way_to_end_recidivism_give_prisoners_jobs.html [<https://perma.cc/8GV7-3DFQ>].

⁸ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

⁹ See *id.*

¹⁰ See Shawn Bushway, *Reentry and Prison Work Programs 5–7* (May 19–20, 2003) (N.Y. Univ. Law Sch., The Urban Inst. Reentry Roundtable, Discussion Paper), <https://www.urban.org/sites/default/files/publication/59406/410853-Reentry-and-Prison-Work-Programs.pdf> [<https://perma.cc/TL4V-R9UZ>].

grams like UNICOR,¹¹ are only available to a small number of work eligible inmates.¹²

In reality, prison job skills programs are not funded at a level that would permit substantial training for any significant number of inmates.¹³ As a result, many prisoners participating in these programs are employed in low-skill positions, such as piecing together clothing for Victoria's Secret, stamping license plates, or stitching the flags that fly outside of federal government buildings and United States' Embassies.¹⁴ Having received little to no training, many struggle to find work following their release from prison.¹⁵ In addition to a lack of practical skills, prisoners face the challenge of a U.S. labor market with low demand for this type of work. Many companies have automated these types of jobs,¹⁶ or sent them or into the underground labor market, where they can use sweatshop labor at a much lower cost.¹⁷ Former prisoners also face the additional challenge of many employers' hesitance to hire workers with criminal records of any kind.¹⁸ Consequently, while prison work programs allow prisoners to earn a small amount of income, even the highest performing inmate-workers will still face significant barriers to employment upon release, despite any training that they may or may not have received through their participation in these programs.

When these outcomes are considered in the context of the racial and ethnic makeup of prison populations, it raises concerns about whether or not these prison labor programs are further hampering employment options for inmates of color when they are eventually released from prison. When in-

¹¹ UNICOR, formerly known as the Federal Prison Industries Corporation, was established in 1934 and is wholly owned by the United States Government. UNICOR has long billed itself as the owner of fenced-in factories that provide prisoners with job training and the capacity to produce goods at an incredibly low cost. See UNICOR, FACTORIES WITH FENCES: 75 YEARS OF CHANGING LIVES 8, 32-33 (2009), https://www.unicor.gov/publications/corporate/CATMC1101_C.pdf [<https://perma.cc/GA93-NZ35>].

¹² UNICOR Program Details, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [<https://perma.cc/GM2G-HHMF>].

¹³ UNICOR, for example, only provides jobs and training for 8% of eligible inmates, and currently has a waiting list of more than 25,000 individuals. See *id.*

¹⁴ See, e.g., Caroline Winter, *What Do Prisoners Make for Victoria's Secret? From Starbucks to Microsoft: a sampling of what US inmates make, and for whom*, MOTHER JONES (June/July 2008), <https://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret/> [<https://perma.cc/6NNR-2DDG>].

¹⁵ See Bushway, *supra* note 10, at 5-6.

¹⁶ See Mark Mauro, *Manufacturing Jobs Aren't Coming Back*, MIT TECH. REV. (Nov. 18, 2016), <https://www.technologyreview.com/s/602869/manufacturing-jobs-arent-coming-back/> [<https://perma.cc/9HPQ-BE62>].

¹⁷ See Kristi Ellis & Khanh T.L. Tran, *Sweatshops Persist in U.S. Garment Industry*, WOMEN'S WEAR DAILY (Dec. 5, 2016), <http://wwd.com/business-news/government-trade/sweatshops-persist-in-u-s-garment-industry-10716742/> [<https://perma.cc/7B58-YUU8>].

¹⁸ See, e.g., Harry J. Holzer, Steven Raphael & Michael A. Stoll, *How Willing are Employers to Hire Ex-Offenders?*, 23 FOCUS 40, 41-42 (2004), available at <https://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf> [<https://perma.cc/N36W-83HN>]; *Between a Rock and a Lawsuit: A Legal Minefield for Employers*, ECONOMIST (June 22, 2013), <https://www.economist.com/news/united-states/21579832-legal-minefield-employers-between-rock-and-lawsuit> [<https://perma.cc/KBK5-KL68>].

mates acknowledge their participation or employment in one of these programs, which may be relevant work experience, they are also flagging their incarceration for employers, even if the employer is in a “Ban the Box” state and cannot directly ask about an applicant’s criminal background at the initial stages of the hiring process. Prisons in the United States are disproportionately filled with Black and Latinx people, as a direct result of the over-policing of communities of color.¹⁹ As compared with the population at large, prisons in the United States house 32.4% of young Black men who have not completed high school, as compared with 6.7% of young white men who did not complete high school, despite some sociological data suggesting that white Americans commit crimes at a rate equal to or higher than people of color.²⁰ If Black and Latinx people were incarcerated at the same rate as white people in the United States, U.S. prison populations would drop by approximately 40%.²¹

The dramatic incongruence of prison demographics compared to the United States population as a whole is produced and perpetuated by broken windows policing and the disproportionate enforcement of non-violent criminal statutes in communities of color.²² As a result of these policies, prisons in the United States are filled with young people of color, often serving unreasonably long sentences.²³ The prison industrial complex,²⁴ and private prisons in particular, capitalize on this captive population of potential laborers for their own profit. They do so by requiring prisoners to perform services within the prison,²⁵ or by contracting with private sector businesses for the use of prison labor, and by garnishing up to 80% of prisoners’ wages to

¹⁹ See generally Juan Carlos González & Eduardo L. Portillos, *The Undereducation and Overcriminalization of U.S. Latinas/os: A Post-Los Angeles Riots LatCrit Analysis*, 42 EDUC. STUD. 247 (2007).

²⁰ See Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1030 (2012).

²¹ *Criminal Justice Fact Sheet*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE (Jan. 14, 2017), <http://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/7UH5-MM4B>] [hereinafter *Criminal Justice Fact Sheet*].

²² A tremendous amount has been written on the subjects of broken windows policing and the disproportionate enforcement of drug laws in communities of color. An in-depth analysis of these subjects is beyond the scope of this paper. For a more detailed analysis on broken windows policing, see Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing And Misdemeanor Marijuana Arrests In New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL’Y 165 (2007); Richard Rosenfeld, *Crime Decline in Context*, 1 CONTEXTS 25 (2002). For a more detailed analysis on the disproportionate rate of incarceration of young people of color for drug related crimes, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2012); Haney-López, *supra* note 20, at 1028–29.

²³ See *Criminal Justice Fact Sheet*, *supra* note 21.

²⁴ See generally DONNA SELMAN & PAUL LEIGHTON, *PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE* 78 (2010).

²⁵ See, e.g., *Class Action Complaint for Unpaid Wages and Forces Labor at ¶1*, *Menocal v. The Geo Group*, 320 F.R.D. 258 (D. Colo. 2014) (No. 14-cv-02887), 2014 WL 5389925.

cover, among other things, the cost of their incarceration.²⁶ The wages for prisoners' work frequently only amount to one dollar per hour.²⁷

In this article, I will begin by tracing the history of race discrimination in the American workforce, describing the statutes that are designed to combat race discrimination in the private sector, notably Title VII of the Civil Rights Act of 1964. I will discuss how the use of prison labor functionally creates a second-class labor market, largely made up of people of color, which exists outside of Title VII's protection against disparate impact discrimination in the workplace. I will then explore how prisons specifically have been exempted from labor laws that otherwise govern employers' conduct, and how the absence of unions, or collective bargaining more generally, contributes to the exploitation of prisoner-workers by amplifying the imbalance in the labor-management power dynamic. Finally, I will examine the reality of job segregation under the modern prison labor system and parallel job segregation outside of U.S. prisons. An examination of the loopholes in each of these statutory schemes—and the resultant job segregation and sub-par terms and conditions of employment—will show that the use of prison labor on these terms has created de facto job segregation and contributes to the ongoing oppression of people of color in the United States.

I. A HISTORY OF RACE DISCRIMINATION AND TITLE VII

Race discrimination is far from new in the American workplace. Before Congress passed Title VII of the Civil Rights Act of 1964,²⁸ race discrimination in the workplace was not only lawful, but the cultural norm. Many employers established two segregated career tracks, reserving the most desirable jobs and careers for white employees, while restricting Black employees to lower-skill positions with lower compensation and significantly limited growth potential.²⁹

Some American corporations clung to this structure even after the Civil Rights Act of 1964 was signed into law.³⁰ Common examples of how employers attempted to retain these separate tracks included instituting pretextual education or training requirements, which functionally screened out all Black applicants, or assigning additional unwritten duties to Black employees, effectively preventing them from performing the more challenging or interesting parts of their jobs. This freed up the most desirable tasks for

²⁶ Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (Dec. 9, 2015), <https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration> [https://perma.cc/UDX2-TPVU].

²⁷ See *Criminal Justice Fact Sheet*, *supra* note 21.

²⁸ Title VII bars discrimination against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC §2000e-2(a)(1) (2016).

