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ONE DOLLAR PER DAY: THE SLAVING WAGES OF IMMIGRATION JAIL, FROM 1943 TO PRESENT

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ABSTRACT

This Article evaluates the legality and the genesis of the one dollar per day wages paid to those in custody under immigration laws. In 1941, President Franklin Roosevelt issued an order moving the Immigration and Naturalization Service (INS) out of the Department of Labor and into the Department of Justice (DOJ). During this same time frame, the U.S. Government established internment camps for "enemy aliens," i.e. civilians in the United States and other countries in Latin America who were or were imagined to be citizens of Axis powers. When the average daily cost of each person's detention in 1943 was one dollar, the DOJ paid those so held 80¢ per day for their work. The camps inspired the Immigration Service Expenses law of 1950, which authorized paying those in custody under immigration laws for work performed. If those in immigration custody today are paid at the 1943 rate, they would be earning about $80 per day. This Article draws on documents and contracts obtained under the Freedom of Information Act (FOIA) as well as the program's implementation and history for a statutory analysis of its legality. It also argues that under a plain meaning reading of the relevant laws, legislative history, and purpose, the program appears to violate several labor laws and the Fifth, Sixth, Thirteenth, and Fourteenth Amendments.†

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I. THE PROBLEM—ROBINSON MARTINEZ

Following several years of prison in Michigan and Texas for convictions on drug related crimes, Robinson Martinez was taken into custody in March 2012 by Immigration and Customs Enforcement (ICE), which held him at a Houston facility owned by the private security firm Corrections Corporation of America (CCA).[1] Shortly after his arrival, CCA hired Mr. Martinez to

1. Criminal records are on file with author.

work for them for one dollar per day.[2] In a September 12, 2013 letter, Mr. Martinez wrote:

> 'Volunteer Work Program,' the way I describe it, is basically doing the same as working in the outside world. But with a chip labor with no benefits. For e.g., I am assign as 'Dorm Porter,' meaning that I do the sweeping and mopping the floors of the dorm we (detainees) are house in or assign to. I clean and scrub the toilets, urinals, showers and sinks, clean tables, windows, and have trash ready for pick-up by 'Hall Porters.' I perform other tasks, if necessary at the direction of a CCA staff member, such as working both shift, day and nights, although I am assigned to work at nights, only 8 hrs I'm assign to work . . . . During the past 3 month I have been assign to work night shift, stating from 6:00 pm to Breakfast, which is about 4:00 am or at times about 5:00 am. Out of those hrs. I approx work 4 hrs. because I refuse to work the whole 8 hrs.[3] There's many different jobs and hours, but some of them are the same job title, some are call 'Hall Porters,' 'Recreation Porters,' 'Dorm Porters,' 'Kitchen Workers' ect . . . . . The function of Recreation work is cleaning up the rack room, gather the all balls left out-side, bring-in the water jar (5 gallons), sweep and mop the restroom and other duties directed by the staff. There's also kitchen workers where you prepare food trades for the male detainees, wash dishes, although a machine washes the dishes . . . just as working in a restaurant. You clean-up the kitchen area, by sweeping and moping the floor and other work requested by the staff. Basically the kitchen work is as working out-side. Hours, I have an understanding they work from 8:00 am to 2:00 pm, from 2 pm to 7:00 pm and from 3:00 am to 7:00 am.
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> Now there's also 'Hall Porters', they work the hall ways, do painting at times, sweep and mop the hall way floors, buffing and waxing, help out with the commissary cards by pushing them to the dorms to be deliver accompanied with staff and any other job as directed by the staff, clean offices, take care of the trash, bring-in cleaning supply, ect . . . . . Basically they perform more of the work than any other job mention above . . . . All jobs are paid one dollar/day except Kitchen workers, I believe they get paid differently from the rest of the job.
>
> There is also laundry workers, they work in the laundry but are call 'Hall Porters,' they work 8 hrs and perform the watching of detainee's cloth, (uniforms), sheets, blankets ect . . . . . They perform other duties at the direction of staff, e.g., if staff needs the detain to some type of cleaning and that detainee is close by, the staff will ask him to do that cleaning.[4]

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2. Interview with Robinson Martinez in Houston CCA, Houston, Tex. (July 8, 2013) [hereinafter July Martinez Interview].

3. Mr. Martinez must be constantly available to his supervisor during the period of his shift, and beyond, even if he is not exerting himself the entire period.

4. Letter from Robinson Martinez to author (Sept. 12, 2013) [hereinafter Sept. Martinez Letter] (transcribed verbatim, with portions omitted) (on file with author).

Though dozens of men in his dorm were available for these and other jobs, Mr. Martinez estimated that in September 2013 only about six men were actually working on any particular day, a ratio that is well below the levels reported elsewhere in the Houston CCA facility.[5] This could be because of their security level.[6] Or perhaps it was because many of those in his dorm had friends and family on the outside keeping their commissary accounts in decent shape.[7]

"They don't give me a helper," Mr. Martinez reported, "There used to be a whole bunch for the day shift, but they're already deported."[8] Lacking the staffing necessary for their contractual commitments to keep the facility clean and maintained, CCA guards ordered Mr. Martinez to take on additional tasks during his shifts, as well as work beyond them.[9] On one occasion a guard woke him at 3 a.m. and ordered him to clean:

> She is also the officer who have given us detainees problems with making available 'toilet paper.' She says that we are wasting it . . . . [S]he approach me [after my shift was over] and said I had to clean up since I we [sic] were the only porters on the list left, that we needed to clean-up and do the work. I can't remember what the other detainee answer to her, but I said 'I do not have to work because this is a 'volunteer work' and I am not obligated to work.
>
> She responded by saying 'well then I will right you up' . . . If a detainee is not doing what they suppose to, and depends the officer you get write-up meaning you can get off the volunteer work program . . . That's what I was told by Officer C. Huddleston. Now, if you accumulate several offense you can be put in segregation and also if you do something real bad . . . I've not been in segregation but I have been told by other detainees that It's afoul. [It's] not clean and very cold in the cell. What is my understanding of why people decides to sign for the volunteer program. Well, for some is that they don't have nobody that send them money to purchase, hygiene, mailing, stamps and writing material, commissary, such as coffee, soups, coke, [ect.] Detainees have trouble obtaining writing material so at times is hard.[10]

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5. Telephone Interview with Robinson Martinez (Sept. 17, 2013) [hereinafter Sept. Martinez Telephone Interview].

6. "High security detainees are not assigned to work with low security detainees. The majority of the work assignments off the housing unit i.e. Food Service, are performed by low security detainees." STEWART DETENTION CENTER ANNUAL REVIEW 23 (2008), *available at* http://deportationresearchclinic.org/Stewart-CCA-AnnualRev-0513152008.pdf. All contracts, evaluative reports, and grievances specific to a particular ICE facility referenced in this article are available at http://deportationresearchclinic.org/DRC-INS-ICE-FacilityContracts-Reports.html [hereinafter Source Materials].

7. *See, e.g.*, Telephone Interview with Kenneth Danard (Sept. 26, 2010) [hereinafter Danard Interview].

8. Sept. Martinez Telephone Interview, *supra* note 5.

9. *See, e.g.*, Sept. Martinez Letter, *supra* note 4; July Martinez Interview, *supra* note 2.

10. Sept. Martinez Letter, *supra* note 4.

On the occasions he is ordered to work beyond his shift, Mr. Martinez cleaned as ordered.[11]

Mr. Martinez's work was inspected by CCA guards.[12] Sometimes his work detail required cleaning the dorm showers, including the floors, walls, and toilets of a dank, humid area that had never been exposed to fresh air.[13] He recalled being ordered to revisit a particularly difficult patch of mildew that had seemingly been there for years. When he explained that the company needed a specialized janitorial service and equipment for the task, he was told he would be fired. Mr. Martinez cleaned as best he could, but much of the stain remained.[14]

In July 2013, he requested gloves for cleaning tasks requiring the use of highly concentrated chlorine bleach. "If you pour it on the [cement] floor, it leaves a white spot," he explained. His supervisor handed him the same pair of gloves used and reused by the employees delivering food from the kitchen to his dorm. Concerned about the numerous sanitary deficiencies of such a procedure, he requested a new pair of gloves but was rebuffed. The guard said, "Why do you care?" implying that because Mr. Martinez would not be immediately eating the food served from the next person to use these gloves, the dual uses should not bother him. The guard ignored as well Mr. Martinez's concerns that they might already contain bacteria to which he would be exposed if he wore them. Contagious infections are a constant problem, Mr. Martinez said, and several residents had severe, untreated skin staph infections.[15]

Mr. Martinez used the gloves, and then he filed a grievance.[16] Shortly after, CCA guards moved him to a different dorm and no longer allowed him to work.[17] On October 28, 2013, he wrote,

> Here you find me writing you this speedy letter to inform you that I have been transfer[red] to another facility here in Livingston, Texas. I do believe that my transfer was not made [for a] legitimate reason. It was done out of retaliation of writing to[o] many grievances against CCA officials and the way it's being operated. Listen, Jacki[e], this place is worse than CCA.[18]

Mr. Martinez reported that upon arriving, the guards had thrown away his legal papers, made the law library unavailable to him, and refused to let him

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11. July Martinez Interview, *supra* note 2.
12. Sept. Martinez Letter, *supra* note 4.
13. July Martinez Interview, *supra* note 2.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Letter from Robinson Martinez to author (Oct. 28, 2013) (on file with author).

file grievances about these and other matters.[19]

II. OVERVIEW

A. *Prison Custody is Categorically Different from Custody Under Civil Immigration Laws*

Those familiar with prison work programs may find Mr. Martinez's experiences unexceptional. They understand, correctly, that those in custody for *purposes of punishment* are subject by statute and regulation to working conditions and compensation that may be exempt under the Fair Labor Standards Act (FLSA) and other state and federal employment laws. But exemptions on this basis apply exclusively to those in custody on criminal charges, not those in custody for civil infractions, or those awaiting immigration or citizenship status determinations or removal from the country. The statutes, codes, and jurisprudence for those in deportation proceedings and criminal custody are largely distinct.[20] Representative Samuel Hobbs cited *Wong Wing* during the 1950 hearings on the bill that authorized paying those in custody for immigration law violations.[21] *Wong Wing* distinguishes between the rights one has to avoid detention without a trial from the rights one has to challenge an order of hard labor or the taking of property without a trial:

> Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongly accused; but it is not imprisonment in a legal sense . . . But the evident meaning of the section in question, and no other is claimed for it by the counsel for the Government, is that the detention provided for is an imprisonment at hard labor . . . and that such imprisonment is to be adjudged against the accused by a justice, judge or commissioner, upon a summary hearing . . . We regard it as settled by our previous decisions that the

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19. *Id.* Mr. Martinez was subsequently returned to Houston CCA for immigration hearings. On February 12, 2014, the Board of Immigration Appeals (BIA) stated in a one-person "panel" decision that immigration judge Saul Greenstein made a legal error in determining Mr. Martinez to be an alien and remanded. *Probable U.S. Citizen Robinson Martinez Returns After Deportation, Locked Up As Alien*, STATES WITHOUT NATIONS BLOG (June 11, 2015), http://stateswithoutnations.blogspot.com/search/label/Robinson%20Martinez/. On April 3, 2014, the immigration judge in the Houston CCA facility, outside the presence of Mr. Martinez's attorney, ignored the order and sent the case back up. *Id.* On December 4, 2014, with no new factual information, the same board member, Roger Pauley, reversed himself. *Id.* Without notice to his attorneys, ICE deported Mr. Martinez on December 12, 2014. *Id.* Mr. Martinez believes CCA and ICE denied him his right to a renewed appeal to the BIA in retaliation for his grievances. *Id.* As of June 2015, Mr. Martinez is in federal custody in Brownsville, Texas, defending himself on a charge of Illegal Reentry. *Id.*

20. Wong Wing v. United States, 163 U.S. 228 (1896).

21. "Appropriations now or hereafter provided for the Immigration and Naturalization Service shall be available for . . . payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed . . . ." Immigration Service Expenses, ch. 503, 64 Stat. 380 (1950) (codified as amended at 8 U.S.C. § 1555 (2012)).

> United States can, as a matter of public policy, by Congressional enactment . . . in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.
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> But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.[22]

Wong Wing invalidated forced hard labor for those in custody under civil laws that would be permitted as legal punishment for criminals convicted and sentenced in conformity with the Fifth and Sixth Amendments of the Constitution.[23]

Wong Wing's overturning of Section Four in the 1892 Congressional statute mandating hard labor for those held under immigration laws has important implications for ICE residents today.[24] The decision establishes that Article III courts may punish those afforded the protections of the Sixth Amendment right to a trial by jury,[25] and that Article I executive branch employees implementing civil laws may impose civil penalties, but not punishments.[26] *Wong Wing* interpreted forced hard labor as punishment, and

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22. *Wong Wing*, 163 U.S. at 233–37.

23. "[T]he fourth section of the act of 1892, which provides that 'any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States,' inflicts an infamous punishment, and hence conflicts with the [F]ifth and [S]ixth [A]mendments of the [C]onstitution . . . ." *Id.* at 233–34.

24. Contemporary statutes and ICE's Performance Based National Detention Standards (PBNDS) reference "detainees," not "residents." ICE, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 382-87 (2011) [hereinafter 2011 PBNDS] (standards regarding the Voluntary Work Program), *available at* https://www.ice.gov/doclib/detention-standards/2011/voluntary_work_program.pdf. From 1903, when Congress first established the Bureau of Immigration, through at least 1918, Congressional reports and bills refer to immigrants in government custody as "immigrants," "aliens," "internees," and "residents," not "detainees." *Id.* I use the word "residents" because thousands of people in ICE custody in recent years have been U.S. citizens and because "detainees" is a more recent concept for those held under immigration laws. "Detainee" connotes a one-sided condition of the government's determination, one that interpellates the Respondent's abjection in a fashion inconsistent with the lawful implementation of our country's immigration policy. ICE, CCA, GEO, and other prison firm contracts and documents refer to those in ICE custody as "residents." *See infra* Parts III and VII. The use of "resident" in many of these contexts is admittedly Orwellian double-speak. But rather than concede to the collapse of lawful, rights-bearing U.S. immigrant residents and U.S. citizens into the constellation of "convict," "inmate," and "prisoner" effected by the dehumanizing category of "detainees," this Article's vocabulary anticipates a government accountable to the due process rights afforded Respondents to a Notice to Appear in an immigration court. The proceedings and additional classifications are part of a system of the rule of law that requires prioritizing restraints on egregious, systemic and often criminal, misconduct by the government over those of implementing civil penalties, i.e. detaining and deporting people based only on violations of immigration laws.

25. For a proposal for a jury trial for resident migrants see Daniel Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 51 (2013).

26. *See* Zadvydas v. INS, 185 F.3d 279, 289 (5th Cir. 1999) ("[T]he *Wong Wing* court distinguished between the unconstitutional act before it—which made illegal presence in the country

found this, when ordered by administrative officials and not juries, unconstitutional.[27] Subsequent Sixth Amendment due process requirements, including in particular a right to an attorney paid for by the government if one cannot afford one,[28] impose additional obligations on the government before it can punish people.

The statute under review in *Wong Wing* referred to hard labor, but, as *Wong Wing* also pointed out, the Thirteenth Amendment declares that slavery or involuntary servitude shall not exist within the United States or any place subject to their jurisdiction, except as a punishment for crime whereof the party shall have been duly convicted.[29] Slavery and indentured servitude may include any forced labor, not just hard labor. Thus, *Wong Wing* renders unconstitutional any government official's demand to order labor of those held under civil immigration laws.[30]

B. *Legal Status of Work Performed by Those in Custody under Immigration Laws: New Research on Labor Conditions and Prison Industry Profits from Immigration Detention Facilities*

Mr. Martinez's experiences as a CCA employee raise several questions. First, what are the official government policies for work performed by those in custody under immigration laws? Second, what is the extent and character of ICE resident labor in practice? And, finally, is this legal under our statutes, the U.S. Constitution, and international law?

Before going into the relevant statutes, and their histories and jurisprudence, it is worthwhile to point out that perhaps the most salient fact is the program's obscurity, and thus its failure, until recently, to receive any sustained attention by journalists, scholars, policy-makers, or judges.[31] On

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summarily punishable by a sentence to being 'imprisoned at hard labor' for not more than a year and provided that the alien would be '*thereafter* removed from the United States' (emphasis added [by the *Zadvydas* Court])—and detention pending deportation.").