²⁹ See, *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971).

³⁰ See *id.*

white employees.³¹ Although both of these tactics were ultimately found to be barred by Title VII,³² they are simply among the most obvious of myriad attempts by employers to cling to pre-Title VII workplace segregation. These attempts were often rooted in stereotypes that white workers were more intelligent, hardworking, and trustworthy than Black employees,³³ biases that were apparent in the new requirements employees had to satisfy to qualify for traditionally white jobs.³⁴

Employers continue to establish and enforce workplace norms that are rooted in whiteness today, giving white employees an inherent advantage in the hiring process and professional advancement through “soft skills,” which are subjective in nature and might include the use of social mannerisms or language that derive predominantly from white culture.³⁵ This particular form of white privilege carries value and is one of many aspects of whiteness that has been conceptualized as a form of property by critical race theorists.³⁶ But other employment practices have become more ambiguous, rooted in case-by-case evaluations of employees, or tied to things employees can change if they choose to do so, like clothing, hairstyle, or the colloquialisms that an employee uses in day-to-day conversation.³⁷ Such policies, for example a ban on dreadlocks or “unruly” hairstyles,³⁸ implicitly discriminate against people of color, placing a positive value on whiteness and a

³¹ See *id.* at 427–28; *Slack v. Havens*, 522 F.2d 1091, 1092–93 (9th Cir. 1975).

³² See *id.*

³³ This stereotype can be traced back to the pre-Civil War United States, during which time white slave owners frequently complained about slaves’ laziness and lack of productivity while lauding the potential of young white men, despite the constant backbreaking labor required of slaves. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 63, 81–85 (1956).

³⁴ For example, the requirement in *Griggs* that employees in traditionally white jobs have high school degrees, see 401 U.S. at 427, or similar requirements that employees pass tests on subject matter unrelated to their employment. These requirements place disproportionate emphasis on the perceived intelligence of the employees rather than upon their skills, in a context in which white candidates have far greater educational opportunities and resources, thereby reinforcing those stereotypes and artificially inflating the number of white candidates placed in those positions. For a more thorough analysis of racial bias and educational outcomes, see generally DAWN GILL, BARBARA MAYOR & MAUD BLAIR, *RACISM AND EDUCATION: STRUCTURES AND STRATEGIES* (1992).

³⁵ Soft skills can generally be defined as personal attributes that allow one to communicate effectively and harmoniously with others. See generally Marcel M. Robles, *Executive Perceptions of the Top 10 Soft Skills Needed in Today’s Workplace*, 75 *BUS. & PROF. COMM. Q.* 453 (2012). Those skills often include knowledge of and comfort with the social norms common to white middle- to upper-class culture in the United States. For a detailed analysis of employers’ perceptions of the soft skills of employees of color, with an emphasis on Black men, see generally Philip Moss & Chris Tilly, “Soft” Skills and Race: An Investigation of Black Men’s Employment Problems, 23 *WORK & OCCUPATIONS* 252 (1996).

³⁶ For a more detailed analysis of whiteness as a legally constructed form of property, see Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709 (1993).

³⁷ See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2016).

³⁸ *Id.*

negative value on characteristics that are commonly associated with Blackness, Asian-ness, or Latinx-ness.

As our societal definition of discrimination has shifted in the more than fifty years since Title VII was passed, courts have been forced to reckon with the meaning of the word discrimination within that statute: does it include decisions tainted by implicit bias, or adverse employment actions that an employee could have avoided had they attempted to mask or subdue the visible presentation of their race or gender?³⁹ These questions are unlikely to go away. Academics have suggested that employers can treat employees differently based on race, or establish policies that impact employees of different racial backgrounds differently, in much subtler ways than by reserving a certain subset of desirable positions for white employees.⁴⁰

a. Title VII and Disparate Impact

Although employment policies that have a disparate impact against non-white employees have become subtler, courts have been less inclined to enjoin practices that disfavor the use of African American Vernacular English, or ban dreadlocks,⁴¹ leaving those employees with limited statutory protection under Title VII. Protection under Title VII is generally limited to employees facing discrimination based on things that are truly outside of their control, and not on other aspects of a person's performance of their protected identity or characteristic.⁴² This limitation means, for example, that employees are not protected from their employer's implicit biases⁴³ against people of a particular racial background.

³⁹ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (relying on explicit statements of sex stereotyping to find evidence of discrimination based on sex); *Simonton v. Runyon*, 232 F.3d 33, 37–38 (2d Cir. 2000) (discussing whether a failure to conform to gender norms might be cognizable under Title VII); *Catastrophe Mgmt. Sols.*, 11 F.Supp. 3d at 1143–44 (focusing on whether or not a prohibition on dreadlocks was discrimination based upon an immutable characteristic).

⁴⁰ See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. OF CONTEMP. LEGAL ISSUES 701, 715 (2001).

⁴¹ See *id.*

⁴² See *id.* at 728.

⁴³ Harvard University's Project Implicit defines implicit bias as the unconscious perceptions or associations that individuals have about race, gender, and sexual orientation, among other topics. Project Implicit's online Implicit Association Test ("IAT") measures these associations by asking participants to click on images in connection with a particular word or phrase and measuring the amount of time it takes the individual to click on the photos associated with a particular race or gender group. The IAT is available at <https://implicit.harvard.edu/implicit/takeatest.html>. For the purposes of this paper, the term implicit bias refers to an unconscious negative association with a particular group based on race, gender, or sexual orientation. Given the subject matter of this paper it will largely be used to refer to unconscious negative associations with particular racial or ethnic groups. Unconscious bias in the workplace has a measurable negative impact on the employment prospects of Black and Latinx candidates. See generally Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

Title VII mainly protects employees who are facing policies that facially discriminate against employees of a particular racial background, for example by saving certain choice positions for white employees or using racial quotas in hiring.⁴⁴ Courts have upheld verdicts against employers for requiring Black women employed to perform office or administrative work to perform janitorial functions, and for berating employees as dirty on the basis of their racial background, as clear violations of Title VII's bar on disparate treatment.⁴⁵ Other clear examples of disparate treatment might include practices such as drug testing only employees of color, segregating jobs on the basis of race, capping promotions at a certain level for members of a specific racial group, or automatically screening out applications with non-Anglo-Saxon names.

Generally, an employer's decision to compensate one group of employees, made up largely of people of color, at a rate that is only a small fraction of the compensation offered to its other, similarly-skilled, employees would likely amount to disparate treatment in violation of Title VII. And yet, when dealing with prisoner-workers, disparities in pay have not been analyzed under the disparate treatment framework, because they have not been analyzed under Title VII at all.

While the statute has been relatively effective in eradicating blatantly racist behavior, it does not reach many subtler forms of discrimination.⁴⁶ As a result, its utility as a tool for combating discrimination has become more limited as social norms have shifted toward so-called "color blindness" or race neutrality, teaching employers what not to say, but not necessarily eradicating the underlying animus that drove those policies in the first place.

Under current doctrine, employees may receive Title VII protection against policies that explicitly set different standards or provide different benefits to one racial group.⁴⁷ The Supreme Court has historically provided some protection for disparate treatment policies that are designed to remedy past discrimination, like affirmative action policies, but even that protection is relatively limited and has eroded over time.⁴⁸ Affirmative action policies have had the most success in educational environments, where schools have been able to argue that having a critical mass of people of color provides an educational benefit to all students who attend the school, as a result of the diversity that it fosters.⁴⁹ Even under those facts, however, the Court has

⁴⁴ See Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e–2000e(17) (2016); *Griggs v. Duke Power Co.*, 401 U.S. 424, 427–28 (1971); *Slack v. Havens*, 522 F.2d 1091, 1093 (9th Cir. 1975).

⁴⁵ See *Slack*, 522 F.2d at 1092.

⁴⁶ See generally Katherine E. Leung, Note, *Racial Identity Performance and Employment Discrimination Law*, 24 VA. J. SOC. POL'Y & L. 57 (2017).

⁴⁷ See *Griggs*, 401 U.S. at 431.

⁴⁸ See *Fisher v. University of Texas*, 136 S. Ct. 2198, 2209 (2016) (Alito, J., dissenting); see also Tanya Washington, *Jurisprudential Ties That Bind: The Means to End Affirmative Action*, HARV. J. RACIAL & ETHNIC JUST. ONLINE (2015).

⁴⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 321 (2003).

signaled that this benefit will not continue to provide protection for schools' ability to utilize affirmative action programs forever.⁵⁰ In employment situations, the Court has become hyper-vigilant in their scrutiny of policies that have a so-called negative impact on white employees, indicating that perhaps workplace programs to promote diversity in hiring may be standing on very thin ice.⁵¹

In the workplace context, affirmative action policies are most likely to arise in response to issues of disparate impact, rather than disparate treatment. The most obvious example of such a discussion can be found in the Supreme Court's decision in *Ricci v. DeStefano*.⁵² There, the Court considered whether or not throwing out civil service exams when test-takers of color received disproportionately low scores—in an attempt to avoid disparate impact liability—was a violation of the high scoring white test-takers' rights.⁵³ In *Ricci*, the Court held that, by throwing out the test results, itself an attempt to avoid disparate impact liability under Title VII of the Civil Rights Act of 1964, the City of New Haven had violated Title VII's ban on disparate treatment on the basis of race.⁵⁴ The Court went on to explain that before an employer can discard test results in response to disparate impact concerns, it must have "a strong basis in evidence" to believe that it will be subject to disparate impact liability if it fails to take such discriminatory action.⁵⁵ In the context of affirmative action, the court seems to place less value on a diverse workforce than it does on a diverse student body, perhaps because the workplace is not designed to help employees develop as individuals in the ways that schools are. Or perhaps because, as in *Ricci*, attempts to increase workers of color's access to careers that were historically restricted to white employees are perceived as a form of oppression of white employees—akin to taking money directly out of the pocket of hardworking individuals who never personally did anything to harm workers of color.

The Court's lengthy analysis in *Ricci* of the ways in which New Haven's attempt to avoid oppressing employees of color actually oppressed white firefighters placed the focus squarely back on the white workers with a long-standing advantage in the United States labor market.⁵⁶ By adding an additional burden that an employer must demonstrate a "strong basis in evidence" that it will be liable for disparate impact discrimination before

⁵⁰ See *Grutter*, 539 U.S. at 320 (suggesting that eventually past discrimination will be adequately remedied and schools will no longer need to provide affirmative action in order to achieve a critical mass, and indicating that in perhaps 50 years, the Court would expect that the justification for affirmative action programs will have diminished and they may become impermissible).

⁵¹ See *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009).

⁵² *Id.*

⁵³ See *id.* at 562–63.

⁵⁴ *Id.* at 563.

⁵⁵ *Id.* at 563, 585.

⁵⁶ See *id.* at 579–84.

attempting to remedy disparate impact discrimination,⁵⁷ the court reinforced existing oppression of workers of color. This focus on the rights of white workers at the expense of workers of color points to a valuation of the rights of workers of color as less important than their white counterparts, or only important if white workers do not suffer any consequences as a result of steps taken to remedy all but the most extreme forms of discrimination.

Given the context in the private labor market, it is unsurprising that prison work programs do not attempt to remedy structural racial oppression, which contributed to many participants' incarceration in the first place. And, of course, prison work programs, even those focused on teaching employees marketable skills, are not cut from the same cloth as affirmative action programs. They are generally not geared toward remedying the past discrimination that led to the disproportionate incarceration of people of color, or the historical barriers to entry into many of the fields that generate familial wealth and the educational, social, and professional privileges that that wealth provides. However, prison work programs that are designed to provide additional job training and support to prisoners in anticipation of their eventual release could be analogized to educational affirmative action insofar as they are designed to provide disproportionately Black and Latinx prison populations with the skills and training that were previously unavailable to them as a result of centuries of racial discrimination.

Federal prison work programs like UNICOR, which provide vocational training, apprenticeships, and vocational certificates to participants—and which have been linked to reduced rates of recidivism⁵⁸—take some meaningful steps toward providing prisoner-workers with the kind of training in skilled trades that was historically denied to people of color in the United States. A possible critique of the UNICOR program—and other training programs that give extra job training and support to prisoners—could be that to provide this training to prisoners when it is not available to unincarcerated job seekers is a misuse of resources. This is similar to the argument that affirmative action in the workplace takes money out of the pockets of white employees who have never personally sought to oppress workers of color. These optics might explain why UNICOR only employs 8% of eligible prisoners, making up only a small fraction of the jobs and apprenticeships available to incarcerated people.⁵⁹

b. Limited Protection Against Discrimination

When dealing with the general workforce, courts have placed so little emphasis on diversity in the workplace that they have allowed employers to

⁵⁷ *Id.* at 563, 585.

⁵⁸ See UNICOR, FED. PRISON INDUSTRIES, INC., THE BUSINESS OF REDUCING CRIME (2017), https://www.unicor.gov/publications/reports/FY2017_AnnualMgmtReport.pdf [<https://perma.cc/3LVB-XCCM>].

⁵⁹ UNICOR Program Details, *supra* note 12.

dictate how a Black woman can wear her hair at work without providing a justification for their policy, so long as the policy is technically applied to all female employees.⁶⁰ While policies banning hairstyles worn predominantly by Black women are racially neutral on their face, and will likely only lead to notes in personnel files and warnings, they require Black women to expend additional time and money adopting hairstyles that comply with the employer's dress code. This is time and money that white, Asian, and Latinx women are unlikely to have to spend, because the natural texture of their hair conforms to the requirements laid out in the employment policy. The approach taken by courts in response to these policies is consistent with the Supreme Court's holding in *Ricci*,⁶¹ which treated all forms of racial discrimination as equal, whether ensuring that Black applicants were not disadvantaged as compared with white applicants, or protecting white applicants against hiring procedures that favor Black applicants. This signals that, particularly in the workplace, courts are disinclined to protect employees from disparate impact discrimination that could technically be avoided as a result of an employee's choices, but which nevertheless place a significant burden on employees of color. Under this framework, employees of color are faced with the choice: either assimilate to white culture or spend their career fighting back against implicit bias that might increase the likelihood of an adverse employment action simply for failing to assimilate (assuming such structures of oppression are even knowable).⁶² If courts continue to frame the question of whether or not an employment policy or practice has a disparate impact on a particular racial group in this manner,⁶³ it follows that they might also be unwilling to treat employment policies regarding criminal records or prison labor as having a disparate impact on employees of color, despite the disproportionate policing of communities of color and the resultant disproportionate rates of conviction and incarceration.⁶⁴

⁶⁰ See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2016) (holding that rescinding the charging party's offer of employment because she refused to cut off her dreadlocks was not discrimination based on race), *aff'd*, *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016). While these policies are technically applied to all women, the texture of Black women's hair, and the historical policing of Black women's hair as a form of controlling their bodies and constructing cultural norms in which Black women and their natural hair were considered abnormal and unprofessional, has created an additional barrier for Black women to navigate in the workplace. See Carbado & Gulati, *supra* note 40, at 726.

⁶¹ *Ricci*, 557 U.S. at 580.

⁶² Assimilation in this context might include anything from listing an Anglo-Saxon name or a first initial as opposed to a name that sounds Black, Latinx, or Asian American, relaxing natural hair, or wearing Western styles of clothing rather than clothing with non-Western cultural significance (e.g. Kente cloth).

⁶³ See, e.g., *Ricci*, 557 U.S. at 558.

⁶⁴ For a more detailed analysis of over-policing and over-incarceration of people of color, see ALEXANDER, *supra* note 22.

II. SYSTEMIC RACIAL DISCRIMINATION AND EXPLOITATION

Over-policing in communities of color and disproportionately high criminal penalties for nonviolent drug offenses have contributed to extraordinary rates of imprisonment of Black and Latinx young people.⁶⁵ Beginning in the late 1960s with Richard Nixon's "Law and Order" platform,⁶⁶ the American criminal justice system has, to a large degree, criminalized being a person of color, and particularly being Black.⁶⁷ This phenomenon became more pronounced during the 1980s and 1990s with the advent of the "war on drugs" and the subsequent incarceration of men of color for extraordinarily long periods of time.⁶⁸ This has created one of the largest prison populations in the world.⁶⁹ Many of those individuals are confined to prisons run by private corporations rather than the government.⁷⁰

Incarceration of people of color has a long history as a tool of oppression and white supremacy, beginning with post-Civil War prisoner leasing programs. Under these programs, Black men were arrested and charged with fabricated crimes, and then forced into prisoner leasing programs under which their labor could still be exploited without violating the Thirteenth Amendment.⁷¹ Throughout the 1950s and 1960s, incarceration and so-called "crime control" were used as tools to oppose the civil rights movement, and to deprive activists of social capital and a platform to gain public support for their cause.⁷² In the early 1970s, Richard Nixon presented a propagandized version of the theory that crime was the result of racial tensions,⁷³ and deployed law enforcement as a tool for controlling racial minorities.⁷⁴ This was particularly effective in the cultural moment of white flight,⁷⁵ eventually becoming the foundation of law and order politics in the United States.⁷⁶ Ultimately, these hyper-racialized conversations about crime propelled older

⁶⁵ See ALEXANDER, *supra* note 22; *Criminal Justice Fact Sheet*, *supra* note 21.

⁶⁶ See, e.g., Richard Nixon, Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida (Aug. 8, 1968), <http://www.presidency.ucsb.edu/ws/?pid=25968> [<https://perma.cc/7SQV-V74J>].

⁶⁷ See generally ALEXANDER, *supra* note 22.

⁶⁸ See *id.* at 77.