27. *Wong Wing*, 163 U.S. at 237–38.

28. Gideon v. Wainwright, 372 U.S. 335 (1963).

29. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

30. *See*, *e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893). For analyses of their legacy see Hiroshi Motomura, *Phantom Constitutional Norms Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). The literature critical of jurisprudence finding deportation per se not punitive is enormous. *See*, *e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000). An enlightening recent contribution to this literature highlights how these decisions have culminated in the "stipulated order," whereby a handful of immigration judges are rubber-stamping thousands of removal orders without any evidence that the respondent waivers conform with legal requirements that they be voluntary, knowing and intelligent, as required by 8 C.F.R. § 1003.25(b)(6), and often when the respondents have a legal right to remain in the United States. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 498, 517, 521 (2013).

31. In May 2014, a New York Times article drawing on statistical and other analyses in a working paper on which this Article was based drew the attention of civil rights litigators. Ian Urbina, *Using*

October 22, 2014, immigrants in Colorado filed the first class action lawsuit alleging exploitation by a global prison firm, the GEO Group.[32] The complaint alleges violations of the Colorado Minimum Wage Order, 7 C.C.R. § 1103-1 (2013), the federal Forced Labor statute, 18 U.S.C. § 1589 (2000), the Service Contract Act of 1965 (SCA), 41 U.S.C. § 351., the Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 1700 *et seq.*, and unjust enrichment under Colorado common law.[33] Judge Kane granted GEO's motion to dismiss as to the violation of the Colorado Minimum Wage Order.[34] However, he denied GEO's motion to dismiss the remaining claims.[35]

ICE mentions the "Volunteer Detainee Work Program" in its Performance-Based National Detention Standards (PBNDS) but misstates its scope and payments, and covers up administrative findings of employer-employee relations.[36] Moreover, the authorizing legislation delegates to Congress and not ICE the authority to set the compensation.[37] Hence, the program's invisibility to Congress is of special note. It is not referenced in the budgets Department of Homeland Security (DHS) submits to Congress;[38] it does not appear among the exceptions for the employment of aliens by the federal government in the Government Accountability Office (GAO) "Red Book" on appropriations;[39] nor is it referenced in the most recent Congressional Research Service (CRS) report surveying immigration detention issues of interest to legislators.[40]

The PBNDS description of the work program provides no hint of the reliance by private contractors on ICE resident labor for the services and

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Jailed Migrants as a Pool of Cheap Labor, N.Y. TIMES, May 24, 2014, at A1; Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail Work Programs—A History and Legal Analysis, 1943 to Present* (May 15, 2014) (working paper on file with SSRN), *available at* https://papers.ssrn.com/so13/papers.cfm?abstract_id=2434006/. For an analysis of how immigration jail labor violates the Thirteenth Amendment see Anita Sinha, *Slavery by Another Name: 'Voluntary' Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1 (2015). Sinha, drawing in part on documents and data appearing in earlier versions of this Article, emphasizes the similarity between the work programs in immigration jails and slavery. *Id.*

32. Class Action Complaint for Unpaid Wages and Forced Labor, Menocal v. GEO Group, No. 14-cv-02887-JLK (D. Colo. Oct. 22, 2014) [hereinafter Menocal Complaint], *available at* http://deportationresearchclinic.org/MenocalGEO-Complaint-10-22-2014.pdf.

33. *Id.* at 8, 13, 17.

34. "I find the plaintiffs are not 'employees' under the CMWO." Memorandum Opinion and Order, Menocal v. GEO Group, No. 14-cv-02887-JLK (D. Colo. July 7, 2015) [hereinafter Menocal Order].

35. *Id.*

36. 2011 PBNDS, *supra* note 24, at 382–87.

37. 8 U.S.C. § 1555(d).

38. *See infra* Part VI.

39. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (3d ed. 2004) [hereinafter RED BOOK], *available at* http://www.gao.gov/products/GAO-04-261SP.

40. Alison Siskin, *Immigration-Related Detention: Current Legislative Issues* (Cong. Research Serv. Working Paper No. RL32369, 2012).

maintence of these facilities.[41] Yet, in recent years the GEO Group, Inc., CCA, AKAL Security, Ahtna Technical Services, Community Education Centers (CEC), and several other security firms ("firms") will have employed ICE residents for millions of shifts of four to eight hours and longer at one dollar per day.[42] In 2012, GEO brought in an estimated $33 to $72 million profits from labor savings, and CCA an estimated $30 to $77 million, or about 25% of the company's total profits.[43] The irony is apparent. Firms contracted for detention in service of a policy providing pseudo-protection for the U.S. labor market are increasing their profits hundreds of millions of dollars each year by failing to pay the federally mandated minimum wage, much less the higher wages required under the SCA.[44] These wages should be going into the pockets of ICE facility residents or those in the employment sectors of food, janitorial, and housekeeping services as well as painters, plumbers, builders, clerks, librarians, barbers, and beauticians.[45]

The one dollar per day wages are so low that the phrase "subminimum wages" is a misnomer. To convey a key characteristic of slavery, in particular the nonnegotiable labor and wage conditions when one party has physical control over the party receiving work orders and compensation, this Article uses for its legal analysis of the resident worker program the phrase "slaving wages."[46] Kenneth Danard's wife kept his commissary account funded, so he did not work.[47] Of the work by residents in ICE at the Florence Correction Center in southern Arizona, he states,

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41. The PBNDS section on "Volunteer Detainee Work" is discussed *infra* Part III. ICE's contract as of April 2015 with Akal Doyan JV at the El Paso Detention Facility states the firm adheres only to the 2008 National Detention Standards. *See* ICE, PERFORMANCE WORK STATEMENT—DETENTION AND TRANSPORTATION SERVICES [hereinafter PERFORMANCE WORK STATEMENT], *available at* http://deportationresearchclinic.org/FOIA-PWS-EP-ELOY-FL-HST-STE-TRI.pdf.

42. Contracts and disbursements are available at http://deportationresearchclinic.org/DRC-INS-ICE-FacilityContracts-Reports.html. The website will be updated with additional documents as the author receives releases pursuant to her requests for documents, pending litigation of Stevens v. DHS, No. 13-C-03382, 2014 WL 5796429 (N.D. Ill. May 6, 2014).

43. *See infra* Table Three. The estimate of total 2012 profits for CCA and GEO is based on average daily populations from data in CODY MASON, SENTENCING PROJECT, DOLLARS AND DETAINEES (2012), *available at* http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf.

44. 41 U.S.C. § 351, as amended by Pub. L. No. 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Pub. L. No. 94-489, as enacted October 13, 1976.

45. *See, e.g.*, *Florence Scope of Work,* included in the Request for Proposals ICE circulated to bidders, at 42-43, *available at* http://deportationresearchclinic.org/FlorenceSPCWorkScope Amendment_0001.pdf.

46. Although there is a general climate of coercion that imbues any request by a guard with the effect of an order, the context for the labor conditions in immigration jails is the monopoly economic power of those managing the ICE facility and the dependence on the commissary to meet basic hygiene and medical needs. While many detention facilities depend on the unpaid work of the residents, I am not aware of systemic corporal punishment. This is not just poor optics, but also more onerous for the guards than the use of threats, bribes, or the sanctions of solitary confinement.

47. Danard Interview, *supra* note 7. For more on Mr. Danard's plight see Jacqueline Stevens, *Kenneth Danard*, STATES WITHOUT NATIONS BLOG (Sept. 26, 2010), http://stateswithoutnations.blogspot.com/search/label/Danard/.

"The folks I met worked for money to call home, buy food, clothing, and hy[giene] products. Prison was kept cold, inmates were given t-shirts and had to buy through commissary, anything warmer. Diet the[re] was limited to potatoes, green beans and some mystery meat called turkey-ham . . . . In an effort to in[g]est more nutritious and palatable food one needed money."[48] The phrase "slaving wages" is used hereafter because it evokes the coercion from the monopoly authority of the single employer in the ICE detention facility and is consistent with the terminology of those paid these wages or choosing not to work in "their slave system."[49]

C. *Key Statutes and Regulations Addressing Work Performed for Private Prisons by those in Custody under Immigration Laws*

In light of these concerns, an obvious question arises: what is the statutory basis for these wages? To address this matter, this Article reviews relevant portions of the U.S. Code, Code of Federal Regulations, and agency rules and memoranda.[50]

Firms regularly violate 8 U.S.C. §§ 1589 & 1590, which prohibit forced labor,[51] and trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,[52] and also allow for the imprisonment of violators.[53] In addition, budgeting and disbursement laws and rules bearing on the legality of ICE setting the one dollar per day rate and paying for this, in at least one instance, through imprest funds (petty cash), also are brought to bear on this analysis, which emphasizes the tensions between the program as stated and the laws for compensation of unforced labor.[54] This is not to diminish the centrality of forced labor to the private prison industry, but to suggest that 8

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48. Email from Kenneth Danard to author (June 18, 2010) (on file with author).

49. *Id.* Referring to his work for the CCA Houston ICE detention facility, former ICE resident Frank Serna said of the cooking, cleaning, and maintenance done by himself and other workers in detention there: "They slave us." Interview with Frank Serna in Houston, Tex. (July 7, 2013) [hereinafter July Serna Interview]. For other examples, see *infra* Part III. After fourteen months of slaving wages, an immigration judge terminated Serna's deportation order based on the prior 2004 termination order in Dallas, where an immigration judge found Serna's evidence of U.S. citizenship credible. EOIR, FRANK SERNA (on file with author); ICE, FRANK SERNA (on file with author) [hereinafter SERNA ICE FILE].

50. These include: the Occupational Health and Safety Act (5 U.S.C. §§ 1101-2013); the Immigration Reform and Control Act (1986) (Pub. L. No. 99-603 as codified at 8 U.S.C. § 1324(a)); the Immigration Expenses Act (1950) (8 U.S.C. § 1555(d)); the Convict Labor Contracts Act (18 U.S.C. § 436, and 48 C.F.R. 22, 161 Fed. Reg. 31644, June 20, 1996; 28 C.F.R. 94-1(b); Exec. Order No. 11755, 48 C.F.R. 22.201 (1973)); the Forced Labor Act (18 U.S.C. §§ 1589-90); the Fair Labor Standards Act (29 U.S.C. § 201); the Service Contract Compliance Act (41 U.S.C. § 351 as amended by Pub. L. No. 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976); and the Federal Procurement Act (42 U.S.C. § 6962).

51. 18 U.S.C. § 1589.

52. 18 U.S.C. § 1590.

53. 18 U.S.C. § 1589(d), 1590(a).

54. *See infra* Part V. *See generally* 2 GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (3d ed. 2004).

U.S.C. § 1555(d) does not exempt private firms from compliance with the FLSA.

ICE claims that the dollar per day payments by CCA and other private prisons are legal garner support from both a 1990 Fifth Circuit decision, *Alvarado Guevara v. INS*,[55] and a portion of a recent order citing to this.[56] This Article analyzes the precedential *Alvarado Guevara* decision in light of the subsequent history of the program, a 2008 final decision by the California Occupational Safety and Health Agency (OSHA) ruling that the implemented program met its definition of an "employer/employee" relationship,[57] and three major theories of statutory construction. Neither the OSHA ruling nor the theories of statutory construction appear to overcome the program's *prima facie* violations of laws designed to protect workers and worker wages, health, and safety. The plain meaning of the relevant statutes, consequently, suggests ICE and firm noncompliance.[58]

The FLSA applies to all employer-employee relations in enterprises that are engaged in interstate commerce and have at least $500,000 in annual gross volume of sales made or business done.[59] 29 U.S.C. § 203(d) defines an "employee" as "any person acting directly or indirectly in the interest of an employer in relation to an employer."[60] The GEO Group, CCA and other prison companies far surpass the cut-off for gross sales; ICE residents do work at a range of jobs in the detention facilities under conditions that meet the definition of an "employer-employee." The FLSA applies to the federal government as well as the private sector. Pay administration under the FLSA states:

> (a) Covered. Any employee of an agency *who is not specifically excluded by another statute is covered by the Act*. This includes any person who is:
> (1) Defined as an employee in section 2105 of title 5, United States Code;
> (2) A civilian employee appointed under other appropriate authority; or
> (3) *Suffered or permitted to work by an agency whether or not formally appointed*.[61]

Those in ICE custody are "suffered or permitted to work" and not excluded from coverage by any other statute.[62] In addition to federal employment

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55. Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990).
56. *See supra* text accompany note 24.
57. ICE OFFICE OF PROFESSIONAL RESPONSIBILITY, REPORT OF INVESTIGATION, at ICE 2013FOIA-32547.004384 [hereinafter ICE RESIDENT WORKER GRIEVANCES], *available at* http://deportationresearchclinic.org/ICE-FOIA-2013-32547-501pp.pdf.
58. See, for example, the FLSA, SCA, and IRCA as analyzed throughout this article.
59. *See* 29 U.S.C. §§ 206(a), 207(a).
60. 29 U.S.C. § 203(d).
61. 5 C.F.R. § 551.103 (emphasis added).
62. *Id.*

laws, ICE and its contractors must comply with federal procurement laws as well as occupational health and safety laws. Under a reading of the plain meaning of these statutes, none provide exemptions from wage or other employment laws for work performed by those housed by ICE under immigration laws, nor does any other law or regulation.

Absent congressional action, the use of ICE resident labor consistent with the plain text of the relevant laws would allow ICE residents to work at minimum wage for up to two hours per day, with the balance of the work performed by the U.S. labor force per the conditions of the SCA. Such limits would accommodate the SCA, the FLSA, and also IRCA—all of which are incorporated into each ICE contract.[63] The federal government last defended the program in court in 1990 when it invoked the 1978 Appropriation Act, which expired in October of 1979.[64] In that case, the INS was the defendant and not a private firm.[65] This Article reviews the relevant authorities for ICE's more recent public assertions of the program's legality.[66] The most important legislative fact is that in 1979 the INS deleted the program from its budget and it no longer appeared in appropriations acts.[67]

After 1982, the INS (within the DOJ) and now ICE (within the DHS) have omitted reference to these payments from their budget submissions or public accounts of ICE expenditures.[68] 8 U.S.C. § 1555(d) does not exempt the government or its contractors from paying the minimum wage, nor does it exempt ICE and its contractors from adhering to 8 U.S.C. § 1324(a).[69] If either Congress or ICE bureaucrats want a program that pays those in ICE custody at a rate below minimum wage, then Congress needs to amend the FLSA so it exempts those working on operations central to the work of a private prison firm from minimum wage protections. Were Congress today simply to authorize a rate for 8 U.S.C. § 1555(d) below the minimum wage, this would be vulnerable to invalidation under the Constitution's Fifth, Sixth,

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63. The scholarly field of statutory interpretation is dense and rich with opportunities for considering competing political theories of governance and jurisprudence. The approaches to the questions evaluated herein are: 1) the plain meaning of the statutory texts; 2) congressional intent based on legislative history; and 3) congressional purpose, as construed by judges based on criteria and evidence largely distinct from those in the first two approaches. While, in a specific decision, any one of these approaches on closer inspection may dissolve into another, the approach here favors the first on the grounds that it is most amenable to citizens holding their government accountable. The federal government, at present, relies for its legal rationale on *Alvarado Guevara v. INS*, 902 F.2d 394 (5th Cir. 1990), that fails to accommodate the facts today and that ignores the plain meaning of the statutes and relies on its own creative construction of legislative intent and purpose. This Article reviews the history of the relevant laws and shows that the Fifth Circuit district court and appellate judges ruled based on conjecture and not historical facts and laws.

64. *See* Appropriation Act, Pub. L. No. 95-86, 91 Stat. 426 (1978).

65. *See* Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990).

66. *See infra* Part IV.A.

67. Appropriations Act, Pub. L. No. 95-431, 92 Stat. 1021, 1027 ("An Act making appropriations for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1979, and for other purposes.").

68. *See infra* Part VI.