⁶⁹ This phenomenon also impacts women of color to a significant extent, but, given the larger relative size of the male prison population, the largest pool of prisoner-workers created as a result of this phenomenon will be made up of men of color.

⁷⁰ See generally James J. Misrahi, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective*, 33 AM. CRIM. L. REV. 411, 419–22 (1996).

⁷¹ For a history of post-Civil War prisoner leasing programs, see generally BLACKMON, *supra* note 2.

⁷² See Haney-López, *supra* note 20, at 1032–34.

⁷³ See Richard Nixon, *What Happened to America*, READER'S DIG., Oct. 1967, at 49–54.

⁷⁴ See, e.g., President Richard Nixon, Annual Budget Message to the Congress, Fiscal Year 1972 (Jan. 29, 1971), available at <http://www.presidency.ucsb.edu/ws/?pid=3188> [<https://perma.cc/2DQR-K4QS>].

⁷⁵ The phenomenon whereby white people moved to the suburbs as a response to the influx of people of color into cities and urban centers.

⁷⁶ See Haney-López, *supra* note 20, at 1036–38.

white men into political power,⁷⁷ where they could solidify their own position of privilege and power at the expense of people of color and others with marginalized identities.

Eventually, this use of prisons and the criminal justice system to oppress people of color and entrench elite white male power was monetized. In addition to incarcerating young people of color in order to further individual political ambitions, these traditionally white institutions of power also began to earn significant profits off of these policies by selling prisoners' labor, reducing production costs, and increasing profit margins.⁷⁸ As the United States shifted toward the privatization of prisons,⁷⁹ both private prisons and correctional officers' unions started lobbying for criminal justice policies that would increase the number of incarcerated persons in the United States.⁸⁰ This helped lead to the rapid incarceration of significant portions of communities of color.⁸¹

While some scholars⁸² believe that the war on crime and the war on drugs may soon end and be replaced by another theory of crime control, such a shift would still leave hundreds of thousands of people of color incarcerated under the policies of those eras. Many of these individuals are serving long prison terms—including life sentences—for nonviolent drug crimes.⁸³ As a result, such a change would be unlikely to shift the racial impact of using prison labor for years to come, if it were to result in a shift in the racial makeup of prisons at all.

III. THE PRISON EXCEPTION

When evaluating the relationship between an unincarcerated worker and an employer, courts determine whether an employment relationship ex-

⁷⁷ See Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough On Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 1, 12 (2013) (describing conservative politicians stoking constituents' fears about crime and race).

⁷⁸ See Haney-López, *supra* note 20, at 1036–38.

⁷⁹ In 2016, 128,300 of the 1,505,400 state and federal prisoners in the United States were housed in private prisons, representing an increase of 1.6% from 2015, although the overall prison population in the United States decreased by more than 1% over the same period. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 1 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/ZG7K-QF9N>].

⁸⁰ For a detailed analysis of the influence that correctional officers' unions can have on criminal justice policy, see generally VINCENT SCHIRALDI, CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE UNDUE INFLUENCE OF CALIFORNIA'S PRISON GUARDS' UNION: CALIFORNIA'S CORRECTIONAL-INDUSTRIAL COMPLEX (1994), available at http://www.cjcj.org/uploads/cjcj/documents/the_undue_influence_of_californias_prison_guards_union-californias_correctional_industrial_complex.pdf [<https://perma.cc/FRV3-Y5NA>].

⁸¹ See Haney-López, *supra* note 20, at 1036–38.

⁸² See, e.g., Sasha Abramsky, *Is This the End of the War on Crime?*, NATION (June 16, 2010), <https://www.thenation.com/article/end-war-crime/> [<https://perma.cc/S2AU-VF56>].

⁸³ See generally AM. CIVIL LIBERTIES UNION, *A Living Death: Life Without Parole for Nonviolent Offenses* (2013), https://www.aclu.org/sites/default/files/field_document/111813-lwop-complete-report.pdf [<https://perma.cc/9W5H-Q9WM>].

ists by looking at the control the employer exercises over the employee's work.⁸⁴ In prison work programs, these questions become more complicated by the question of which entity actually employs the prisoners, who exercises what control, and whether the work is being performed as a part of the prisoner's punishment. Much of the earliest prison labor litigation dealt with Fair Labor Standards Act⁸⁵ ("FLSA") minimum wage violations in work release programs and whether or not the prisoners were classified as employees.⁸⁶ However, the focus of most litigation about prison labor has centered on whether prisoners working through job training programs or performing other in-prison work should be classified as prison employees.⁸⁷ Courts have consistently held that the FLSA employment relationship is much narrower for prisoners than for individuals in the private market—limited to work performed for private firms as part of a work release program.⁸⁸ This limitation lessens prisoner-workers' rights to employment benefits and contributes to cycles of financial instability that can increase the likelihood of recidivism. It also provides a consistent pool of sub-minimum wage prison laborers.

The FLSA requires, among other things, that employers pay all employees a federal minimum wage.⁸⁹ States are able to raise the minimum wage above the federal minimum wage, and many do, in an attempt to provide a living wage for their workers or, in particularly progressive states, to satisfy constituents.⁹⁰ But there is at least one constituency in this country that is consistently, lawfully, paid far less than minimum wage: prison laborers.⁹¹ While the FLSA does not explicitly exempt prisoners from its minimum wage requirements, both the Fifth and Seventh Circuits have held that prison

⁸⁴ See e.g., *O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 995–97 (N.D. Cal 2014); *S.G. Borello & Sons, Inc. v. Dep't of Indus.* 48 Cal. 3d 341, 355 (1989). The Internal Revenue Service and California state law, for example, look at location, circumstances, tools, and manner in which the work is performed, among other factors. See *Understanding the Employee vs Contractor Distinction*, INTERNAL REVENUE SERV. (July 20, 2017), <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation> [https://perma.cc/P5MH-5L6K].

⁸⁵ First passed in 1938, the Fair Labor Standards Act was created primarily to establish the right to a minimum wage and to overtime pay. See 29 U.S.C. §§ 201–219 (2016); Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y.C. L. REV. 107, 107–09 (2009–2010). It also prohibits child labor, except under very limited circumstances. See U.S. DEP'T OF LABOR, CHILD LABOR PROVISION FOR NONAGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT, (2016), <https://www.dol.gov/whd/regs/compliance/childlabor101.pdf> [https://perma.cc/529L-TYYN].

⁸⁶ See, e.g., *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

⁸⁷ See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 871–74 (2008).

⁸⁸ See, e.g., *Watson*, 909 F.2d at 1553–54.

⁸⁹ 29 U.S.C. §§ 206–07 (2016).

⁹⁰ See e.g., Ben Casselman, *California's \$15 Minimum Wage Makes a Lot Less Sense Outside of Silicon Valley*, FIVETHIRTYEIGHT (Apr. 1, 2016), <https://fivethirtyeight.com/features/californias-15-minimum-wage-makes-a-lot-less-sense-outside-of-silicon-valley/> [https://perma.cc/LKU6-TCZX].

⁹¹ See *Prison Labour is a Billion-Dollar Industry*, supra note 6.

laborers are not covered.⁹² These decisions have rested on the fact that prison laborers are working inside of the prison and are primarily classified as “prisoners,” not “employees.”⁹³

Ultimately, this classification seems to be based on the prison’s relationship to the prisoner, rather than upon the work that a prisoner may or may not be doing.⁹⁴ Courts view the primary relationship between prisoner and prison as one of wrongdoer and punisher, or criminal and law enforcement agent, rather than employer and employee.⁹⁵ Even when prisoners are participating in work release programs, where courts have classified them as employees and therefore covered by the FLSA,⁹⁶ those courts have refused to implicate the prison in the work relationship.⁹⁷ Through these work release programs, prisons may play a role in prisoners’ placements with employers, the hours they work, and the workspaces in which that work is performed, all factors that favor classifying an individual as an employee rather than an independent contractor.⁹⁸ But even with that high level of control, courts are loathe to acknowledge the role of prison as employer,⁹⁹ which might trigger an additional set of obligations unrelated to the prison’s role as a law enforcement actor.¹⁰⁰

These courts’ failure to acknowledge non-punitive or non-correctional aspects of the prisoner’s relationship with the prison is consistent with their resistance to protect employees against discrimination on the basis of racial identity performance or any other characteristic that could technically be classified as a choice rather than an immutable characteristic.¹⁰¹ Rather than

⁹² See *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006); *Bennett v. Frank*, 395 F.3d 409, 409 (7th Cir. 2005).

⁹³ See *Watson*, 909 F.2d at 1553–56; see also *Bennett*, 395 F.3d at 410 (arguing that Congress did not intend to include prison “employees”).

⁹⁴ See *Watson*, 909 F.2d at 1554–57.

⁹⁵ See *Bennett*, 395 F.3d at 409–10.

⁹⁶ This classification likely derives from the fact that prison work release programs allow prisoners to leave the institution to work for an employer, in a more traditional workspace, during business hours—whatever those hours may be—before returning to some form of incarceration at the end of the workday. For a more detailed analysis of prison work release programs, see WILLIAM D. BALES ET AL., AN ASSESSMENT OF THE EFFECTIVENESS OF PRISON WORK RELEASE PROGRAMS ON POST-RELEASE RECIDIVISM AND EMPLOYMENT (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/249845.pdf> [<https://perma.cc/B62E-9A37>].

⁹⁷ See, e.g., *Watson*, 909 F.2d at 1553–54.

⁹⁸ See BALES ET AL., *supra* note 96, at 3–6.

⁹⁹ See *Bennett*, 395 F.3d at 409–10.

¹⁰⁰ Employers, for example, are typically responsible for providing job training, contributing to workers’ compensation insurance, paying employees a minimum wage, and are obligated to respect employees’ rights to unionize. See, e.g., National Labor Relations Act of 1935, 29 U.S.C. §§151–169 (2016); Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2016). Those obligations are specific to employers and distinct from the obligations that prisons hold with respect to those they imprison.

¹⁰¹ See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1141–43 (S.D. Ala. 2016), *aff’d*, *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016) (holding that grooming policies that prohibit employees from wearing their hair in dreadlocks and other styles that are predominantly worn by Black employees did not amount to disparate impact discrimination under Title VII).

acknowledge the nuanced nature of a culture or relationship, in both contexts, courts have opted to draw a clear bright-line to define the actors as either jailer or employer, either explicitly racist or inconsequential. It may be convenient for the law to characterize employees or prisoners as one-dimensional things which can fit easily into boxes that are deserving or undeserving of a statute's protection. However, that approach is unlikely to reflect any actual human being's experience, because no one's identity is limited to only one of the many ways in which they spend their time, or one of the different types of relationships they have with those around them. Just as individuals outside of prison take on a variety of roles in relation to those around them—spouse, sibling, child, parent, and professional—prisons occupy many roles in relation to those they imprison. Whether the law acknowledges it or not, a prison may in reality be jailer, hospital, and employer to its inmates all at the same time.

These kinds of bright-line tests make a lot of sense on paper, particularly when evaluating allegations of discrimination, where the risk of a factfinder's own implicit bias bleeding into their assessment should be avoided at all costs. But in practice, bright-line rules and categories don't reflect the complex nature of invidious discrimination, or help to determine when a discriminatory act or a discriminating party could be viewed as justified. While a prisoner's relationship with the prison may be primarily defined by the underlying violation of a state or federal law for which they were incarcerated, and the resultant restrictions upon their freedom, that kind of simplistic definition of the prisoner-prison relationship fails to take into account all of the racial, social, and economic dynamics that shape a person's experiences. It also fails to account for the experience of being employed in prison, including the number of hours prisoners spend engaged in work over the course of their incarceration. If prisoners work a traditional eight hour workday, meaning they are spending about half of their waking hours engaged in some form of employment within the prison, that means that for at least half of the time during which a prisoner consciously interacts with the prison, he or she is doing so in the context of a quasi-employment relationship. An analytical framework that fails to account for about half of the context in which inmates and prisons interact fails to account for the reality of the relationship between inmate and prison, and thus cannot effectively regulate that relationship.

The problematic nature of the courts' predominant approach to prisoners as workers is compounded by the fact that many private prisons have adopted policies that attempt to recoup the costs of incarceration from prisoners upon their release—whether by charging them a bill, attempting to seize savings they had prior to entering prison, or by seizing the meager wages that prisoner-workers manage to save while they are incarcerated.¹⁰²

¹⁰² See, e.g., Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOYOLA J. PUB. INT. L. 319, 324–28

This creative approach to cost-savings and profit maximization suggests that prisons recognize the many different levels on which they relate to inmates (jailer, caretaker, landlord, and meal-prep service, among others), even if the courts do not. A policy of seizing assets or billing prisoners for the cost of their incarceration blurs the line between the prison as punisher or law enforcement officer, and the prison as a business providing a service for which it must be compensated. The latter view would seem to undermine both the Fifth and Seventh Circuits' rationales, refusing to acknowledge that a prison can be both the prisoner's jailer and employer at the same time.¹⁰³ If the provision of food, water, clothing, and shelter is a service for which the prison expects to be paid, rather than the obligation of the state in recognition of the fundamental human rights of those incarcerated within its walls, then the prison also has a vested interest in ensuring that its "clients" can pay their bills. That interest is wholly unrelated to the prison's interest in enforcing the law or ensuring that prisoners cannot present any further danger to society, and instead is tied entirely to the prison's own bottom line.

This inconsistency becomes clearer when we examine why prisons are viewed as an instrument of punishment, and why we release prisoners after their sentences, not only from a purely Constitutional standpoint but also from a practical one. If the prison's purpose is exclusively to punish,¹⁰⁴ then its purpose, by definition, is not to profit from the prisoner's incarceration, but instead to take privileges away from the prisoner for the purpose of punishment. Under such a rationale, there would be no reason to release prisoners early for good behavior, or to allow prisoners to have contact with support networks outside of prison, or to provide job training, or other educational benefits available to prisoners while they are incarcerated. If, in the alternative, the purpose of incarceration is to both punish and rehabilitate prisoners in an effort to change their behavior by the time they are released from prison, then there is a legitimate policy justification for programming linked to reduced rates of recidivism, including job training and education.

But if rehabilitation is indeed the criminal justice and public policy reasoning behind the existence of prisons and their relationship with prisoners, it is directly at odds with paying prisoners subminimum wages or charging them for room and board. Incarceration already results in increased economic instability, even without considering the low wages for prisoners en-

(2014); Steve Mills & Todd Lightly, *State Sues Prisoners to Pay for Their Room, Board*, CHI. TRIBUNE (Nov. 30, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-prison-fees-lawsuits-met-20151129-story.html> [<https://perma.cc/FE7Z-HGRU>]; LAUREN-BROOKE EISEN, BRENNAN CENT. FOR JUSTICE, CHARGING INMATES PERPETUATES MASS INCARCERATION (2015), <https://www.brennancenter.org/sites/default/files/publications/Charging%20Inmates%20Perpetuates%20Mass%20Incarceration.pdf> [<https://perma.cc/HZ9H-V646>].

¹⁰³ See *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006); *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005).

¹⁰⁴ For a detailed analysis of the four theories of punishment on which the U.S. criminal justice system is based, see generally RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA* (2000).

rolled in job training programs or prison work programs.¹⁰⁵ Policies that fail to pay prison laborers minimum wage, and garnish the vast majority of those wages, contribute to that pattern of financial instability. This instability can drive people to return to the patterns that were familiar before they were incarcerated as a way to earn enough money to get by when they are shut out of the so called legitimate workforce.¹⁰⁶

The combination of the classification of prisoners as non-employees and therefore not covered by the FLSA, and the practice of billing prisoners for the cost of their incarceration, creates circumstances that can drive people back into prison. Such a cycle creates a large pool of prisoners' and former prisoners' labor available to private corporations at sub-minimum wages.

IV. LIMITS ON PRISON UNIONS' ABILITY TO REBALANCE LABOR RELATIONS

Conventional wisdom would dictate that contract negotiations, collective bargaining, and the labor market itself, would prevent significant disparities in compensation or terms and conditions of employment along racial lines for individuals of similar skill levels performing similar work.¹⁰⁷ But this philosophy assumes that workers have the right to organize and comparable bargaining power when negotiating wages, hours, benefits, and any other terms and conditions important to the workers in a particular bargaining unit. In practice, these assumptions do not always prove true in the civilian workforce, resulting in a pay gap of 26.7% between Black and white workers in 2015, for example.¹⁰⁸ Prisoners' bargaining power is significantly weaker than that of civilian bargaining units, because the tools of economic pressure they can employ are more limited than civilian unions, and cultural perceptions of prisoners may make it more difficult for them to garner public support in the event of a labor dispute.

Traditionally, labor unions use economic pressure to help balance the scales in a labor dispute. This includes striking and attempting to shut down the business's ability to function, and by picketing or handbilling to notify

¹⁰⁵ See Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. C.R. & ECON. DEV. 679, 704–06 (2015); Wesley Lowery, *Former Inmates: Incarceration Makes Economic Stability Nearly Impossible for Our Families*, WASH. POST (Sept. 15, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/09/15/former-inmates-incarceration-makes-economic-stability-nearly-impossible-for-our-families/> [<https://perma.cc/QA4V-PUKV>].

¹⁰⁶ For the purposes of this paper, "legitimate workforce" shall be defined as those employed to perform work that does not violate any laws, and for which the workers are lawfully hired and paid a legal wage.

¹⁰⁷ See ECONOMIC POLICY INSTITUTE, *THE BENEFITS OF COLLECTIVE BARGAINING: AN ANTIDOTE TO WAGE DECLINE AND INEQUALITY* (2015), <https://www.epi.org/publication/benefits-of-collective-bargaining/> [<https://perma.cc/SBP8-RVFR>].