69. 8 U.S.C. § 1555(d).

and Thirteenth Amendments, as well as for conflicting with the rate set by the FLSA.[70]

Those familiar with administrative law will recognize the scenario anticipated by the case law adjudicating between the prerogatives of the legislative and executive branches. While the Court has carved out areas of deference to administrative discretion, it also has set aside from this discretion certain laws and actions. *Chevron v. National Resources Defense Council*,[71] according to the American Bar Association, does not empower agencies to ignore statutes and regulations that apply across departments.[72] Furthermore, when a regulation or policy (e.g., leaving the setting of pay to ICE or private prisons) conflicts with a statute (e.g., explicitly delegating to Congress the rate of compensation of ICE residents and the general workforce), the latter prevails.[73] Finally, there is a general practice of courts interpreting remedial statutes broadly.[74]

Four observations inform the more detailed analysis that follows: 1) the Service Contract Act, which requires agencies to abide by the FLSA and more generous "prevailing wages," applies to all agencies and is referenced in ICE contracts; 2) the PBNDS is an agency manual—not a regulation—and thus is an object of statutory interpretation and not its basis; 3) the FLSA and OSHA are remedial laws and the implementing language of the former explicitly requires broad application; and, 4) the Trafficking Victims Protection Act prohibits firms from using forced labor.[75]

While the plain meaning of the laws in question and favored practices of statutory construction would seem to require a complete revamping of contracts relying on one dollar per day wages for private prisons, empirical research suggests judges are likely in such circumstances to intervene based on their political commitments[76] and could invoke less favored approaches, especially those relying on the imputations to the statutes in play of imagined congressional intent, purpose, or, in the case of Judge Richard Posner,

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70. *See* United States v. Langston, 118 U.S. 389 (1886) (overturning appropriation of $5,000 for salary of representative to Haiti in conflict with authorizing statute setting the level at $7,500). A more complete legal analysis appears *infra* Part III.

71. 467 U.S. 837 (1984).

72. American Bar Association, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 39 (2002) ("*Chevron* principles do not apply to agency interpretations (a) of statutes that apply to many agencies and are specially administered by none, such as the APA, FOIA, or the National Environmental Policy Act.").

73. Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949) ("It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy.").

74. LAWRENCE M. SOLAN, LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 190 (1993). A more complete discussion of relevant cases under interpretive theories of a statute's plain meaning, legislative intent, or statutory purpose appears *infra* Parts IV–VII.

75. *See infra* Part V.A.1 and note 307 and accompanying text.

76. Tom J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006).

"pragmatism."[77] This Article reports on judges using their own preferences to construe statutes more broadly than logically or physically necessary in the area of prison and immigration detention work. The approach favored here is consistent with an interpretation following the doctrine of implied repeal, whereby judges have authority to supersede a statute's plain text only when no other alternative is logically or physically possible.

One of the classic cases illustrating this approach is *Tennessee Valley Authority v. Hill*, a case in which the Supreme Court was faced with a tension between a congressional appropriation for a dam and Congress' recently passed Endangered Species Act (ESA)—a lawsuit that elevated the "snail darter" to iconic status in the annals of U.S. political discourse.[78] The Court ruled that despite the congressional authorization and appropriation for a dam, the project's threat to the survival of the snail darter, in violation of the ESA, took precedence.[79] While acknowledging that most members of Congress may have preferred the dam to the reptile, the Court did not move to interpret the issue based on this hunch:

> [W]e are urged to find that the continuing appropriations for Tellico Dam constitute an implied repeal of the 1973 Act, at least insofar as it applies to the Tellico Project. In support of this view, TVA points to the statements found in various House and Senate Appropriations Committees' Reports . . . . Since we are unwilling to assume that these latter Committee statements constituted advice to ignore the provisions of a duly enacted law, we assume that these Committees believed that the Act simply was not applicable in this situation. But even under this interpretation of the Committees' actions, we are unable to conclude that the Act has been in any respect amended or repealed. There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act.[80]

Absent any specific exclusion of the Tellico Dam from the ESA, the Tennessee Valley Authority was obligated to follow the ESA, just like any other agency.[81] In the case of the wages for those held in custody under

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77. RICHARD A. POSNER, HOW JUDGES THINK 230-268 (2008).

78. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 156 (1978).

79. *Id.* at 189.

80. *Id.* For an excellent discussion of the case see Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989), *available at* http://scholarship.law.berkeley.edu/facpubs/1533/.

81. Further context illustrates the advantages of this example. First, the Burger Court was known for its moderation. The majority opinion was authored by Chief Justice Burger and joined by Justices Brennan, Marshall, Stewart, Stevens, and White (four Republican appointees, two Democratic appointees). Charles M. Lamb & Stephen C. Halpern, *The Burger Court and Beyond*, *in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 433–62 (Charles M. Lamb & Stephen C. Halpern, eds., 1991). Moreover, the dissent by Justice Rehnquist eschews attention to the text of the ESA and advocates a more open-ended "equities" approach to statutory construction: "This Court has

immigration laws, ICE is alone in setting the rate of wages it will reimburse private prisons, and the private prisons set the wages for their ICE residents. In violation of the FLSA and 8 U.S.C. § 1555(d), Congress is playing no role in this at all.[82]

The implied repeal approach offered here is on behalf of a legislative supremacy view of these cases, one that pursues the larger goal of citizens being able to meaningfully engage with the laws their representatives pass—an objective foiled if judges fail to rely on laws' ordinary meanings.[83] By way of contrast, there is a well-developed literature on statutory interpretation premised on the observation that in certain contexts the plain meaning of the statute would, if implemented, lead to "absurd" results not contemplated by Congress.[84] However, on closer inspection many of the paradigmatic apparent hard cases, including those brought to the fore by Judge Posner in his academic writings and published opinions, yield outcomes that are entirely sensible and not "absurd" through a plain meaning analysis.[85] Importantly for the analysis that follows, the "absurd" exceptions vanish after those laws obligating law enforcement officials to perform their duties are considered. Since Judge Posner himself has authored a recent decision dismissing as absurd an FLSA lawsuit brought by those housed under post-conviction orders, it is especially important to assess his jurisprudence on this point.[86]

A cautious, text-based implied repeal approach, one that constrains judges from findings consistent with the statute based on their private findings of supposedly absurd results, provides citizens a more transparent and account-

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specifically held that federal court can refuse to order a federal official to take a specific action, even though the action might be required by law, if such an order "would work a public injury or embarrassment" or otherwise "be prejudicial to the public interest." Tenn. Valley Auth. v. Hill, 437 U.S. at 213 (citing United States *ex rel*. Greathouse v. Dern, 289 U.S. 352, 360 (1933) (finding that petitioners were not entitled to harbor rights against the federal government's authorization of public highway)). Finally, in response to the lawsuit, Congress drafted an amendment to the ESA and it passed shortly after the Supreme Court decision, a course of events that protected the rule of law if not the snail darter. Chris Clarke, Commentary, *The Endangered Species Act: 40 Years of Compromise*, REWILD (Jan. 2, 2014, 3:50 PM), http://www.kcet.org/news/redefine/rewild/commentary/the-endangered-species-act-40-years-of-compromise.html/. This implies a) the judge-crafted equities approach lost; and b) Congress is capable of weighing equities itself and does not need judges to intervene.

82. *See, e.g.*, Appropriations Act, Pub. L. No. 95-431, 92 Stat. 1021, 1027; *infra* Part VI.

83. For a more extensive explanation of this approach and its stakes see HANNA PITKIN, WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT (1973).

84. The foundational case for this doctrine is Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). For an excellent review of its role in statutory construction and new historical information see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998). *See generally* John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388 (2003).

85. The classic case of *Church of Holy Trinity* responsible for the "absurdity doctrine" itself could have, as Laurence Tribe has argued, been resolved on behalf of the Irish minister if the Court had used the statute's exception for the class of "lecturers," of which ministering is one example. *See* Vermeule, *supra* note 83, at 1896.

86. *See infra* Part VII.

able government than one in which courts insist on the discretion to make substantive findings the statute precludes. An approach that allows anyone to invoke a statute or regulation's plain meaning, particularly in statutes that bear on restraints of liberty, is vital to a society's trust of those with prison keys. John Locke, in his critique of monarchies, explains his rationale for finding legitimate only those governments based on majority rule:

> To ask how you may be guarded from harm, or injury, on that side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all of them but one, should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by *pole-cats* or *foxes*; but are content, nay think it safety, to be devoured by *lions*.[87]

It is certainly the case that laws may be passed that favor lions, but a jurisprudence hewing to laws passed by a majority, if there is universal suffrage, should favor the people over time.[88]

III. VOLUNTARY WORK PROGRAM: POLICY AND PRACTICE

The PBNDS is the contemporary government document defining the work program discussed in this Article.[89] Section 5.8 of the PBNDS, five and a half pages set in two columns of large type and without any citations to legal authorities, is the only publicly available government document characterizing the "Voluntary Work Program" affecting hundreds of thousands of people being paid one dollar per day, more or less, in service of one of the most profitable sectors of the economy.[90] The unenforceable standards are repetitive, vague, internally inconsistent, and not followed in practice. The PBNDS indicates as its primary authority for the work program a code authored by

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87. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 93 (1690).

88. For an explication on why legislatures and not courts are the most legitimate venues for settling disagreements, and the importance of statutory interpretation to political philosophy see JEREMY WALDRON, LAW AND DISAGREEMENT (1999). For an argument about Locke's recognition of individual rights in the state of nature and their being trumped by majority rule in political society see Jacqueline Stevens, *The Reasonableness of John Locke's Majority: Property Rights, Consent, and Resistance in the Second Treatise*, 24 J. POL. THEORY 423 (1996).

89. The original "National Detention Standards" came about in the aftermath of yet another hearing on the poor conditions in the INS detention centers in the 1970s and 1980s. *See infra* Part VI. The "Performance Based" nomenclature is consistent with a shift required by new budgeting procedures, whereby agencies were required to elaborate quantifiable metrics of outcome-based, and not procedural, performance. *See* CONGRESS OF THE UNITED STATES CONGRESSIONAL BUDGET OFFICE, USING PERFORMANCE MEASURES IN THE FEDERAL BUDGET PROCESS, CONGRESSIONAL BUDGET OFFICE (1993), *available at* https://www.cbo.gov/sites/default/files/103rd-congress-1993-1994/reports/1993_07_usingperformance.pdf.

90. 2011 PBNDS, *supra* note 24, at 382–87.

the American Correctional Association (ACA),[91] even though the ACA is a professional association of corrections officers and the purpose of ICE custody is not to punish, reform, or otherwise "correct" their residents.

Section A analyzes the portions of the PBNDS most relevant to assessing the program's legality. Section B reports on how ICE documents shared with Congress omit reference to the program and mischaracterize the safeguards for ICE resident workers.

A. *Policy Stated in Performance-Based National Detention Standards (PBNDS).*

1. *Highlights from the Current PBNDS Rules*[92]

Legal Work and Safety Obligations:
a) "While not legally required to do so, ICE/ERO affords working detainees basic Occupational Safety and Health Administration (OSHA) protections."[93]
b) "Detainee working conditions shall comply with all applicable federal, state and local work safety laws and regulations."[94]
c) "All detention facilities shall comply with all applicable health and safety regulations and standards."[95]
d) "1. The voluntary work program shall operate in compliance with the following codes and regulations: a. Occupational Safety and Health Administration (OSHA) regulations; b. National Fire Protection Association 101 Life Safety Code; and c. International Council Codes (ICC)."[96]

Non-dedicated IGSAs [Intergovernmental Service Agreements]:
a) Non-dedicated IGSA facilities "must conform to these procedures or adopt, adapt, or establish alternatives, provided they meet or exceed the intent represented by these procedures."[97]
b) "*Non-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the voluntary work program.*"[98]

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91. AMERICAN CORRECTIONAL ASSOCIATION, PERFORMANCE-BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES, 4-ALDF-5C-06, 5C-08, 5C-11(M), 6B-02 (4th ed. 2004).
92. *See generally Ice Detention Standards*, ICE, https://www.ice.gov/factsheets/facilities-pbnds (last visited on Nov. 13, 2015) (2000, 2008, and 2011 data) (the portions in italics duplicate the ICE style indicating changes from 2008 PBNDS).
93. 2011 PBNDS, *supra* note 24, at 382–87.
94. *Id.*
95. *Id.* at 386.
96. *Id.*
97. *Id.* at 382.
98. *Id.* at 383 (italics in original).

Program availability:
a) "Detainees shall be able to volunteer for work assignments but otherwise shall not be required to work, except to do personal housekeeping."[99]
b) "Detainees who are physically and mentally able to work shall be provided the opportunity to participate in a voluntary work program."[100]
c) "Non-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the voluntary work program."[101]

Program purposes:
a) "Essential operations and services shall be enhanced through detainee productivity."[102]
b) "The negative impact of confinement shall be reduced through decreased idleness, improved morale and fewer disciplinary incidents."[103]

Program location
a) "This detention standard incorporates the requirements regarding detainees' assigned to work outside of a facility's secure perimeter originally communicated via a memorandum to all Field Office Directors from the Acting Director of U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) (11/2/2004)."[104]
b) "*In SPCs* [Service Processing Centers], *CDFs* [Contract Detention Facilities], *and dedicated IGSAs, low custody detainees may work outside the secure perimeter on facility grounds. They must be directly supervised at a ratio of no less than one staff member to four detainees. The detainees shall be within sight and sound of that staff member at all times.*"[105]

Work Assignments
a) "Work assignments are voluntary . . . ."[106]
b) "*The primary factors in hiring a detainee as a worker shall be his/her classification level and the specific requirements of the job.*"[107]
c) "*Staff shall present the detainee's name to the shift supervisor or the requesting department head.*"[108]
d) "*The shift supervisor or department head shall assess the detainee's language skills because these skills affect the detainee's ability to*

99. *Id.* at 382.
100. *Id.* at 383.
101. *Id.*
102. *Id.* at 382.
103. *Id.*
104. *Id.* at 383.
105. *Id.*, italics in original.
106. *Id.*
107. *Id*. at 384.
108. *Id.*, italics in original.

perform the specific requirements of the job under supervision."[109]
e) "*Inquiries to staff about the detainee's attitude and behavior may be used as a factor in the supervisor's selection.*"[110]
f) "Detainees may volunteer for temporary work details that occasionally arise. The work, which generally lasts from several hours to several days, may involve labor-intensive work."[111]
g) "Detainees who participate in the volunteer work program are required to work according to a schedule. The normal scheduled workday for a detainee employed full time is a maximum of 8 hours daily, 40 hours weekly."[112]
h) "Unexcused absences from work or unsatisfactory work performance may result in removal from the voluntary work program."[113]
i) "A detainee may be removed from a work detail for such causes as: 1. unsatisfactory performance; 2. disruptive behavior, threats to security, etc.; 3. physical inability to perform the essential elements of the job due to a medical condition or lack of strength; 4. prevention of injuries to the detainee; and/or 5. a removal sanction imposed by the Institutional Disciplinary Panel for an infraction of a facility rule, regulation or policy."[114]
j) "The detainee is expected to be ready to report for work at the required time and may not leave an assignment without permission."[115]
k) "The detainee may not evade attendance and performance standards in assigned activities nor encourage others to do so."[116]

Compensation
a) "Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy."[117]
b) "The compensation is at least $1.00 (USD) per day."[118]
c) "The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released."[119]

Procedures for Workers to Challenge "Unfair" Treatment
a) "Detainees may file a grievance to the local Field Office Director or facility administrator if they believe they were unfairly removed from work, in accordance with standard '6.2 Grievance System.'"[120]

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109. *Id.*, italics in original.
110. *Id.*, italics in original.
111. *Id.*
112. *Id.* at 385.
113. *Id.*
114. *Id.*
115. *Id.* at 386.
116. *Id.*
117. *Id.* at 385.
118. *Id.*
119. *Id.*
120. *Id.*

2. *Prima Facie De Jure Questions*

The PBNDS uses terms of art that characterize an employer-employee relation under the FLSA and also IRCA, and also implies OSHA's applicability, but it does not overtly reference either the FLSA or IRCA, and specifically exempts ICE from an obligation to protect worker rights under OSHA.[121] For instance, the PBNDS references "hiring a worker"; the assessment of "the detainee's language skills as it affects the detainee's ability to perform the specific requirements of the job under supervision"; a requirement to work "according to a fixed schedule," with failure to do so a cause for firing; and a normal scheduled work day of no more than eight hours.[122] Having covered all the requirements of the definition of an employee-employer relation in the FLSA and contemplated by IRCA, and providing no legal authority for an exemption, including 8 U.S.C. § 1555(d), the PBNDS nonetheless indicates compensation of "$1.00 per day."[123]

The document tells contractors that the program "shall operate in compliance with OSHA" and also that OSHA may not be enforced.[124] OSHA compliance requires engagement with OSHA's non-discretionary site reviews, assessments, and whistleblowing opportunities, as well as compensation for worker injuries, all of which ICE denies ICE residents.[125]

The document allows "non-dedicated IGSAs," i.e., typically county jails with a wing rented out to ICE, to "establish alternatives [to the work program], provided they meet or exceed the intent represented by these procedures."[126] However, there is no reference to any statement or guidance as to the alternatives. Does this include the ICE resident participation in the "chain gangs" of Butler County, Ohio,[127] off-the-book imprest payments at El Centro,[128] the payments of food at the Atlanta City and Yuba facilities?[129] How many of the procedures may be ignored? Which ones must be followed?