¹⁰⁸ VALERIE WILSON & WILLIAM M. RODGERS III, ECON. POL'Y INST., *BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY* 7 (Sept. 20, 2016), <https://www.epi.org/files/pdf/101972.pdf> [<https://perma.cc/9SXD-GXHJ>].

the public of the dispute and garner public support for the workers' position, placing further economic pressure on management to agree to the union's proposed terms.¹⁰⁹ These strategies can be so effective that employers have petitioned both the National Labor Relations Board ("NLRB") and the Supreme Court to limit unions' ability to exercise them, arguing that unions' actions are tantamount to extortion and constitute an unreasonable refusal to negotiate in violation of the National Labor Relations Act ("NLRA").¹¹⁰ While prison workers still can, and occasionally do, strike,¹¹¹ their ability to effectively spread their message to the public and amass public support for their cause is limited by the realities of being confined to a prison, which fundamentally separates prisoners from the public and the rest of the business (including management and fellow employees) for which they work. Additionally, it remains uncertain whether or not the protections supplied by the NLRA apply to prisoner-workers, and therefore going on strike presents a much greater risk.

While prison unions have arisen as one available avenue for labor organizing and collective bargaining,¹¹² they also face unique challenges as collective bargaining agents. Prison administrators and correctional officers have a legitimate interest in maintaining order within the prison, which under some circumstances may include limiting the number of prisoners who can gather at a given time, where they can gather, and at what times they can gather, all of which can limit union organizers' ability to use traditional methods of organizing.¹¹³ Restrictions on public access to prisons can also serve as a barrier to unions' attempts to organize prisoner-workers, and given the government's distinct interest in maintaining security, prisoner-workers are far less likely to benefit from the presence of outside union organizers who have the knowledge and skills to help them establish a union. Similarly, concerns about security make it unlikely that prisoners could meet without the presence of any guards or correctional officers, limiting their ability to hold private union meetings and discuss the terms and conditions of employment over which they would want to bargain, or to discuss bargaining strategies they could use to pressure management (prison

¹⁰⁹ See generally *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); *New England Health Care Emp. Union v. NLRB*, 448 F.3d 189 (2d Cir. 2006); *In re Church Homes, Inc.*, 343 N.L.R.B. 1301 (2004), *vacated*, *New England Health Care Emp. Union v. NLRB*, 448 F.3d 189 (2d Cir. 2006).

¹¹⁰ See e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 573 (1988); *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 285–86 (1957).

¹¹¹ Chantal Da Silva, *Florida Inmates To Strike Against 'Prison Slavery' And Inhumane Conditions On Martin Luther King Jr. Day*, NEWSWEEK (Jan. 1, 2018), <http://www.newsweek.com/us-inmates-strike-against-prison-slavery-and-inhumane-conditions-martin-luther-781367> [<https://perma.cc/F6HF-GJRF>].

¹¹² See Mike Elk, *The Next Step for Organized Labor? People in Prison*, NATION (July 11, 2016), <https://www.thenation.com/article/the-next-step-for-organized-labor-people-in-prison/> [<https://perma.cc/C657-BDGV>].

¹¹³ See *id.*

officials) to capitulate to the workers' demands.¹¹⁴ This problem is compounded by the fact that no court to date has explicitly held that prisoner-workers have a legally protected right to unionize under the NLRA, and the issue has not arisen before the NLRB.¹¹⁵

In addition, correctional officers open prisoners' incoming and outgoing mail, listen to and record their phone calls, and literally lock them away from the general public, limiting the means by which prisoners could get the word out to the public about a labor dispute and strike if the warden, prison guards, or private corporation running the prison opposed those efforts. While the Supreme Court has not held that prisoners *cannot* form unions, it has left the determination of whether or not to allow the existence and recognition of a prisoner-workers' union up to the prison administrator or warden in a specific prison.¹¹⁶ As a result, even in rare cases when prisoner-workers successfully organize, they lack significant legal protections like NLRB elections, mandatory negotiations, and support from union organizers and administrators who are trained to help negotiate better workplace conditions for union members.¹¹⁷

If prison unions make it past the barriers to organizing, they also face unique challenges in employing economic pressure in negotiations. In the case of a prison union, the already significant power imbalance in the relationship between employee and employer is combined with the additional power imbalance between prisoner and prison. These two sets of relationships are inextricably linked in the context of prison labor, where the prison administrators control the workspace, materials, and manner in which the work is performed, in addition to controlling every non-work-related aspect of an inmate's life. These factors exaggerate the power imbalance that exists in an ordinary civilian workplace, making it even more difficult for workers to negotiate better wages or working conditions for themselves. Traditionally, unions balance out these kinds of power imbalances with economic pressure—by threatening strikes, striking, picketing, or handbilling.¹¹⁸ For prisoner-workers, some of these approaches are unavailable, and others are watered down by the prison environment. While prisoners can still go on strike, the absence of NLRA protections makes a strike riskier for workers, and without the ability to gather in a large group, meet to plan the strike, or

¹¹⁴ See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 140–47 (1977) (Marshall, J., dissenting).

¹¹⁵ See *id.* at 125–33 (majority opinion).

¹¹⁶ See *id.*

¹¹⁷ The question of whether or not prisoners are protected under the National Labor Relations Act has not been raised before the National Labor Relations Board.

¹¹⁸ For a detailed analysis of the power of handbilling, strikes and secondary picketing, see generally Brian K. Beard, *Secondary Boycotts After DeBartolo: Has the Supreme Court Handed Unions a Powerful New Weapon?*, 75 IOWA L. REV. 217 (1989); Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LABOR & EMP'T L. 905 (2005); Gary Rhys Johnson, *Labor Handbilling After Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 1989 DET. C.L. REV. 931 (1989).

create a public demonstration to rally public support for workers, the strike itself may not create as much pressure.¹¹⁹ These limitations on prisoners' collective activities typically mean that the economic pressure is limited to tools like a manufacturing slowdown.

Prisoner-workers' inability to leave the prison to picket represents a significant barrier to using economic weapons as a collective bargaining tool. Picketing is one of the most powerful tools a collective bargaining unit can employ during negotiations to drum up public support for their cause or drive away business until the employer gives in to its demands.¹²⁰ Employers have long argued that picketing is threatening to their business, and too strong of an economic weapon to permit unions to use during a labor dispute.¹²¹ These kinds of economic tools have a powerful impact on the balance of power between unions and management, and the way that both of those parties relate to one another.¹²² When workers are stripped of these tools, it becomes unrealistic to expect that the balance of power will continue to empower workers to demand better wages or working conditions, or otherwise negotiate the terms and conditions of their employment.

The prison environment also limits workers' ability to find other employment, creating a captive market for employers. Those who want to work or participate in a job-training program while incarcerated have very little choice about who will benefit from their labor. This contributes to an atmosphere in which workers have very little leverage in negotiations with their employers, particularly when the workers have no legally recognized collective bargaining rights.

All of these barriers to collective bargaining are compounded by the importance of maintaining positive relationships and goodwill with correctional officers. So long as correctional officers control access to both essentials and luxuries, and can dole out punishment at will,¹²³ prisoners have to bear the possible consequences of making waves within the prison. Prison administrators and guards can put prisoners in solitary confinement and cut off their access to privileges, ranging from computer access to time in the exercise yard.¹²⁴ This concentration of power gives the prison the ability to

¹¹⁹ See Elk, *supra* note 112.

¹²⁰ See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 573 (1988); *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 285–86 (1957).

¹²¹ See Elk, *supra* note 112; see also *DeBartolo*, 485 U.S. at 573; Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 *Suffolk U. L. Rev.* 883 (1982).

¹²² See Beard, *supra* note 118.

¹²³ For a more detailed analysis of the different ways in which prison guards and administrators exercise power and control, see generally John Wooldredge & Benjamin Steiner, *The Exercise of Power in Prison Organizations and Implications for Legitimacy*, 106 *J. CRIM. L. & CRIMINOLOGY* 125 (2016).

¹²⁴ See *id.*

manifest extreme control over prisoners' behavior, and the impact of this hierarchy cannot be filtered out of the employment relationship.

V. PRISON LABOR AND JOB SEGREGATION

Many private corporations have cultivated relationships with prisons, which afford these corporations access to cheap labor from prisoner-workers who, by virtue of their own circumstances, may be more compliant than civilian laborers in traditional manufacturing jobs.¹²⁵ For corporations, prisoner-workers are an attractive proposition because they don't take vacations, aren't covered by the FLSA, and are unlikely to strike or picket.¹²⁶ As a result, corporations have shifted many manufacturing and other rote tasks to prison labor populations and out of the civilian workforce.¹²⁷ Relatedly, the cost of operating public prisons is continuing to rise,¹²⁸ and contracts with corporations looking to hire prison laborers may serve as a solution to the challenge of paying to incarcerate a group of prisoners so large that they account for roughly 25%¹²⁹ of the world's prison population.¹³⁰ While the majority of prisoners do not work, those who do help create revenue for the prisons that house them, and given the size of the American prison population, that labor is enough to create ripple effects in the overall labor market.¹³¹

¹²⁵ See Shemkus, *supra* note 26.