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121. 2011 PBNDS, *supra* note 24, at 382–87.

122. *Id.* at 384–85.

123. *Id.* at 385.

124. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, (codified as amended in 29 U.S.C. § 15 (1970)). For operational details, please see *Occupational Safety & Health Administration*, U.S. DEPARTMENT OF LABOR, http://www.osha.gov/ (last visited Feb. 9, 2016).

125. ICE RESIDENT WORKER GRIEVANCES, *supra* note 57 (CAL-OSHA finding ICE violated safety laws, following the electrocution of an ICE resident on a work detail).

126. 2011 PBNDS, *supra* note 24, at 382–87.

127. Press Release, Sheriff Richard K. Jones, Butler County Sheriff's Office, BCSO Jail "Chain Gang" Makes Major Haul (Apr. 10, 2009), *available at* http://www.butlersheriff.org/phpBB/viewtopic.php?p=377&sid=2b152d3c61bf56a5d3b8d878ff6aed9e.

128. El Centro Monthly Imprest Payments, 2000-2010, *available at* http://deportation researchclinic.org/ElCentro-FOIA-2011-113921.pdf (records for ICE work programs at El Centro, Cal.; Florence, Ariz.; Lumpkin, Ga.; N.Y.C., N.Y. responsive to request by author for work program records).

129. ICE Correspondence and Materials Responsive to Inquiries by Ian Urbina, Responsive to request under FOIA by Jacqueline Stevens, 2015-ICFO -00563 at 96 [hereinafter 2015-ICFO-00563], *available at* http://deportationresearchclinic.org/FOIA-2015-ICFO-00563-UrbinaICE.pdf ("ICE is aware of two detention facilities, Atlanta City and Yuba . . . that provide extra food as one type of compensation.").

Absent criteria, it is impossible to contemplate either a successful alternative or how it might be evaluated for about half of all ICE residents held among three-quarters of facilities holding people for over seventy-two hours.[130]

The PBNDS indicates that detainees "*will* be able to volunteer for work assignments" and also states "[n]on-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the program."[131]

The compensation policy in one place states that it is "at least one dollar per day," but in another that it is "in accordance with the facility's standard policy."[132] These two sentences can be read as meaning that all facilities compensate people at the rate of at least one dollar per day. However, since the non-dedicated IGSAs are not obligated by these requirements, their compensation policies could (and do) range from paying people in food to simply ordering work and locking people up in solitary confinement if they fail to comply. Also, the PBNDS allows for a payment rate higher than the one dollar per day last authorized by Congress in 1978. This indicates that ICE is not using the fiscal year 1979 Appropriation Act—limiting payments to "no more than one dollar per day"—as the authority for its compensation programs,[133] thus unmooring the program from 8 U.S.C. § 1555(d). The PBNDS references no other statute, regulation, or rule for the legal authority for determining the rate of compensation.

3. *Implementation, De Facto Violations*

In addition to questions about the text of the document, there are significant discrepancies between how ICE represents this program in the PBNDS and how the program is actually implemented in its contracts and facility documents.[134]

For instance, the incentives and management for the work programs of the non-dedicated IGSAs appear to be based upon ad hoc decision-making. In some locations, residents are paid one dollar per day, per the contracts indicating rates of reimbursements from ICE.[135] In other locations, the IGSA facility may provide this payment, despite the program not being mentioned

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130. "The other 50 percent of the population is detained primarily in non-dedicated or shared-use county jails through IGSA." DR. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009), *available at* https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. For data on the absolute number of non-dedicated IGSA facilities see Table 1 in 77 Fed. Reg. 244 (Dec. 19, 2012) (indicating 74 non-dedicated IGSAs, 6 Service Processing Centers (SPC), 7 Contract Detention Facilities (CDF), and 7 Dedicated IGSAs).

131. 2011 PBNDS, *supra* note 24, at 382–87 (emphasis added).

132. *Id.*

133. *See infra* Part V.

134. *See infra* Part IV.

135. *See, e.g.*, the IGSA contracts available on the author's webpage at http://deportationresearchclinic.org/DRC-INS-ICE-FacilityContracts-Reports.html.

in the particular IGSA contract.[136] Elsewhere, the ICE resident workers may be paid with food and other perks unavailable to the general population.[137] Or, they may simply work because they are ordered to do so, with or without *de minimis* compensation.[138]

The contract for the Florence facility reveals the purpose of the work program was to provide chattel labor to Asset Protection and Security Services.[139] The ad hoc nature of the program's implementation across facilities suggests that the program's sole objective is to suit the work requirements of the facilities, and not to boost ICE residents' morale. If the latter were the objective, then the work opportunities would be based on the characteristics of the ICE residents and not the employment needs of the contractors. Program variation would reflect morale and disciplinary problems, not the work requirements of the contractors. The contracts, Requests for Proposals (RFPs), Requests for Quotations (RFQs), and Requests for Information (ROIs) reviewed individually and together reveal that detainee labor is a chief consideration in contract budgeting and bidding.[140]

ICE claims that the program is for "reduced idleness, improved morale, and fewer disciplinary incidents."[141] But if ICE resident morale were the genuine goal of the program, then ICE would make sure that all of those in its custody have the benefit of participation. When firms need to exploit respondents in ICE custody to save money, they do so, and when firms or government agencies can rely on the exploitation of prisoners, then ICE drops the pretense of concern about idleness and morale. In more extreme cases, guards will order ICE residents to work for pay in-kind or no pay at all.

4. *ICE Resident Work Program Rates of Participation, Profits, Labor Violations*

To show the extent to which firms save money through these worker program arrangements, this section reviews the disparities between federal

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136. *See, e.g.*, STEWART DETENTION CENTER ANNUAL REVIEW, *supra* note 6. In the section where other IGSAs' reference detained work payments of one dollar per day, the CCA Stewart County, GA, IGSA contract for 2006-09 omits reference to this program. *Id.*

137. The government's legal defense of the Volunteer Work Program in the PBNDS is discussed *infra* Parts IV–VI. An IGSA facility might compensate labor through barter arrangements rather than cash payments but this would not exempt them from either IRCA mandates against hiring undocumented workers, or the requirements of OSHA or the FLSA.

138. Menocal Complaint, *supra* note 32, at 13 ("Defendant violated the federal Forced Labor statute when it coerced Plaintiffs and others to work cleaning pods for no pay.").

139. PERFORMANCE WORK STATEMENT, *see supra* note 41 ("The Detainee Volunteer Work Program will be provided as a Government-furnished service for quantities of any given period.").

140. Indeed ICE on behalf of GEO has invoked as a rationale for not disclosing contract information revealing payments for detainee wages a FOIA exemption for "confidential commercial information, the disclosure of which is likely to cause substantial harm to the competitive position of the person who submitted the information . . . ." Letter from Catrina Pavlik-Keenan to author (Sept. 21, 2014) (ICE Case Number 2013FOIA07484), *available at* http://deportationresearchclinic.org/2013-FOIA-07484-cov.pdf/.

141. 2011 PBNDS, *supra* note 24, at 382–87.

contract and wage laws; reviews the actual outlays on ICE resident labor for two facilities; and connects the disparities with the terms of additional contracts, including the exchange of bidding firm questions and ICE responses. Payments for resident labor vary by the staffing needs of the facilities.[142] Inferring from amounts budgeted and spent at various facilities in recent years, as well as interviews with those who have been in ICE detention, it appears as though on any given day 15-44% of those detained at dedicated ICE facilities receive one dollar per day for work performed, and that about 50% of all those held in such facilities for more than a few days[143] will be employed at some point during their detention.[144]

Extrapolating from this to the entire 34,000 people Congress has required ICE to lock up each night,[145] would mean about 7,500 people at work daily

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142. For more on the profits driving immigration detention see SILKY SHAH, MARY SMALL & CAROL WU, DETENTION WATCH NETWORK, BANKING ON DETENTION: LOCAL LOCKUP QUOTAS AND THE IMMIGRANT DRAGNET (2015), *available at* http://detentionwatchnetwork.org/sites/default/files/Banking_on_Detention_DWN.pdf. Also of note are the substantially lower per diem charges for running the facilities that appear consistently in the non-dedicated IGSA contracts—about 40% to 60% less than the payments to CDFs, SPCs, or dedicated IGSA facilities. Of special interest is the $290 million IGSA ICE ran through the city of Eloy, Arizona for pass-through funds for CCA to build and manage an immigration facility dedicated to families in Dilly, Texas. Lora Neu, *City of Eloy Takes on $290M Deal with Ice*, ARIZ. CITY INDEP. (Oct. 1, 2014), http://www.trivalley.com/arizona_city_independent/news/city-of-eloy-takes-on-m-deal-with-ice/article_850b65f2-48e8-11e4-a406-db2b638da61.html/. The ACLU indicated that a barber at Stewart CCA was paid three dollars per day. *See* ALEXANDRA COLE, PRISONERS FOR PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 57 (ACLU of Georgia 2012).

143. During Fiscal Year 2010, 90% of the ICE detainee population was housed for two months or less, 51% of that population was housed for two weeks or less, and 25% was housed for one to three days. Less than 1% of the population remained for more than one year. DEP'T OF HOMELAND SEC., DENVER REQUEST FOR PROPOSALS, STATEMENT OF OBJECTIVES 2 (2011), *available at* http://deportationresearchclinic.org/DenverAttach_3_SOO.pdf.

144. *See* 2015-ICFO-00563, *supra* note 129, at 132–45. In October of 2010, $6,081 was disbursed by Asset Protection and Security Services, Ltd. (APSS) for its "Detainee Pay-Work Program" at the El Centro Service Processing Center, a 450 bed capacity facility about a two-hour drive east from San Diego. El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128. The APSS contract was to manage the El Centro facility and to pay those in its custody "1.00 per day per detainee." DEP'T OF HOMELAND SEC., DETENTION SERVICES SOLICITATION NUMBER: HSCEDM-09-R-00008, 003 (2009), *available at* https://www.fbo.gov/index?s=opportunity&mode=form&id=bab95d17227113f8db7e219f9df5fc06&tab=core&_cview=1. Mathematically, it is possible that for the $6,081 spent on resident labor between 196 and 6,081 individuals were paid one dollar per day for between one to thirty-one days of labor in October ($6,081/31 days = 196 people and $6,081/one dollar per day = 6,081 days of individual employment). However, the low end is unlikely for several reasons. First, ICE standards prohibit more than five days of work per week; second, ICE data indicate turnover among the population inconsistent with this. It is mathematically possible that the legally minimum 304 people ($6,081/$20) who started work on October 1, 2010 would all be detained on October 31, 2010 but practically unlikely. El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128. This range is consistent with the median in the facilities characterized in an ICE 2014 analysis. Of the twenty-eight Stewart CCA residents interviewed, twelve (or 43%) reported working there. COLE, *supra* note 142, at 15; *see also infra,* Tables One and Two.

145. Department of Homeland Security Appropriations Act of 2014, H.R. 2217, 113th Cong. § 544 (2013) [hereinafter 2014 DHS Appropriations Act]. Note that ICE in recent years has been detaining people in numbers approximating this target (34,000 FY2013; 34,260 FY2012; 33,360 FY2011). U.S. DEP'T OF HOMELAND SEC., ANNUAL PERFORMANCE REPORT: FY 2012-2014 [hereinafter 2012-2014 DHS ANNUAL PERFORMANCE REPORT], *available at* http://www.dhs.gov/sites/default/files/images/DHS%20FY%202012-FY%202014%20Annual%20Performance%20Report.pdf.

for the private prison firms for one to three dollars per day,[146] a figure that excludes the forced labor across all facilities, and discussed further below.[147]

Moreover, were APSS[148] paying its El Centro facility workers pursuant to the SCA, the firm would have paid about $583,000 for the month of October 2010 alone, not the recorded $6,081. Over the course of June 2009 to May 2010, the payments to thousands of immigrants and U.S. citizens held in El Centro alone, paid by federal minimum wage and not at California's minimum wage level per the FLSA and the SCA, would cost the firm $3.86 million (at eight hours per day), and not the $63,426 actually spent on wages during that 12-month period.[149] For payments consistent with the FLSA, SCA, and IRCA, the total expenditures for the year would have been over

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146. This calculation uses ICE's assumption of 25,000 ICE residents in private facilities each day, and the average time in detention in ICE data, as well as a maximum $20/month available for each individual so employed and .25 ADE. *See infra* Table Two (calculation). This takes into account ICE claims of 5,500 resident-workers employed daily for pay. 2015-ICFO-00563, *supra* note 129, at 59; MASON, *supra* note 43, at 22 (data on ADPs by private firm); DEP'T OF HOMELAND SEC., DENVER REQUEST FOR PROPOSALS, STATEMENT OF OBJECTIVES 2 (51% released before 2 weeks); 2011 PBNDS, *supra* note 24, at 385 (prohibits more than five paid shifts/week); APSS monthly reports for the El Centro facility show regular disbursements in increments of $20, consistent with one individual's monthly pay (five days/week for four weeks/month). These are extrapolations from several sources and not restatements of the 2014 government data on worker participation for three reasons. First, the 5,500 figure does not capture labor that is coerced or in exchange for food or perks. *See infra* Part III.B. Second, invoices responsive to ongoing FOIA litigation show higher rates of participation than those indicated in the data ICE released to Urbina. *See infra* note 155; *see also* Stevens v. DHS, No. 13-C-03382, 2014 WL 5796429 (N.D. Ill. May 6, 2014), *available at* http://deportationresearchclinic.org/FOIAComplaint05062014.pdf. Finally, agency officials are prone to propaganda in their presentations to Congress and the press; thus any aggregate numbers the agency releases are not reliable in themselves; *see also* NAT'L IMMIGRANT JUSTICE CTR., THE IMMIGRATION DETENTION TRANSPARENCY & HUMAN RIGHTS PROJECT: FREEDOM OF INFORMATION ACT LITIGATION REVEALS SYSTEMIC LACK OF ACCOUNTABILITY IN IMMIGRATION DETENTION CONTRACTING (2015) [hereinafter IMMIGRATION DETENTION TRANSPARENCY & HUMAN RIGHTS PROJECT REPORT], *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf (revealing ICE advised contracted compliance inspectors to provide favorable ratings despite findings of noncompliance with the PBNDS). Compare, for instance, 2012-2014 DHS ANNUAL PERFORMANCE REPORT, *supra* note 145, that states it is committed to new standards that will improve conditions above those of criminal confinement, with the information on the obscure FedBiz.com bidding site containing ICE March 2014 Response to Questions on Port Isabel Contract that indicates ICE is aware that facility does not comply with the American Correction Association standards for bed space, PORT ISABEL DETENTION CENTER SITE VISIT, *available at* http://deportationresearchclinic.org/PIDC_Site_Visit_Questions_Final.docx.

147. Data released by ICE indicate average daily work program participation of 5,500—or 2,070,500 person workdays per year. ICE data on average time in detention suggest about 185,000 people participate in the work program for one dollar per day or "extra privileges" each year that ICE reports; it is very important to note that the ICE data excludes dozens, possibly hundreds of IGSAs; and there are disturbing discrepancies in the data it does report. Substantial variations for similar size facilities run by the same private firms, as well as median data, suggest undercounts are the culprit (e.g., CCA reports only 17% participation at the Stewart facility with a population of 1,452, while its Eloy CDF with a population of 1,489 has a 27% rate of participation. Likewise, GEO states only an 8% participation rate for its Aurora, Denver CDF with a population of 414 and 28% participation rate at its Broward County, Florida facility with a population of 548. El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128.

148. APSS is exploiting workers but at least this company and the ICE ERO officers supervising it are compliant with the Freedom of Information Act, unlike CCA and GEO. Both firms consistently flaunt the reporting and document release policies required by 5 U.S.C. § 552 and its interpretations by agencies and the courts, including the omission of the similar records requested of Stewart CCA.

149. *See* El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128, at 008.