¹²⁶ While prison unions have become more common in recent years, *see, e.g.*, Incarcerated Workers Organizing Committee, *Incarcerated Workers Union Industrial Branch Forming*, INDUSTRIAL WORKERS OF THE WORLD (Jan. 22, 2018), <https://www.iww.org/category/union-news/news-all-departments-and-unions/department-600-public-service/incarcerated-workers> [<https://perma.cc/L3B6-PNYT>], striking workers are not able to engage in some of the behaviors traditionally associated with strikes among civilian workers. For example, picketing either the plant or the distributor of goods simply isn't an option so long as the striking workers remain incarcerated. Additionally, prisoner-workers do not have the established right to unionize under the National Labor Relations Act and are therefore not necessarily protected under provisions of the NLRA that deal with striking, picketing, or other forms of economic pressure unions may choose to exert against the employer.

¹²⁷ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6; Shemkus, *supra* note 26.

¹²⁸ See Gabby Galvin, *Underfunded, Overcrowded State Prisons Struggle With Reform*, U.S. NEWS & WORLD REPORT (July 26, 2017), <https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership> [<https://perma.cc/Z4BC-YMVD>].

¹²⁹ The United States' prison population is approximately 2,145,100, making up approximately 25% of the world's prison population. See *The Prison Crisis*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/prison-crisis> [<https://perma.cc/2M7T-UAXC>]; *see also* Institute for Criminal Policy Research, *World Prison Brief: United States of America*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> [<https://perma.cc/EE3D-VTF4>].

¹³⁰ An estimated 90,000 or more prison laborers working for both public and private industries in recent years have helped their employers achieve profits in excess of \$800 million. See Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 383 (2012).

¹³¹ Whether prisons or related state corporations are profiting directly from the sale of goods made by prisoners employed by state or federal corporations like UNICOR, or as the result of agreements with private corporations, profit margins on goods created in prisons are

Historically, prisons were designed to be self-sustaining¹³²—to create everything the prison needed and provide the labor to run it—by having prisoners work during the day rather than putting them in cages barely large enough to move in. But as theories of prison and law enforcement have changed, more emphasis has been placed on punishment and incapacitation, confining prisoners away from the public for long periods of time, with a secondary focus on prisoners’ eventual reentry into society.¹³³ The increased use of solitary confinement in prisons, which is used both to isolate highly dangerous prisoners and as a form of punishment,¹³⁴ is particularly demonstrative of this trend.

In this context, prison labor has evolved into a creature of corporate profit rather than public necessity, while the rules around prisoner-workers’ rights have remained stagnant.¹³⁵ As a result of this transformation, the way we evaluate prisoner-workers’ rights and obligations is out of step with the reality of the work that they are doing. There is a logic to having prisoner-workers earn significantly less than minimum wage in exchange for their contributions to the upkeep of the prison, where they benefit from the labor that they and their fellow inmates are contributing. But when the prisoners are performing labor for the benefit of a private corporation, and receive no benefits or other non-traditional compensation,¹³⁶ that compensation structure doesn’t square with employment protections that were designed to create limits on the ways in which employers could use their power over employees to exploit them.

The under-compensation of prisoner-workers is compounded by the disparities in positions made available to prisoners compared with non-prisoners, and in their respective compensation. By the very nature of a prison environment, the types of positions available to prisoner-workers will be limited to work that can be performed in a prison, without sharp tools that could be used as weapons, and which do not require the workers to be present at a specific facility or plant. The prison environment is also unlikely to be conducive to higher skilled jobs where the employer would have to invest significant sums of money in bringing training to the prison, or any work that requires large amounts of on-site equipment. As a result, the majority of prison work is low-skill, low-wage, and does not have a significant impact

high. In part, this is a result of the fact that the average wages paid to prisoner-workers are generally lower than \$1 per hour. See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

¹³² See John Dewar Gleissner, *How to Create American Manufacturing Jobs*, 9 TENN. J.L. & POL’Y 166, 168 (2013).

¹³³ See ALEXANDER, *supra* note 22, at 7.

¹³⁴ See Gleissner, *supra* note 132, at 168.

¹³⁵ See *id.* at 179–80.

¹³⁶ Prisoners working for private corporations do not receive traditional benefits like health insurance as part of their compensation from those corporations because their health care is provided by the state or federal government under whose jurisdiction the prisoner is incarcerated. See, e.g., *Estelle v. Gomes*, 429 U.S. 97, 103 (holding that the Eighth Amendment obligates the government “to provide medical care for those whom it is punishing by incarceration”).

on the workers' ability to compete in the job market after their release.¹³⁷ While some prisoners benefit immensely from job training programs that provide training that will help improve their ability to compete in the civilian job market, programs that provide this level of training are the exception, not the rule.¹³⁸ Therefore, prison job programs frequently leave formerly incarcerated people in the position of competing with other low-skill workers—who have similar training but do not have criminal records—for jobs upon their release.

In states where employers are allowed to ask applicants to check a box on their job application indicating whether or not they have ever been convicted of a crime, many employers are loath to hire applicants with criminal records.¹³⁹ In many cases, the prisoner's conviction is not relevant to their ability to do the job, and the prisoner does not pose any risk of violence to the employer.¹⁴⁰ Employers nonetheless sometimes use a criminal conviction as an indicator of an applicant's character or trustworthiness.¹⁴¹ Employers like Victoria's Secret or Whole Foods have used prisoners to perform work at sub-minimum wages, but when considering applicants for work outside of prison, many of these companies require criminal background checks.¹⁴²

"Banning the box," however, does not resolve the problems of racial disparities in hiring for entry-level jobs. Some studies show that hiring rates of Black workers for low-skill jobs in states that have "banned the box" have actually declined, a result that many activists and organizers suggest is the result of stereotypes about Black men, and to some degree women, as criminals.¹⁴³ While unemployment has declined among formerly incarcerated white workers in states that have "banned the box," these policies have had a negative effect on hiring of Black workers, an effect that generally in-

¹³⁷ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

¹³⁸ See *id.*

¹³⁹ See generally Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2806 (2015).

¹⁴⁰ The majority of non-violent federal prisoners in the United States are serving sentences related to drug crimes. See *Offenses, Inmate Statistics*, FED. BUREAU OF PRISONS (FEB. 24, 2018), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [<https://perma.cc/5CLV-GXYK>]. These individuals' history of non-violent drug offenses do not impact their ability to perform the essential functions of many jobs, and do not raise a higher risk of employee misconduct, except in sales positions. See Dylan Minor, Nicola Persico & Deborah M. Weiss, *Should You Hire Someone with a Criminal Record? Companies that give ex-offenders a fresh start may be rewarded with employees who stick around*, *KELLOG INSIGHT* (Feb. 3, 2017), <https://insight.kellogg.northwestern.edu/article/should-you-hire-someone-with-a-criminal-record> [<https://perma.cc/C8DM-BMLW>].

¹⁴¹ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

¹⁴² See Alex Henderson, *9 Surprising Industries Getting Filthy Rich from Mass Incarceration*, *SALON* (Feb. 22, 2015), http://www.salon.com/2015/02/22/9_surprising_industries_getting_filthy_rich_from_mass_incarceration_partner/ [<https://perma.cc/GEG6-YHKQ>]; Claire Zilman, *Why Whole Foods, Dollar General, and Panera have all been sued over a tiny hiring technicality*, *FORTUNE* (Jan. 16, 2015), <http://fortune.com/2015/01/16/whole-foods-dollar-general-panera-hiring-lawsuit/> [<https://perma.cc/85BN-CSMU>].

¹⁴³ See Agan & Starr, *supra* note 2, at 39; Doleac & Hansen, *supra* note 1, at 5–6.

creases over time.¹⁴⁴ It is far too soon to have a complete set of empirical studies exploring whether employers that previously used criminal records as a litmus test for trustworthiness or character are now using race to perform the same function in their hiring process. Even without studies to demonstrate causation, however, the correlation between banning the box and a swift drop in employment rates for Black workers in entry level jobs suggests that some form of bias may be infecting the hiring process in states that have enacted these policies. While the racial disparity in hiring in jurisdictions that have “banned the box” is more extreme than in jurisdictions where employers are permitted to use “clean” criminal records as a threshold requirement in their hiring process,¹⁴⁵ the disparities still indicate parallel forms of racial bias that have disparate impacts on workers of color. These disparities are arguably tied to the disproportionate rate of incarceration among people of color in the United States and the implicit biases that many employers harbor regarding the supposed criminal tendencies of people of color.