$5 million.[150]

An ICE-produced table for the Krome, Miami CDF reveals how ICE Enforcement and Removal Operations (ERO) and firms running the ICE facilities see those in deportation proceedings as the key to maintaining their essential operations of laundry, food service, and numerous other services from labor paid one dollar per day.[151] The Krome Operational Parameters for Food Service details the meal shifts, hours of meal service, and the number of seats per meal.[152] It also indicates the number of individuals per shift who are paid according to federal laws, and those employed for one dollar per day, so that firms bidding can better anticipate labor demand and supply going forward.[153] Table I of the Krome Attachment, attached hereto as Appendix I, shows that in 2012, Akal Security was paying eight workers, including two supervisors, for the 4:30 a.m. to 12 p.m. shift, and six workers for the 11 a.m. to 7 p.m. shift according to the requirements of the SCA.[154] But Akal Security also was employing at one dollar per day ten ICE residents for each of the two shifts, a ratio of 14:30 of SCA compliant to SCA non-compliant employees for its Krome CDF food service each day.[155]

The thirty food workers employed at the Krome facility by Akal Security at one dollar per day were calculated into the contract itself at a cost of exactly $10,950.[156] This, and other statements, make it clear that firms are negotiating contracts based on the availability of the employment of those in ICE custody at one dollar per day wages, thereby restricting local residents who are not in ICE custody from competing for these jobs. Such employment would appear to be prohibited under current laws for those in ICE custody with a final removal order—such as being within the country without legal

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150. *See infra* Table One.

151. RFPs are available on the Sources page for this Article. *See* Source Materials, *supra* note 6. DHS ICE RFPs are online documents specifying the detention services required for specific regions or existing facilities. They are publicly available, per federal procurement laws, and authorized by regional offices. The contracts bear many similarities but also have some differences, including for the funding of the detainee work program and the level of details released online. Some regions do not release the contract attachments online, even though they are part of contract. An ICE FOIA response to a request for the ICE contracts since 2008 with the City of Adelanto unlawfully withheld these attachments; following an appeal the request was remanded for the purpose of removing these redactions. Letter from Abby Meltzer, Chief, Government Information Law Division, ICE to author (Oct. 28, 2013), OPLA Case No. 14-971, *available at* http://deportationresearchclinic.org/DNS-INS-ICE-FacilityContracts-Reports.html. The contracts typically stretch out for several years; the Krome contract has renewals through 2024. One method to locate these contracts is the Service Contract Inventory, which lists all DHS contracts. DEP'T OF HOMELAND SEC., FY2012 SERVICE CONTRACT INVENTORY, *available at* http://www.dhs.gov/sites/default/files/publications/Service_Contract_Inventory_DHS_2012_0.xls (2013).

152. *See infra* Appendix I.

153. *Id.*

154. *Id.*

155. *See id.* (The chart indicates two shifts staffed by outside workers alongside ICE residents; the dinner shift is staffed only by ten ICE residents.).

156. 30 food workers x $1 per day x 365 days in a year. *See* DEP'T OF HOMELAND SEC., REQUEST FOR PROPOSAL: DETENTION MANAGEMENT, TRANSPORTATION AND FOOD SERVICES FOR THE KROME SERVICE PROCESSING CENTER (SPC), MIAMI, FL, SECTION A-B, 13 (2012), *available at* https://www.fbo.gov/utils/view?id=789f1944a87d9e65662896c1b43495af.

authorization under 8 U.S.C. § 1324a—and in violation of the SCA and FLSA for those whose status is pending final determination.[157]

Similarly, the 2009 El Centro RFP facilities listing of employment positions and the number of employee shifts per week indicates the facilities requirements for guards and transportation, maintenance, janitorial work, housekeeping, food services, barber services, painting, and admitting detainees.[158] The RFP states that each week the contractor would compensate 1,221 shifts at wages determined either by Collective Bargaining Agreements or federal rules on wages, and an additional 763 individual days per week of work by detainees at one dollar per day.[159] The El Centro "Imprest Reports" indicate compensation for the following categories of work, in descending order of frequency mentioned: Detention, Kitchen, Diesel Shop.[160]

In addition to the accounting data for reimbursements from ICE, the "Questions and Answers" between the government and firms[161] reveal the relevance of the resident work force to the corporations' bidding.[162]

From the third set of RFP exchange between ICE and private firms ascertaining the availability of facility residents to perform facility work, it is clear that both ICE and the firms contemplate an employer/employee relation:

> **11. Does the contractor provide managers/workers for any facility maintenance functions?**
> **A. No.**
> **12. Assuming detainee cleaning crews (in addition to detainees) clean housing units, there does not appear to be a post associated with 'houskeeping' [sic]. Does the contractor provide any janitorial labor/equipment/supplies, or a detainee labor supervisor?**

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157. 8 U.S.C. § 1324a (1952) ("(a) Making employment of unauthorized aliens unlawful (1) In general It is unlawful for a person or other entity—(A) to hire, or to recruit or refer for a few, for employment in the United States an alien knowing the alien is an unauthorized alien . . . or (B) to hire for employment in the United States an individual without complying with the requirements of subjection (b) of this section or (ii)[hiring agricultural workers].").

158. DEP'T OF HOMELAND SEC., EL CENTRO SPC, SOLICITATION NUMBER ACL-0-R-0004, *available at* http://www.ice.gov/doclib/foia/contracts/acl2c0003asofp00027akalsecurity.pdf.

159. *Id.*

160. *See* El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128.

161. These often occur for large, multi-year contracts to help the bidding companies clarify the government's expectations and the terms of the contracts; they may also lead to RFP revisions, as was the case for the descriptions of the ICE resident work force availability discussed below.

162. *See Florence Scope of Work*, *supra* note 45. Please note that these pages include three sets of questions and answers. The first set refers to "QUESTIONS AND ANSWERS FROM 4-24-01 PRE-PROPOSAL CONFERENCE AND SITE VISIT FOR SOLICITATION ACL-0-R-0004" and appears to have been submitted in 2000. It has 19 pages; the second has 95 (it has a cover sheet dated June 4, 2001); the third has 110 (titled HSCEDM-09-R-00008, the RFP for which was issued Jan. 14, 2009 and modified Feb. 2, 2009), and the fourth has 100 (no date or other reference, the numbering is contiguous with previous questions and includes a question referencing the 2009 Collective Bargaining Agreement Health and Welfare increase, indicating they were posed in the same time frame as the previous questions). These documents are not clearly organized. For instance, DHS included information from the Florence SPC RFP in the materials for the El Centro RFP.

> **A: The offeror is responsible for providing a solution to the requirements in the RFP. Equipment and supplies are provided by the Government. The contractor is responsible for oversight of the detainee workforce.**[163]

The government states it will not be responsible for maintenance and that the private firms are to supervise the residents and enlist them for the entirety of this work.[164]

Facility Coverage

In some places even the one dollar per day payments are not provided, and instead ICE residents work in exchange either for small perks or to avoid "the hole."[165] Although one portion of the PBNDS indicates that non-dedicated IGSAs must develop a work program, many do not, or those that do develop programs that are even more humiliating and coercive than those appearing in the PBNDS. A study prepared for Congress by Professor Craig Haney in 2005 found nineteen of twenty-one ICE detention facilities responding to survey questions indicated, "detainees were allowed to work."[166] But only twelve provided pay and all at one dollar per day.[167]

None of the non-dedicated IGSA contracts reviewed for this study indicate the one dollar per day payments, though the facilities may provide these payments for work performed nonetheless.[168] Other non-dedicated IGSA facilities have no ICE work program, but largely rely on the labor of inmates for food service and laundry operations.[169] At Houston CCA in January 2014,

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163. HSCEDM-09-0008 Questions and Answers, Set 3, 2009, *available at* http://deportationresearchclinic.org/HSCEDM09-R-0008Questions_and_Answers.pdf.

164. For more from these exchanges, *see infra* Appendix Two. Further evidence of the detainees as a component of the facility's labor force is a form to indicate the residents' completion of training a requirement that is consistent with a facility's systematic reliance on resident labor for its staffing needs. There are eleven such forms, one for each "barrack of workers," e.g., "Alpha North Barrack Workers." The form states, "The Worker Roster must be turned into the Detainee Funds Manager daily." The form has at the top left hand corner the logo for ATSI and has the form number QAM20111022. El Centro's "Detainee Worker Roster" form states: "THE DETAINEES LISTED BELOW PERFORMED WORK FOR THE U.S. GOVERNMENT ON: August 31, 2011". *See* El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128.

165. Sept. Martinez Letter, *supra* note 4; Menocal Complaint, *supra* note 32, at 3; COLE, *supra* note 142, at 158, 191; Tiznado Interview, *infra* note 174 and associated text.

166. Craig Haney, *Conditions of Confinement for Detained Asylum-seekers Subject to Expedited Removal*, *in* STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, AS AUTHORIZED BY SECTION 605 OF THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998, 178 (2005), *Submitted February 2005, Appendix C, Committee on the Judiciary, House, Interior Immigration Enforcement Resources, Hearing before the Subcommittee on Immigration, Border Security, and Claims of the H. Comm. On the Judiciary*, 109th Cong. App. C (2005).

167. *Id.*

168. These included those with Pinal County, Arizona (Sheriff operated) and Polk County, Texas (CEC operated). *See* Source Materials, *supra* note 6.

169. The difference between the CDFs and the IGSAs is noted in a 2008 inspection checklist for the IGSA governing the ICE operations at the CCA Stewart facility: "Detainees in CDFs are paid in accordance with the 'Voluntary Work Program' standard. Resident workers at IGSAs are subject to local and state rules and regulations regarding detainee pay." The legal basis for this qualification is

Robinson Martinez reported perks for paid and unpaid dorm porters of "three or four pieces of chicken on chicken day," instead of the standard one piece per resident.[170] An IGSA contract signed in 2011 for York County, Pennsylvania stated, "[f]ood will never be used as a reward or punishment,"[171] indicating that while perks of extra food violates policy, it likely is a de facto practice, if not at York County then elsewhere.[172]

A form accompanying an ICE facility contract, as well as a checklist, indicate that ICE has no problem with IGSAs opting out of the work program, despite this violating requirements in the PBNDS.[173] Someone held at the Florence Service Processing Center in southern Arizona could be paid for janitorial cleaning or a variety of jobs in the kitchen, but less than a mile away in a wing at the Pinal Adult Detention Center (PADC) rented out to ICE through an IGSA, the janitorial cleaning would be done on the order of the guards by the ICE wing residents on a rotating basis, while the kitchen work is performed by outside workers and the criminal inmates housed in the same facility.[174] Failure to work as ordered results in infraction points and

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unclear. Among the many regulations referenced in the ICE contracts is Federal Acquisition Requirement, Convict Labor Subpart 22.2 instructing the contractor that "The rates of pay and other conditions of employment will not be less than those for work of a similar nature in the locality where the work is being performed." It also states: "The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society." STEWART DETENTION CENTER ANNUAL REVIEW, *supra* note 6. However, this requirement does not explain the discrepancy: it is a regulation that should apply across facilities and not only those owned or managed by non-federal agencies. The reference to the regulation is moot; ICE residents are not "convicts," one of a litany of inconsistencies in the program *de jure* and its *de facto* rules and practices.

170. Sept. Martinez Telephone Interview, *supra* note 5.

171. EROIGSA-11-0007 INTERGOVERNMENTAL SERVICE AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AND REMOVAL OPERATIONS AND YORK COUNTY 40 (2011) [hereinafter YORK COUNTY IGSA], *available at* https://www.ice.gov/doclib/foia/isa/yorkcountypaprison-igsa-11-0007.pdf.

172. *See supra* note 128 (Atlanta City and Yuba); *infra* note 175 and associated text (Mira Loma); *infra* note 185 and associated text (Houston CCA).

173. Detainee Volunteer Work Program Training Form (If detainees are used), HSCEDM-09-R-00008 (Apr. 9, 2008 through Dec. 31, 2011) (Attach. 6, § 1k), *available at* http://deportationresearchclinic.org/hscedm-09-r-0008.pdf/.

174. The specific examples were noted in 2013 by Esteban Tiznado, held at both facilities, and confirmed by ICE in its contract materials. The Pinal County jail held on behalf of ICE a daily average of 300 men and 158 women for the twelve months preceding the inspection on August 5-7, 2008. The form includes a list of thirteen "Detainee Services," from "Admission and Release" to "Voluntary Work Program," for which the inspectors are to check among the following boxes: "1. Acceptable; 2. Deficient; 3. At Risk; 4. Repeat Finding; and, 5. Not Applicable." This last box is the one checked for assessing the "Voluntary Work Program." DEP'T OF HOMELAND SEC. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE DETENTION FACILITY INSPECTION FORM FOR PINAL ADULT DETENTION FACILITY 2 (2008), *available at* http://www.ice.gov/doclib/foia/dfra-ice-dro/pinaladultdetentionfacilityflorenceazaugust572008.pdf. A similar practice seems to be in place at the Salt Lake City Henderson Detention Center, a facility not referenced in the 2014 ICE data on work program participation. DEP'T OF HOMELAND SEC. IMMIGRATION AND CUSTOMS ENFORCEMENT OFFICE OF PROFESSIONAL RESPONSIBILITY, COMPLIANCE INSPECTION, ENFORCEMENT AND REMOVAL OPERATIONS, SALT LAKE CITY FIELD OFFICE, HENDERSON DETENTION CENTER 18 (2011), *available at* http://www.ice.gov/doclib/foia/odo-compliance-inspections/2011hendersondetentioncenter-henderson-nv-oct25-27-2011.pdf ("Inmate workers provide assistance. ICE detainees do not work in food service."). The Pinal County, Florence, Arizona facility closed in 2014 after Pinal County pressed ICE to match the per diem payments made to CCA via the IGSA with neighboring Eloy. Matthew Hendley, *Ice*

confinement in cramped quarters with no sunlight, a cold temperature, little recreation, and minimum contact with other residents.[175] CCA guards at Stewart CDF retaliated against Omar Ponce "for refusing to work and for organizing a work strike in 2010" by placing him in solitary confinement.[176] The report also noted that kitchen workers were punished en masse when they "wanted to stop working."[177]

As alternatives to payment, residents employed by the Los Angeles County Mira Loma facility received "special privileges" of "living in special barracks with large screen televisions and vending machines, a special meal at least once a week, and extended visiting hours."[178] An American Bar Association memorandum reporting on a site visit noted that a resident "likened the unpaid work structure to slavery."[179]

Frank Serna was held in Houston CCA for fourteen months until his deportation order was terminated in 2013 based on the government's lack of evidence of his alienage and his own evidence of U.S. citizenship.[180] During his time in detention, Houston CCA employed him for eight-hour shifts of kitchen and hall cleaning duties. Mr. Serna stated, "That work was not volunteer [work in the kitchen]. That was mandatory. Other work was volunteer."[181] According to Mr. Serna, once one indicated an availability to work, CCA guards would assign positions and work shifts.[182] The only bargaining leverage for procuring more desirable positions and shifts was to "volunteer" to do extra work.[183] This was required because CCA did not have sufficient resident labor for janitorial tasks.[184] Serna said that, in exchange, CCA gave him food prepared for the guards.[185] Residents preferred the

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Removes Immigrant Detainees from Pinal County Sheriff Paul Babeu's Jail, PHOENIX NEW TIMES (July 25, 2014), http://www.phoneixnewtimes.com/news/ice-removes-immigrant-detainees-from-pinal-county-sheriff-paul-babeus-jail-6644205/.

175. Telephone Interviews with Esteban Tiznardo (2013-2014).

176. COLE, *supra* note 142, at 57.

177. *Id.*

178. AMERICAN BAR ASSOCIATION, COMMISSION ON IMMIGRATION, LATHAM AND WATKINS DELEGATION ANNUAL REVIEW, MIRA LOMA, Confidential File No. 502130-0018, 2006, *available at* http://deportationresearchclinic.org/MiraLoma-Annual-Review07172006.pdf. ICE failed to renew its contract and in 2012 the residents were all moved to Victorville, California, a prison-industrial area over two hours from San Diego, the nearest city. ICE has a dedicated IGSA contract with the city of Adelanto for the new facility. A federal employee who worked at the Mira Loma site explained that ICE was not willing to pay the union wages for Los Angeles County and found GEO, Inc. offered a better deal. Telephone Interview with Anonymous Source (July 2012).

179. *Id.* at 20 ("Most detainees did not seem upset with the lack of payment."). It is extremely difficult to imagine anyone being sanguine about payments of one dollar per day for their work. Leaving aside the questionable accuracy of statements elicited by a group of white shoe lawyers who lack training in ethnography (and provide no information on the circumstances of their interviews), it is plausible that the perks provided were worth more to these ICE residents than one dollar per day, and hence the absence of complaints was relative to a worse alternative.

180. July Serna Interview, *supra* note 49; *see also* SERNA ICE FILE, *supra* note 49.

181. *Id.*

182. *Id.*

183. July Martinez Interview, *supra* note 2.

184. Martinez independently reported the lack of custodial labor in some pods. *Id.*

185. July Serna Interview, *supra* note 49.

kitchen work because it gave them access to food.[186] For instance, when returning trays Serna stated he was allowed to keep those milk cartons not consumed by the residents he served which otherwise was a violation of facility rules.[187]

Worker Health and Safety Enforcement Procedures

As noted in the case of Robinson Martinez and others, if your employer is your jailer, grievances about working conditions are more likely to yield retaliation than redress.[188] Other anecdotal reports along these lines find confirmation in ICE's internal audits.[189] Very few grievances are recorded and, with rare exception, the determinations—made by the guards—favor the guards. For instance, the CEC-run IGSA facility in Livingston, Texas held thousands of ICE residents, but reported a total of three grievances.[190] This outcome is consistent with Mr. Martinez's report that in 2013 CEC did not allow its residents to submit written grievances.[191] The so-called audit by the firm Creative Contractors noted the three grievances that year, but failed to flag the low number even though facilities with far fewer than the average 651 beds occupied nightly in Livingston, Texas reported receiving complaints in the dozens and hundreds in that same time frame.[192]

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186. *Id.*

187. *Id.*

188. Esteban Tiznado reports that on filing a grievance after a guard spit in his face and placed him in segregation, the investigating supervisor informed Mr. Tiznado, who was pleading with her to watch the video, "I don't have to see the video because I'm not on your side. I'm on the side of the guard." Jacqueline Stevens, *Armed Dangerous Criminal Gang Holding Tucson Man Since April, Conditions Worsen*, STATES WITHOUT NATIONS BLOG (Nov. 1, 2012), http://stateswithoutnations.blogspot.com/2012_11_01_archive.html/. A 2004 report by an American Bar Association delegation about Krome also noted a detainee who "says he was placed in segregation for what he believes to have been retaliation for filing a grievance." ABA DELEGATION TO KROME SERVICE PROCESSING CENTER, MEMORANDUM MIADMS/275246.3, at 14, *available at* http://www.ice.gov/doclib/foia/dfra/2004/kromeserviceprocessingcentermiamiflapril162004.pdf; *see also* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004).

189. *See* IMMIGRATION DETENTION TRANSPARENCY AND HUMAN RIGHTS PROJECT REPORT, *supra* note 146.

190. None of the three grievances submitted in 2008 were resolved in favor of the CEC resident. CREATIVE CORRECTIONS, ICE DETENTION STANDARDS COMPLIANCE REVIEW, POLK COUNTY IAH SECURE ADULT DETENTION FACILITY, JAN. 27-29 (Feb. 6, 2009), *available at* http://deportationresearchclinic.org/PolkCounty-ComplianceRev-2009.pdf [hereinafter Creative Corrections Report]. The average daily ICE bed count for the CEC facility was 651. *Id.*

191. *Id.* The likelihood of CEC failing to note grievances is further buttressed by Creative Contractors, the consulting firm conducting the review, finding numerous deficiencies in the facility, including food and library services that would justify grievances. *Id.*

192. *Id.* There are wide disparities in how facilities receive and report grievances. For instance, the Henderson Detention Facility, a Nevada IGSA facility, reported 141 grievances in a six-month period for a 300-bed ICE wing. The Laredo Processing Center, a dedicated IGSA facility with 310-bed occupancy during the site visit, reported, "two informal grievances were filed in 2011, and to date, one informal grievance has been filed in 2012." The Laredo team found the facility to be in compliance with the grievance procedures. At the ICE IGSA in Kenosha, Wisconsin, with 200 beds filled each night with ICE residents at the time of inspection there were just 18 grievances filed in a six-month period. The Elizabeth City, CCA facility, reported 28 grievances in 2011 for the 300 bed facility, but the 2012 ICE investigating team noted that their interviews revealed additional grievances had been filed and not reported, and noted several other deficiencies in the CCA grievance

ICE fails to monitor how ICE residents fare in the work program per se. Indeed the only compliance report surveyed for this Article that mentions the program was one conducted in 2012 at Stewart CCA in Georgia.[193] It omits any discussion of the incidents appearing in the report published that same year by the American Civil Liberties Union, nor this one: "when the medical staff give orders for detainees to rest, these order often go unheeded by CCA officers. [Eduardo Zuniga] stated that guards threatened him with 'the hole' if he did not get up and get back to work despite medical orders to rest."[194]

5. *Cynicism of PBNDS in Practice*

The notion that one might, as a result of being paid one dollar per day or extra pieces of chicken or leftover milk cartons, have one's morale boosted is at odds with common sense understandings of decency and dignity. Such individuals are working for people who realize the person being supervised is selling his or her labor for one dollar per day, or the fast food equivalent, a condition that is inherently debasing if not humiliating. For those individuals who, lacking outside family or friends to fund their commissary accounts, prefer one dollar per day to nothing, the decision to work is a testament to the intolerable quality of life without these small perks and not an endorsement

process, a situation that the report noted had been documented in the prior 2009 report and not corrected. The ICE inspection of the CCA Stewart, Georgia facility noted only that as of August 23, 2012 "no grievances were filed during August 2012," and failed to indicate the number of grievances filed in the previous 11 months, nor their resolution. The report noted that two residents indicated they had filed grievances about CCA prohibiting them from conducting group prayer, as required by their Muslim faith, and also that CCA had not maintained such grievances, but nonetheless said that CCA was fully compliant in its grievance procedures. None of the reports reviewed above included grievance outcomes. Despite obvious red flags in this data, only the team at the Elizabeth City facility noted a problem with how grievances were handled, but it would be appear to be of no consequence since the same problem was noted in 2009 and not remedied. *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF DETENTION OVERSIGHT COMPLIANCE INSPECTION, ENFORCEMENT AND REMOVAL OPERATIONS, SALT LAKE CITY FIELD OFFICE, HENDERSON DETENTION CENTER, HENDERSON, NEVADA (2011), *available at* https://www.ice.gov/doclib/foia/odo-compliance-inspections/2011hendersondetention-center-henderson-nv-oct25-27-2011.pdf; U.S. DEP'T OF HOMELAND SEC., OFFICE OF DETENTION OVERSIGHT COMPLIANCE INSPECTION, ENFORCEMENT AND REMOVAL OPERATIONS, SAN ANTONIO FIELD OFFICE, LAREDO PROCESSING CENTER, LAREDO, TEXAS (2012), *available at* https://www.ice.gov/sites/default/files/documents/FOIA/2015/laredoProcessingCenterLaredoTxJul14-16-2015.pdf; U.S. DEP'T OF HOMELAND SEC., OFFICE OF DETENTION OVERSIGHT COMPLIANCE INSPECTION, ENFORCEMENT AND REMOVAL OPERATIONS, CHICAGO FIELD OFFICES, KENOSHA, WISCONSIN (2011), *available at* https://www.ice.gov/doclib/foia/odo-compliance-inspections/2011kenoshacountydetentioncenter-kenosha-wi-dec13-15-2011.pdf; U.S. DEP'T OF HOMELAND SEC., OFFICE OF DETENTION OVERSIGHT COMPLIANCE INSPECTION, ENFORCEMENT AND REMOVAL OPERATIONS NEWARK FIELD OFFICE, ELIZABETH CONTRACT DETENTION FACILITY, NEWARK, NEW JERSEY (2012), *available at* https://www.ice.gov/doclib/foia/odo-compliance-inspections/2012elizabethcontractdetentionfacility-newark-nj-jan31-feb2-2012.pdf; U.S. DEP'T OF HOMELAND SEC, OFFICE OF DETENTION OVERSIGHT COMPLIANCE INSPECTION, ENFORCEMENT AND REMOVAL OPERATIONS, ATLANTA FIELD OFFICE, STEWART DETENTION CENTER, LUMPKIN, GEORGIA (2015) [hereinafter DHS LUMPKIN GEORGIA REPORT], *available at* https://www.ice.gov/doclib/foia/odo-compliance-inspections/2012stewart_detntn_cntr_lumpkin_GA_aug21-23-2012.pdf. *See* Source Materials, *supra* note 6; IMMIGRATION DETENTION TRANSPARENCY AND HUMAN RIGHTS PROJECT REPORT, *supra* note 146.

193. *See* DHS LUMPKIN GEORGIA REPORT, *supra* note 192.

194. COLE, *supra* note 142, at 58.

of the program's stated purpose. Grievances bear this out. At Port Isabel, ICE resident workers filed complaints that the guards inspecting the kitchen workers during shift changes were exposing the residents' breasts. One complaint states, "Officer [redacted] searched us in a humiliating manner where by [] pulled our blouse up exposing our breasts in front of detainees, which I find to be inhuman and unprofessional . . . "[195] Despite several workers filing similar grievances classified by ICE as "Sexual Harassment," ICE, in violation of Title VII, dropped its investigation. (". . . referral to ICE/DRO mgmt for information only . . . Declination by DHS/OIG, no results required.")[196]

B. *ICE Omissions and Misrepresentations to Congress of Facility Conditions*

The larger political and legal context in which the ICE facilities' resident work program is managed also is not conducive to worker protections. One safeguard in place for other institutionalized populations is regulations. But the Obama administration refused a petition by immigration law professors and attorneys to draft detention facility regulations along the lines of those in place for the Bureau of Prisons.[197] Congress, perhaps because of erroneous and misleading information ICE shares with it, also is not pressing for this. In particular, ICE has been informing Congress that the agency has safeguards and oversight in place that in fact do not exist.

The federal year 2014 DHS budget request asserts a 97% rate of ICE facility compliance with the PBNDS.[198] A reader would have the impression that ICE is showing integrity in evaluating its operations and that the results show the facilities are performing well.[199] The disparities discussed above reflect a DHS and ICE policy discouraging written grievances and cover-up of violations. A 2010 revised ICE 'Death Report' from the Chicago area

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195. *See* ICE RESIDENT WORKER GRIEVANCES, *supra* note 57.

196. *See Facts About Sexual Harassment*, EEOC, http://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Feb. 9, 2016) ("Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees . . . .").

197. 28 C.F.R. § 5. The BOP definitions have been in use since 1979. *See* 28 C.F.R. § 500.1. On January 24, 2007, a group of immigration law professors submitted to the DHS a "Petition for Rulemaking to Govern Detention Standards for Immigration Detainees." The DHS under the leadership of Janet Napolitano denied the petition request. "DHS . . . concludes that rule-making would be laborious, time-consuming and less flexible." Letter from Janet Holl Lute, Deputy Secretary of the Department of Homeland Security, to Michael Wishnie and Paromita Shah (Jan. 24, 2009) [hereinafter Lute Letter], *available at* http://www.nationalimmigrationproject.org/legalresources/Immigration%20Enforcement%20and%20Raids/Detention%20Standards%20Litigation/DHS%20denial%20-%207-09.pdf. *See also* Jacqueline Stevens, *Broken ICE*, THE NATION (Mar. 15, 2010), *available at* http://www.thenation.com/article/broken-ice.

198. 2014 DHS Appropriations Act, *supra* note 145.

199. Page 31 of the 3,627 page document includes a table claiming that in 2012, 97% of ICE detention facilities were "in compliance with the national detention standards by receiving an inspection rating of acceptable or greater on the last inspection." Appropriations Act, *supra* note 66, at 31.

following a grievance instructed deletion of a report with complete information and expresses relief: "Attached are revised reports . . . Please delete the previous . . . The main this [sic] is we are no longer including a full synopsis of the medical treatment . . . Thank goodness!!! This saves a lot on us."[200]

Documents released responsive to FOIA litigation reveal systemic destruction of ICE resident grievances, including over forced work, retaliation, and ICE cover-ups of guard misconduct, as well as DHS pseudo-investigations, with interviews of only guards and not complainants, and vanishing complaints.[201] ICE weights the PBNDS portion that includes implementing grievance procedures ("Justice") between "zero" and "fifteen percent," including the process for worker grievances.[202] Thus it is not surprising that the Jefferson County jail would be nonchalant about an ICE resident fracturing his skull while delivering meals to criminals extorting him for more food, or feel emboldened to threaten residents with solitary for filing complaints.[203] The "Justice" section of the current IGSA for the Adelanto, California facility managed by GEO states:

> A Contract Discrepancy Report that cites violations of PBNDS and [Scope of Work] sections that treat detainees fairly and respect their

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200. Email from Special Agent OPR [Redacted] to [Redacted], Subject: Revised DR's [death reports] (June 25, 2010) at 4324, *available at* http://deportationresearchclinic/org/ICE-FOIA-2013-32547-501pp.pdf.

201. DHS Office for Civil Rights and Civil Liberties (CRCL), ICE Complaint Referral, 09-02-ICE-0011, n.d., *see supra,* note 57, at 004411, et seq. The summary states: "[D]etainees are forced to work without pay, detainees are retaliated against with used laundry when they refuse to work, . . . detainee grievances disappear, detainees are retaliated against for writing grievances, . . . detainees who complain about food are retaliated against with smaller portions, commissary property taken from him and he had to buy it again." One of the underlying complaints states, "Forced to work! No pay. 3 days locks if not volunteered, if not then penalized with used boxers, shirts and socks washed improperly and almost worn through by previous detainees . . . If detainee try to write a grievance it mysteriously disappears and whoever attempted to write them ends up being put on lockdown because the officer gets told who wrote a grievance about them." *Id.* at 4409. The investigation, seven months after the complaints, interviewed no detainees and exonerated the guards of all charges, the single exception being a retaliatory 15 days of lockdown for all ICE residents "in violation of ICE NDS." *Id.* at 4482. Despite this finding being consistent with false imprisonment, no criminal or any other penalties are noted.

202. PERFORMANCE REQUIREMENTS SUMMARY, ICEFOIA1845.00191 EROIGSA-11-0003, 2014ICE-FOIA1845, at 191 (APP. D), *available at* http://deportationresearchclinic.org/Adelanto-EROIGSA-11-0003-FOIA14-1845.pdf.

203. A March 25, 2010 complaint notes an ICE resident held by the Jefferson County Jail, Mt. Vernon, Illinois was "hit by prison inmate while serving food and has severe concussion" following "fracture of the temporal bone of the skull." Symptoms are that he was "dry heaving a lot" and "puked up blood." The attack occurred because the person serving the food would not provide "extras" to the demanding criminal inmates, suggesting that this was actually guard duty work and that assigning unpaid ICE "trustees" would violate Illinois and federal safety and employment laws. JOINT INTAKE SPECIALIST [REDACTED], DHS ICE OPR, REPORT OF INVESTIGATION (Apr. 7, 2010), s*ee infra*, note 132, at -4664, -4676, et seq. An April 21, 2009 Port Isabel grievance indicates a guard threatening ICE resident with "hole" for grievances about treatment during work assignment; a November 21, 2009 complaint indicates a guard "pushed [kitchen worker] angrily to the floor which caused injury to his ribcage" and then "dragged [him] to the laundry room." Case Officer [Redacted], DHS Report of Investigation, March 19, 2010, -04530, *see infra,* note 132. The guard report states, "Detainee slipped and fell in dish room, hitting a dish basket with stomach." *Id*.

> legal rights, permits the Contract Office to withhold or deduct up to zero% [sic] of a monthly invoice until the Contract Officer determines there is full compliance with the standard section.[204]

The performance measures ICE weights at zero for Justice include the protection of the rights in Detainee Handbook (which includes the rules for the Volunteer Work Program), adherence to grievance procedures, law libraries, legal materials, and the Legal Orientation Programs.[205] This means effectively a zero weighting for violations of most other sections of the PBNDS that might adversely affect ICE residents as well. If the written grievance procedures can be disregarded with zero or a negligible impact on a facility's performance review, OSHA noncompliance, medical malpractice, and guard abuse of ICE residents will not surface.

ICE contracts specify that grievances should be addressed "informally" and without written complaints.[206] The 2011 York County, Pennsylvania IGSA adds that a "prohibited act that cannot or should not be resolved informally" merits a "complete Incident report."[207] But the guards and not the ICE residents are deciding this.[208] To thwart guard misconduct, ICE would need to require formal reporting of all grievances and meaningful enforcement in cases of noncompliance with the law or the PBNDS.