These results are in direct conflict with the supposed rationale for prison work programs as a form of job training or skills building that is designed to help prisoners reintegrate into their communities upon their release from prison.¹⁴⁶ While prison work programs are frequently lauded as a way of giving prisoners marketable job skills that will help them attain financial stability after the end of their sentence,¹⁴⁷ financial instability remains a significant cause of recidivism.¹⁴⁸ But this has not drawn increased interest from policymakers to address the ways in which these programs are failing to serve their intended purpose.¹⁴⁹ This suggests that either the programs were never intended to help prisoners gain marketable skills, or that lawmakers do not care whether or not these programs achieve their stated goals. While lawmakers could impose safeguards or attach strings to prison funding that would protect prisoners from exploitation through prison work programs, thus far, they have failed to do so.

For lawmakers and many voters, it may not matter whether prisoner job training or work programs are effective, but the implications for the prisoners who rely on these programs to help them succeed after prison are profound. Financial instability remains among the most significant factors in recidivism,¹⁵⁰ and the inability to find or hold a job is a huge contributor to

¹⁴⁴ See Doleac & Hansen, *supra* note 1, at 45–48.

¹⁴⁵ See *id.* at 5.

¹⁴⁶ See *About UNICOR*, UNICOR, <https://www.unicor.gov/about.aspx> [https://perma.cc/6F4G-VQK4].

¹⁴⁷ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

¹⁴⁸ See Fulcher, *supra* note 105, at 704–06, 709.

¹⁴⁹ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

¹⁵⁰ See EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 41 (April 2016), <https://obama.whitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf> [https://perma.cc/NNA4-M97H].

financial instability. In the rare cases when prison work programs provide prisoners with new marketable skills, they can be key to helping rehabilitate prisoners and giving them tools to establish a financially stable life outside of prison.¹⁵¹ Academic research on the subject of jobs programs and post-incarceration employment rates is virtually nonexistent, but logic dictates that where jobs programs fail to provide prisoners with new skills and instead simply outsource low-skill jobs, workers are not gaining the kinds of new skills that would increase their marketability as prospective employees after they leave prison. This contributes to a cycle of recidivism and a constant pool of prisoner-workers who these employers can rely on to perform the lowest wage work.

As made clear by hiring statistics,¹⁵² failed prison job training programs have contributed to circumstances in which, particularly with respect to lower-skill, lower-wage jobs, Black and Latinx workers have a disproportionately difficult time finding work.¹⁵³ This is a challenge that is exaggerated for workers with criminal records.¹⁵⁴ Some of that disparate impact is inherent in application procedures that screen applicants based on their criminal records because of the astronomical rates at which the United States incarcerates people of color, and particularly Black people.¹⁵⁵ Yet, we see similar dynamics at play even in states that have “banned the box,” as employers use race as a proxy for questions about criminal background.¹⁵⁶ But job or task *segregation* amongst workers who are hired is not a natural result of this screening process. The shift of certain manufacturing jobs into prisons, where corporations can pay its prisoner-workers—largely workers of color—much lower wages, flies directly in the face of federal anti-discrimination laws. Still, it is allowed to continue, arguably because this segregation largely impacts individuals who are incarcerated. By its very nature, segregation of work between prison and non-prison laborers requires the existence of two separate job tracks or pools. These separate pools could not legally exist without the prison labor system, because any other designation separating jobs on the basis of race would be a direct violation of Title VII, whether on the basis of disparate treatment or disparate impact. But because the disparate treatment of prisoner-workers is baked into the very foundations of our laws, the prison labor market can function as that second pool of jobs.

Courts have yet to prohibit screening applicants for criminal records, despite the disparate impact that that policy has on communities of color, and such a prohibition could trigger even more overt racial discrimination in

¹⁵¹ See *Prison Labour is a Billion-Dollar Industry*, *supra* note 6.

¹⁵² See Doleac & Hansen, *supra* note 1, at 45–48.

¹⁵³ See generally Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 619 (2005).

¹⁵⁴ See *id.*

¹⁵⁵ See generally ALEXANDER, *supra* note 22, at 6; see also Pager, *supra* note 153, at 618.

¹⁵⁶ See Doleac & Hansen, *supra* note 1, at 5.

hiring. In many cases, the employer treats the lack of a criminal record as a fundamental qualification, determining whether or not an applicant will even be considered for the position.¹⁵⁷ But the “ban the box” hiring data indicates that, even if courts were to ban the use of criminal records as an application screening tool, disparate treatment of young Black and Latinx people in hiring for low-wage, low-skill jobs would persist.¹⁵⁸ This data suggests that, so long as employers can profit from low-wage prison labor, they will continue to segregate jobs that are performed by prisoners and those that are not, which requires segregation of jobs along racial lines. Not only are there significant racial disparities in the populations that employers treat as eligible for these different types of jobs, but the wages, benefits, and conditions of employment remain extraordinarily different as well.

CONCLUSION

Both the Constitution and federal statutes except prison labor from restrictions designed to protect employees’ rights. Restrictions on forced labor and requirements about maximum hours, minimum wages, and collective bargaining rights are all designed to protect workers from forms of abuse that were common at one point or another in the history of the United States.¹⁵⁹ Historically, employers took advantage of the most vulnerable workers, hiding behind arguments of freedom of contract and failing to acknowledge the power imbalance that necessarily colors employer-employee relationships.¹⁶⁰ This power imbalance is exaggerated in a prison context, where guards’ control over prisoner-workers extends far beyond the workplace.

The workplace power balance shifted with the passage of the Fair Labor Standards Act and the National Labor Relations Act,¹⁶¹ but those provisions can only be effective when an employee can rely on effective enforcement. Unfortunately, because courts have determined that prisoners engaged in in-prison work programs are not employees and therefore not protected under either the FLSA or the NLRA,¹⁶² prisoner-workers have been unable rely on the enforcement of these statutes, relegating them to position based on a pre-

¹⁵⁷ See Pager, *supra* note 153, at 631–33.

¹⁵⁸ See Doleac & Hansen, *supra* note 1, at 5, 45–48.

¹⁵⁹ See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a minimum wage and maximum hours law that applied only to women and children); *Lochner v. New York*, 198 U.S. 45 (1905) (overturning a minimum wage and maximum hours law for bakers in New York, despite evidence of serious health implications); *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (ratifying the use of forced labor and stripping Black people of any right to freedom from slavery). It is worth noting that *Lochner* and *Dred Scott* are no longer good law, and are cited here merely as examples of the Court’s ratification of policies that were harmful to those performing some form of labor at various points throughout U.S. history.

¹⁶⁰ See generally *Lochner*, 198 U.S. at 45.

¹⁶¹ See Harris, *supra* note 85, at 107–09.

¹⁶² Unless and until the National Labor Relations Board is presented with a case on this issue.

1920s balance of power, a balance that skews heavily in favor of employers and can result in the exploitation of workers.

The potential for worker exploitation, and perhaps more importantly, for wider profit margins, creates an incentive for employers to use prison labor for work that can be performed outside of a traditional factory or office environment. The reality that prisoners are not entitled to minimum wage guarantees and do not have legally recognized collective bargaining rights may incentivize employers to choose prison labor over civilian workers where they have the option. When enough employers act on this incentive, it can create a separate pool of jobs for prisoner-workers and one for civilian workers.

Given the racial makeup of prisons, such separate pools create a functionally segregated workforce and keep many workers of color out of an entire class of jobs. In fact, “ban the box” data¹⁶³ suggests that employer perceptions about applicants based on their racial backgrounds may make them disinclined to hire workers of color for positions outside of the prison labor market, even without information about their criminal records. This job segregation can also be a self-perpetuating cycle, locking prisoner-workers out of the civilian workforce, and contributing to high recidivism rates, or in states that have “banned the box,” pushing workers of color specifically into positions of financial instability. All of this takes place in a country that to a large extent criminalizes poverty.¹⁶⁴

This kind of job segregation flies in the face of everything that Title VII is designed to protect. Title VII was designed to end workplace segregation, by barring both disparate treatment and disparate impact discrimination.¹⁶⁵ But Title VII alone cannot solve the systemic oppression of people of color in the United States labor force. In creating a statutory loophole that allows employers to treat prisoner-workers and civilian-workers differently—when people of color make up a significantly larger portion of the prison population than white people—our laws perpetuate the kind of oppression that could only be resolved with comprehensive reform of federal labor laws mandating equitable treatment of incarcerated workers. These reforms could still only be minimally effective without additional statutory protections against race-based discrimination and implicit bias in hiring for workers outside of prisons. In the meantime, the structural oppression perpetuated by the prison labor system remains a harmful force in the labor market, negatively impacting workers of all racial and ethnic backgrounds.

¹⁶³ See generally Pager, *supra* note 153, at 643–47.

¹⁶⁴ See generally Fulcher, *supra* note 105.

¹⁶⁵ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2016).