In concluding this section, we return to Robinson Martinez and his genuine volunteering while in ICE custody. Mr. Martinez was born in Mexico and crossed the border into Texas in the lap of his mother, Sara, when he was three months old.[209] Sara's father, a U.S. citizen, and her mother, a legal resident, adopted Mr. Martinez and raised him as their son.[210] It was not until he was in his late thirties and completing his prison sentence in 2010 that he first was put into removal proceedings and learned that his sister was actually his biological mother.[211]

In collecting and sharing with me information about the CCA work program for purposes of publication, Mr. Martinez was performing work of the sort that would be compensated if performed by student research assistants. Mr. Martinez, however, did not understand us as having an

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204. PERFORMANCE REQUIREMENTS SUMMARY, *supra* note 202, at 191.
205. *Id.*
206. YORK COUNTY IGSA, *supra* note 171.
207. *Id.*
208. *Id.*
209. They were passengers in a car driven by his grandfather, Gregorio. Sara's parents were bringing her back to their home in El Paso. She was 20 years old and unmarried. She had been so ashamed when her pregnancy first showed that she had run away from their home in El Paso a few months earlier. They drove through the check-point. No one bothered to ask for identification. ICE, ROBINSON MARTINEZ (on file with author); CIS, ROBINSON MARTINEZ (on file with author); Telephone Interview with Sara Gomez (May 5, 2013); CIS, SARA GOMEZ (on file with author).
210. *Id.*
211. The biography was consistent with acquiring U.S. citizenship through his mother/sister Sara, if she could prove she had acquired it from her father, Gregorio, which is why Robinson contacted the author. *Id.*

employer-employee relationship: "I don't want any money from you. I just want people to know what's happening."[212] In other words, Mr. Martinez volunteered to do this research. The legal difference between our relationship—he is working for a non-profit for "civic, charitable, or humanitarian reasons"[213]—and the pseudo-volunteer employment in the detention facilities is exactly that contemplated by the regulation implementing the FLSA, and is discussed below.

IV. THE GOVERNMENT'S LEGAL DEFENSE: *ALVARADO GUEVARA* (1990)

Since 2009, journalists and scholars have made inquiries of ICE as to the legal basis for the slaving wages paid those held under immigration and not criminal laws. Part IV reviews the main lines of legal analysis the government offers in defense of the program: Section A summarizes the official statements and their reliance on the single appellate court decision directly on point—*Alvarado v. Guevara v. I.N.S.*;[214] Section B considers the relevant administrative case law on which the government might draw, i.e., the line of decisions that would authorize agency autonomy to effect the conditions of immigration confinement, including slaving wages; and finally, Section C introduces the three dominant approaches to statutory construction as they will be laid out for evaluating the government's position in Parts V (plain meaning), VI (legislative intent); and VII (legislative purpose).

A. *ICE's Legal Defenses*

"ICE officials say the program is perfectly legal. There is no specific statute, regulation, or executive order authorizing the program, ICE said in a statement,"[215] according to the *Houston Chronicle*, which also quotes the agency claiming that the "most important benefit from the program is 'reducing inactivity and disciplinary problems,'"[216] a phrase lifted from the PBNDS reviewed in Part III above.

In response to my own queries,[217] ICE provided this response:

> 8 U.S.C. 1555(d) provides that appropriations for ICE are available for "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws for the work performed . . ." The appropria-

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212. *Id.*; Sept. Martinez Telephone Interview, *supra* note 5.
213. 29 C.F.R. § 553.101.
214. 902 F.2d 394 (5th Cir. 1990).
215. Susan Carroll, *One Dollar A Day For Immigrants Illegal On Outside, Just Fine In Jail*, HOUSTON CHRONICLE (Mar. 26, 2009), http://www.chron.com/news/houston-texas/article/1-a-day-for-immigrants-illegal-on-outside-just-1661907.php.
216. *Id.*
217. E-mail from author to Andrew Lorenzen-Strait, Immigration and Customs Enforcement Chief Public Engagement Liaison (June 21, 2010) (on file with author).

> tions act for the Fiscal Year ending September 30, 1979 was the most recent appropriation act in which this fee was specified. Specifically, Pub., L. No. 95-431 provided for the "payment of allowances (at a rate not in excess of one dollar per day) to aliens, while held in custody under immigration laws for work performed . . ." 92 Stat. 1021, (1978). The INS practice of paying one dollar per day was challenged in federal court and upheld. This practice of allowing volunteer work programs with payment allowances is found amongst all types of ICE facilities: Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and Intergovernmental Service Agreement (IGSAs) facilities.[218]

In response to a follow up query, ICE public liaison officer Andrew Lorenzen-Strait confirmed that the court ruling referenced was *Alvarado Guevera v. INS*, 902 F.2d 395 (5th Cir. 1990).[219]

ICE never disclosed that just months before our queries, California's Occupational Safety and Health Agency found that the "work program [at the Mira Loma Detention Facility (MLDF)] is subject to occupational regulations and CAL-OSHA guidelines"[220] and that MLDF was "negligent in its employer/employee relationship with [MLDF resident/employee Cesar Gonzalez]."[221] Despite these statements appearing in a report by the Office of Professional Responsibility for a case that reached the desk of Julie Meyers, then-Assistant Director of ICE, ICE concealed from journalists inquiring about this program Cal OSHA's finding that an ICE resident killed by brain injuries sustained from electrocution after his jackhammer hit a power line was an employee of the MLDF.[222] ICE also never revealed that MLDF did not pay their employee Cesar Gonzalez or anyone else a penny, but procured services by promises of "extra food, wide screen TV and better dorm or

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218. E-mail from Andrew Lorenzen-Strait, Immigration and Customs Enforcement Chief Public Engagement Liaison, to Jacqueline Stevens (July 6, 2010) (on file with author). "Service Processing Centers" are those owned by the federal government, a legacy of the Immigration and Naturalization Service and the more fluid understanding of these places as residential sites of transit to the interior of the United States as well as to the immigrant's home country. *See infra*, Part VII, A.1.

219. *Id.*

220. ICE OPR SPECIAL AGENT [NAME REDACTED] REPORT OF INVESTIGATION CONTINUATION, ICE OFFICE OF PROFESSIONAL REVIEW, ICE FOIA2013-32547, at 004384, *available at* http://deportationresearchclinic.org/ICE-FOIA-2013-32547-501pp.pdf/.

221. *Id.*

222. "In their final determination, CAL-OSHA found an employer/employee relationship existed between the LASD [Los Angeles Sheriff Department] and [Cesar Gonzalez] and [Gonzalez] was thereby protected by occupational regulations." *Id*. An associated complaint for a civil case no. MC-019520, filed in Los Angeles Superior Court on August 8, 2008 states that co-workers were "made to witness and experience the electrocution of Cesar Gonzalez Baez, his screaming in pain as he was consumed by the explosion and flames, and his pleading with them for help," *Id*. at 4350. The screenshot of the database managing the case indicates it was "last modified March 14, 2014," the same time frame as Ian Urbina's correspondence with ICE about this program. *Id*. at 4392. For email correspondence on the work program between Ian Urbina and ICE see 2015-ICFO-00563, *supra* note 129.

living conditions and extended visitation privileges."[223] And most importantly, even after being on notice that Cal OSHA viewed the MLDF work program as subject to Cal OSHA guidelines, ICE never implemented these rules at any of the California facilities, nor made changes consistent with the Cal-OSHA ruling on the work program as one consistent with the definition of an employee-employer for purposes of other employment and immigration laws.[224]

The 1990 case of *Alvarado Guevera v. INS* is a rare instance of residents challenging their one dollar per day wages as a violation of the FLSA and the Fourteenth Amendment.[225] The two-page Fifth Circuit Appellate Court decision affirming the legality of these payments consists almost exclusively of a verbatim quotation of the decision by the federal district court judge.[226] The plaintiffs were residents at the INS-run Port Isabel SPC, whom Defendants employed in grounds maintenance, cooking, laundry and other services at the rate of one dollar per day.[227] Further alleging that this practice was a violation of the FLSA, the plaintiffs sought relief in the form of unpaid minimum wages, statutory liquidated damages, attorneys' fees and costs, and injunctive relief pursuant to the FLSA.[228]

The Fifth Circuit Court of Appeals, held that the payment of one dollar per day was pursuant to 8 U.S.C. § 1555(d) and thus "set by congressional Act. Department of Justice Appropriation Act, 1978, Pub. L. No. 95-86, 91 Stat. 426 (1978)."[229] The decision also held that the "Plaintiffs are not covered by the FLSA."[230] The decision states that because the work challenged was undertaken by people whose employer fed and housed them, they were outside of the economic relations covered by the FLSA:

> [I]t would not be within the *legislative purpose* of the FLSA to protect those in Plaintiffs' situation. The congressional motive for enacting the FLSA, found in the declaration of policy at 29 U.S.C. sec 202(a), was to protect the "standard of living" and "general well-being" of the worker in American industry. [Citations omitted.] Because they are detainees

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223. Email from [Redacted] to [Redacted], Subject: [Redacted] Mexico, Importance: High (Dec. 5, 2007) (FOIA2013-32547.0043) (The LASD was under pressure from ICE to quickly expand the facility and was thus extending the perimeter fence: "Due to time pressures, [Facilities, Buildings, and Safety] had requested the assistance of detainee volunteer work crews with digging post holes. [Gonzalez] participated in the MLDF [work program] and was deemed to be a skilled and reliable worker. [D]uring his turn on the jackhammer, [he] hammered through the red-painted concrete, struck an electrical cable and was electrocuted with 10,000 volts of direct current. . .").

224. *See, e.g.*, ICE RESIDENT WORKER GRIEVANCES, *supra* note 57 and accompanying text.

225. 902 F.2d 394 (5th Cir. 1990).

226. "With the exception of additional footnotes provided by our court, we adopt the judgment and persuasive reasoning of the district court to the extent published below as Appendix A." *Id.*

227. *Id.*

228. 29 U.S.C. §§ 201-219; 902 F.2d 394.

229. 902 F.2d 394.

230. *Id.*; *see also infra* Part IV.B.

> removed from American industry, Plaintiffs are not within the group that Congress *sought to protect* in enacting the FLSA.[231]

The opinion cites several cases in which courts held the FLSA did not cover prison inmates.

> Those courts have concluded that an extension of the FLSA to the prison inmate situation was not, therefore, legislatively contemplated. *Id.* Because of the similarity in circumstances between the prison inmates and Plaintiff detainees here, the reasons noted by those courts for not extending the FLSA are applicable in this case.[232]

The *Alvarado Guevara* ruling also rejects the plaintiffs' claim that 8 U.S.C. § 1555(d) distinguishes based on alienage "without a compelling governmental purpose to justify this classification,"[233] and concludes, "The court will uphold the constitutionality of the statute as a valid exercise of the congressional power."[234]

The appellate court in a footnote makes a further point.[235] Pointing out that the government is not authorized to employ aliens in the federal government, it infers that the "detainees are not government 'employees' . . . . [T]he federal government usually authorizes the employment of aliens only under limited circumstances, none of which apply here."[236] Neither the district nor appellate courts review the legislative histories of either FLSA or 8 U.S.C. § 1555(d), nor consider that ICE captures and confines U.S. citizens.[237]

In sum, the Fifth Circuit appellate court provides these defenses of INS residents' slaving wages:

1) A 1978 appropriations act expiring after fiscal year 1979 provides the agency in 1990 authority to pay aliens held under immigration laws one dollar per day.

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231. 902 F.2d 394 (emphasis added).

232. *Id*. (citing Alexander v. Sara, Inc., 559 F. Supp. 42 (M.D. La. 1983), *aff'd*, 721 F.2d 149 (5th Cir. 1983); Sims v. Parke Davis & Co., 334 F. Supp. 774 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); Worsley v. Lash, 421 F. Supp. 556 (N.D. Ind. 1976)); *see also* Lavigne v. Sara, Inc., 424 So. 2d 273 (La. Ct. App. 1982). The Louisiana Appellate Court added the following additional citations: Wilks v. District of Columbia, 721 F. Supp. 1383, 1384-85 (D.D.C. 1989) (holding that plaintiffs-foremen's supervision of inmates was not supervision of "employees" under the FLSA); Emory v. United States, 2 Cl. Ct.. 579, 580 (1983) (prisoner work while incarcerated is not government employment), *aff'd*, 727 F.2d. 1119 (Fed. Cir. 1983).

233. 902 F.2d at 396 (quoting *Mathews v. Diaz*, 426 U.S. 67 (1976) (noting that there are many federal statutes that distinguish between citizens and aliens). Because of this broad congressional power, immigration legislation is subject to a limited scope of judicial inquiry. Fiallo v. Bell, 430 U.S. 787 (1977); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).).

234. *Id.*

235. *Id.* at 394 n.2.

236. *Id.*

237. *Id.* For details of U.S. citizens in ICE custody, see Jacqueline Stevens, *U.S. Government Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. L. SOCIAL POL'Y 606 (2011).

2) The FLSA covers American industry.
3) The INS residents are "removed from American industry."
4) INS "detainees" are legally similar to "inmates" and "prisoners," and courts have found the FLSA precedents for inmates and prisoners applies to those held under immigration laws.
5) The government cannot legally employ detainee aliens, so INS residents are not covered by the FLSA.[238]

B. *Administrative Law Precedents Authorizing Agency Discretion*

The *Alvarado Guevara* complaint focused on the failure of the agency to abide by the FLSA.[239] One line of defense the government did not use in 1990 but that the DHS appears to invoke in its 2009 response to the *Houston Chronicle* reporter, is its operational discretion to disburse funds absent any statutory authority ("There is no specific statute, regulation, or executive order authorizing the program, ICE said in a statement").[240] DHS on this basis would presumably claim the authority to employ ICE residents at one dollar per day in furtherance of its obligation to implement deportation policy.[241]

Before turning to an analysis of the statute using alternative interpretive strategies, this section considers the most obvious precedents affirming agency discretion, as set forth in *Skidmore*, *Chevron*, *Christensen*, and *Mead*.[242] The problem ICE may encounter is that, as the Court pointed out in *Tennessee Valley Authority v. Hill*, an agency in implementing its programmatic authority via rules and other internal operations cannot violate federal laws that hold across agencies:

> Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercise in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation . . . (19 Comp. Gen. 285, 292 (1938))[243]

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238. *Id.*
239. Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990).
240. *See* Carroll, *supra* note 215.
241. 8 U.S.C. § 1103(a)(c) ("[T]he Secretary [of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions, and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.").
242. WILLIAM FOX, UNDERSTANDING ADMINISTRATIVE LAW 78–79 ("[T]he issue of whether an agency is acting *ultra vires* assumes that there is a proper delegation in the statute and then analyzes specific action taken by the agency to see whether that action is within the limits set by the enabling act.") (citing Udall v. Tallman, 380 U.S. 1, 6 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").
243. JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 3:42–43 (7th ed.).

And, also from Sutherland, "When Congress wishes to confer discretion unrestrained by other law its practice has been to include the words 'notwithstanding the provisions of any other law' or similar language."[244]

Moreover, as explored in more detail below, the courts give less latitude to an agency's internal guidelines, such as the PBNDS, than to regulations or rules that have been crafted through a formal review process. Review of non-delegated, non-regulatory actions varies according to "nature and degree possessed by the agency";[245] "duration and consistency of interpretation"; "soundness and thoroughness of reasoning underlying the position"; "evidence (or lack thereof) of congressional awareness of, and acquiesce in, the administration position"; and whether the policy is "muddled."[246] Under all these criteria the ICE work program would seem to fall short.

C. *Case Law*

Skidmore v. Swift evaluates whether a decision by an administrator within the Wage and Labor Division of the Department of Labor's (DOL) can produce binding rules for the agency's "fair reading of the statute's definition of hourly work."[247] The lower courts ruled in favor of the firm's claim that the DOL lacked discretion to find the FLSA required compensation for waiting time.[248] The Supreme Court overruled these decisions (rejecting workers' claims for compensation for time waiting or sleeping if part of a job requirement) and produced criteria for deferring to an agency's discretion implementing a statute.[249] *Skidmore* allows administrators discretion in implementing a law, but specifically restricts an agency interpretation if it violates a more general law:

> The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations . . . . The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief curiae, is that the general tests which *he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek* and the inclusion of all other on-call time: although the employees were required to remain on the premises during the

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244. *Id.* at 3:44.
245. *Id.* at 3:31.
246. *Id.* at 3:33.
247. 323 U.S. 134 (1944). "[N]o principle of law found either in the statute or in Court decisions precludes waiting time from also being working time." *Id.* at 140.
248. Skidmore v. Swift & Co., 53 F. Supp. 1020 (N.D. Tex. 1942), *aff'd*, 136 F.2d 112 (5th Cir. 1943).
249. 323 U.S. 134 (1944).

> entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time.[250]

The question being litigated was not whether the workers living on or near the factory should be paid for when they were "engaged in general fire-hall duties and maintenance of fire-fighting equipment of the Swift plant."[251] Note that, unlike the case of ICE resident work, *Skidmore* does not point to the DOL determination as violating any other laws. Note as well that the substantive outcome was an expansive reading of the FLSA.[252] The Court found the agency decision violated no laws and that its specific reasons advanced the purpose of broad coverage the Court found in the FLSA.[253]

Further distinguishing *Skidmore* from ICE's rationale for the program is that the DOL was making determinations affecting third parties, unlike ICE's self-serving self-assessments of the legality of its own labor policies.[254] In fact, none of the major precedents contemplate agency discretion when the beneficiary is the agency itself. For those bureaucrats motivated by the increases in their own areas of authority,[255] the euphemistically termed "efficiencies" enable a detention operation on a scale that otherwise might not be possible.

Chevron USA, Inc. v. the National Research Defense Council evaluates whether a regulation issued by the Environmental Protection Agency (EPA) was consistent with the underlying Clean Air Act.[256] The Court held that "[I]f Congress has explicitly left a gap for the agency to fulfill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[257]

Under this standard, the ICE resident work program reveals two important characteristics that go to the heart of the *Chevron* rationale. First, rather than having "explicitly left a gap" for ICE to set the rate of compensation for a mandatory program, Congress passed a law *allowing but not mandating* the employment of facility residents, and *expressly reserving for Congress*, not the agency, the authority to set their rate of compensation.[258] ICE might

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250. *Id.* at 139 (emphasis added).
251. *Id.* at 136.
252. *See supra* note 240.
253. *Id.*
254. *See infra* Part VI, especially hearing testimony by INS Commissioner, 1982.
255. WILLIAM NISKANEN JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1972).
256. 467 U.S. 837 (1984). The EPA regulation promulgated to implement this "permit requirement allows a State to adopt a plantwide definition of the term 'stationary source' . . . The question presented by these cases is whether EPA's decision . . . is based on a reasonable construction of the term 'stationary source.'" *Id.* at 839. At issue was 48 C.F.R. §§ 51.18 (j)(l)(i), (ii) (1983) under Clean Air Act Amendments of 1977 Pub. L. No. 95-95. *Id.* at 839 n.1.
257. *Id.* at 843–44.
258. 8 U.S.C. § 1555(d) (authorizing appropriations for "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) . . . .").

reference for its authority Congress' more general delegation to ICE of authority to manage immigration detention facilities. But the scope of this delegated authority is of a different character than the specific requirements of the Clean Air Act mandates for "stationary source" air quality monitoring. The discretion the Court authorized to the EPA in *Chevron* was to implement a specific mandatory requirement in a specific portion of a statute, not to invent on an ad hoc basis various otherwise illegal actions for ensuring clean air, a distinction that also would counsel against the approach taken in *King v. Burwell.*[259] Congress has authorized but not required ICE resident employment. Nor has Congress set a rate, other than that in the FLSA (or in the contracts, the SCA).

In 1986, Congress passed the Immigration Reform and Control Act (IRCA) (PL 99-603), rendering the employment of non-citizens unlawful unless in compliance with certain measures put forward in 8 U.S.C. § 1324a(7). This section of the law applies the prohibitions to private firms as well as "any branch of the Federal Government."[260] Absent Congress setting a rate in a contemporary appropriations act for workers in ICE custody employed by private firms, the employment specifications in the PBNDS are "manifestly contrary to the statute."[261] While not defeating employment of those who are still disputing their deportation orders, the prohibitions would seem to make 8-hour shifts and other requirements of a conventional labor force inconsistent with the plain meaning of IRCA for those who have abandoned their appeals, a distinction to which ICE at present pays no attention.[262]

Second, the *Chevron* opinion affirms deference to agency decisions on policies in service of a "regulatory scheme" that is "technical and complex" and in which the "agency considered the matter in a detailed and reasoned fashion."[263] ICE has eschewed a regulatory scheme for its detention facilities.[264] There is no evidence of any agency consideration of the program's implementation, much less that which is "detailed and reasoned."

There are two kinds of further differences between agency deference based on *Chevron* and ICE's assertions of its contractors' prerogative to incentivize work at one dollar per day. First, the detention standards were implemented for the purpose of protecting then-INS residents, i.e. those in facilities owned and run by the federal government. And second, the PBNDS do not meet the

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259. King v. Burwell, 135 S. Ct. 2480, 2490 (2015) ("the Act requires all Exchanges to 'make available qualified health plans. . .'—something an Exchange could not do if there were no such individuals.").

260. § 1324a(7).

261. 323 U.S. 134 (1944).

262. I am not suggesting ICE prohibit work to those held under these conditions—a discretion ICE and private guards are manifestly incompetent to implement without compounding the program's existing hardships. My point here is that the program is purely for the convenience of the contractors, and any legal rationales are afterthoughts.

263. 467 U.S. at 865.

264. *See* Lute Letter, *supra* note 197.

criterion in *Mead* or even Scalia's dissent, that the rule be authoritative across the agency.[265] The 1980 House Conference Report requiring the INS issue "national detention standards" to address "allegations of fraud, corruption, and mismanagement"[266] stated: "In order to insure critically needed improvements in INS detention facilities, policies and programs, the committee amendment requires the Attorney General to develop comprehensive detention standards for the INS and to conduct an evaluation, based on such standards within 1 year from the date of enactment of this legislation."[267] In 1980, the INS produced its first draft standards but it was not until twenty years later that the INS actually published the National Detention Standards.[268] Such standards "do not have the force of law"[269] and they are also still not applied evenly across ICE contracts[270] nor implemented evenly across detention facilities.[271]

The current Congress has been mandating mass detention for those violating civil immigration laws. But earlier Congresses rejected this approach and thus could not contemplate subsidizing private firms with slaving wages or forced labor.[272] In sum, the ICE decision to adopt a labor policy outside the statutory and regulatory process, with no contemplation of the inconsistencies between its program and relevant statutes that apply across federal agencies, has little resemblance to the EPA's effort to implement an

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265. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

266. H.R. REP. NO. 96-873, pt. I, at 13 (1981) (Conf. Rep.).

267. The last sentence contradicts the sense of the preceding paragraph and is responsible for many of the problems documented herein and elsewhere: "The committee expects that such standards will be developed in close consultation with the Bureau of Prisons and the American Correctional Association." *Id.* at 3. The 1980 INS standards on the facilities' resident work program produced shortly after the Conference Report states:

> "1010 Written Policy and procedure provide that only carefully screened detainees are assigned food service work. Discussion: Food service personnel should be in good health and free from communicable disease and open, infected wounds. They should practice hygienic food handling techniques and be periodically checked for personal hygiene." p. 132 Later the report states: "1903 Detainees are paid for work performed."

A system of reward for services may take form of additional funds to purchase canteen items, or additional recreational items or programs. INS STANDARDS FOR DETENTION, INS, DETENTION AND DEPORTATION DIVISION, CENTRAL OFFICE, D.C. 166 (Aug., 1, 1980). Note that this language of a "system of reward for services" and the proposal for "additional recreational items or programs" was at some point removed from the actual standards, suggesting programs that implement this policy, such as the Mira Loma facility, *see supra* note 172, are occurring after the agency decided against this and lack any basis for *Skidmore* deference.

268. The 2000 Detention Standards were issued in September 2000 and are available at *2000 Detention Operations Manual*, ICE, https://www.ice.gov/detention-standards/2000#wcm-survey-target-id (last visited Feb. 12, 2016).

269. Siskin, *supra* note 40, at 11.

270. *See supra* Part III.

271. *Id.*

272. *See* House Rept. 96-873, *supra* note 257, at 15 ("The committee has consistently maintained that the most reasonable and humane administrative solution to the undocumented alien problem is to prevent their entry, rather than attempt to locate and deport them once they have entered the United States.").

air quality policy designed with public review and without conflicts with other laws.

Christensen v. Harris County, et al.[273] and *United States v. Mead Corp*.[274] also delimit an agency's discretion to interpret a statute absent use of the regulatory review process. In *Christensen*, the Court held that "Interpretations, such as those in opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'"[275] The Court held that where the FLSA and its regulations were silent, the agency had discretion but that it had to be used in a manner the Court found persuasive,[276] and rejected the agency's interpretation. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[277] *Christensen* strongly suggests that the PBNDS would not be among those agency documents that would invite judicial deference. The policy's *de jure* and *de facto* inconsistencies and Congress' failure to delegate authority to private prisons for setting wages suggest the agency is creating not just a new regulation but its own labor law.

In *Mead*, the Court elaborated on the different standard of deference due "administrative practice in applying a statute," holding that an agency could have the "force of law" through adherence to certain rule-making procedures.[278] Declining to apply *Chevron* deference, the Court held nonetheless that the agency had met the still intact *Skidmore* criteria of deference, holding that the rule classifying certain Mead products as "diaries" triggered review, and that on review, these were within the discretion authorized by Congress: "There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case."[279] Instead of a "highly detailed" regulatory scheme, ICE has none at all. By rejecting the regulatory rule-making procedures ICE's PBNDS provide no basis for judicial deference.

V. PLAIN MEANING STATUTORY CONSTRUCTION[280]

> [L]egal scholars and Justice Scalia himself agree that the textualist approach decreases the likelihood that justice will defer to the adminis-

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273. 529 U.S. 576 (2000).
274. 533 U.S. 218 (2001).
275. 529 U.S. at 631 (quoting *Skidmore,* 323 U.S. at 140).
276. "Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA. *Christensen,* 529 U.S. at 588.
277. *Id.*
278. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).
279. *Id.*
280. The discussion going forward is enormously indebted to the parsing of these fields by WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994) and SOLAN, *supra* note 74.

> trative agency, and the historicalist approach increases the likelihood that the justice will defer to the administrative agency.[281]

Adrian Vermeule provides an insightful case study on the hazards of statutory interpretations based on legislative intent or purpose and not the plain text.[282] Focusing on the widely cited *Holy Trinity* precedent, Vermeule writes:

> Distinctive features of the adjudicative process—the whole set of institutional and procedural rules that determine when and how litigants try and argue cases and when and how courts decide them—might interact with distinctive features of legislative history in a manner that causes courts systematically to err in their attempts to discern legislative intent from legislative history. Indeed, judicial error in the use of legislative history might occur sufficiently often, and with sufficiently serious consequences, that courts relying on statutory text and other standard sources of interpretation, would achieve *more* accurate approximations of legislative intent over the long run of future cases than courts that also admit legislative history as an interpretive source.[283]

The pseudo-legislative history of the work program on which the *Alvarado Guevara* opinion relied is a symptom of the problems Vermeule describes.[284]

Drawing on the empirical information presented heretofore, Part V suggests how the program might be reviewed and modified in light of the plain meaning approach to statutory construction and an implied repeal analysis of Immigration Expenses Act;[285] the FLSA;[286] Service Contract Compliance;[287] the OSHA;[288] Immigration Reform and Control Act of 1986;[289] Federal Procurement;[290] and Convict Labor Contracts.[291]

A. *The Plain Meanings*

> The starting point in statutory construction is the language of the statute itself.[292]

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281. RUTH ANN WATRY, ADMINISTRATIVE STATUTORY INTERPRETATION: THE AFTERMATH OF CHEVRON V. NATURAL RESOURCES DEFENSE COUNCIL 9 (2002) (citations omitted).
282. *See also* WALDRON, *supra* note 88.
283. Vermeule, *supra* note 83, at 1838.
284. *Id.*
285. 8 U.S.C. § 1555(d).
286. 29 U.S.C. § 201.
287. 41 U.S.C. § 351. As amended Public Law 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976.
288. 5 U.S.C. §§ 1101-2013.
289. Pub. L. No. 99-603, 100 Stat. 3359 (1986).
290. 42 U.S.C. § 6962.
291. 18 U.S.C. § 436; 48 C.F.R. 22 *et seq.*; 161 FR 31644 (June 20, 1996); 28 C.F.R. 94-1(b); Exec. Order No. 11755, 48 C.F.R. 22.201 (1973).
292. YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2009).

The Congressional Research Service's review of statutory interpretation states that in cases in which agency actions are disputed, "there is a 'strong presumption that Congress intends judicial review of administrative action.'"[293] Kim's report also discusses "repeals by implication," and explains that when there are apparent tensions between statutes, e.g., among payments at unenacted rates for work performed by those in custody under immigration law, the FLSA, and the Immigration Reform and Control Act's prohibition of employing unauthorized immigrants, courts will try to "harmonize the two so that both can be given effect."[294]

> A court "must read [two or more allegedly conflicting] statutes to give effect to each if [it] can do so while preserving sense and purpose."[295] Only if provisions of two different federal statutes "irreconcilably conflict," or "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute," will courts apply the rule that the later of the two prevails.[296] "[R]epeals by implication are not favored, . . . and will not be found unless an intent to repeal is clear and manifest."[297] And in fact, the Court rarely finds repeal by implication.[298]

The statutes below are reviewed for analysis of how they might be best read in light of the Court's favoring the plain meaning of disputed statutes and disfavoring repealing statutes absent the express Congressional delegation to do so.

1. *Immigration Expenses (8 U.S.C. § 1555 (d))*

Immigration Service Expenses 8 U.S.C. § 1555 is the sole statutory authority that specifically speaks to compensation for the work of those in ICE custody. It states in its entirety:

> Immigration Service Expenses Appropriations now or hereafter provided for the Immigration and Naturalization Service shall be available for payment of (a) hire of privately owned horses for use on official business, under contract with officers or employees of the Service; (b) pay of interpreters and translators who are not citizens of the United States; (c) distribution of citizenship textbooks to aliens without cost to such aliens; (d) payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed; and (e) when so specified in the appropriation concerned, expenses of

293. *Id*. at 22.
294. *Id.* at 26.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id*. at 26–27 (citations omitted).

> unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General, who shall make a certificate of the amount of any such expenditure as he may think it advisable not to specify, and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.[299]

Nothing in the statute exempts the work from the hourly wage protections of the FLSA, passed in 1938.[300] Moreover, the later act does not "cover the whole subject" of the FLSA, and is not "clearly intended as a substitute."[301] As noted in *Alvarado Guevara,* the last appropriation Act authorizing the one dollar per day allowance was for fiscal year 1979 and expired on October 30 of that year.[302] The text references only the INS pay to immigrants, not that of private prison firms.

In light of the canon instructing jurists to understand specific provisions in the context of the statute as a whole,[303] what does 8 U.S.C. § 1555 as a whole tell us about section (d)? One possible clue is the use of "pay" for "interpreters and translators" in section (b), in contrast with the "allowances" authorized for aliens in custody under immigration laws.[304] According to the American Heritage Dictionary an "allowance" (n) is:

> 1. The act of allowing. 2. An amount that is allowed or granted: *consumed my weekly allowance of two eggs.* 3. Something, such as money, given at regular intervals or for a specific purpose: *a travel allowance that covers hotel bills*. 4. A small amount of money regularly given to a child, often as payment for household chores. 5. A price reduction, especially one granted in exchange for used merchandise: *The dealer gave us an allowance on our old car*.[305]

The definitions here bring home a fundamental problem with the statute: None of these definitions apply to what appears to be 8 U.S.C. § 1555(d)'s scheme of an "allowance" for work performed by adults.

An allowance either is freely given to adults or is payment to a child. The *American Heritage Dictionary* implies here that payment for work to adults is not an allowance but a wage dictated by the choices and (legal) constraints on those participating in a labor market. Other sections of the federal code

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299. Act of Jul. 28, 1950, Pub. L. No. 81-626, 64 Stat. 380 (previously codified as 5 U.S.C. § 341d, prior to the reclassification of Title 5; Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (codified at 8 U.S.C. § 1555)).

300. Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (1938), 29 U.S.C. ch. 8.

301. KIM, *supra* note 292, at 26–27.

302. The history of this statute and its appropriations are discussed in Part VI.B.

303. KIM, *supra* note 292, at 2.

304. "Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary." *Id.* at 6.

305. *Allowance Definition*, AM. HERITAGE DICTIONARY, https://www.ahdictionary.com/word/search.html?q=allowance&submit.x=0&submit.y=0 (last visited Feb. 9, 2016).

refer to an "allowance" only as a capped *reimbursement*, and not a payment for work performed.[306] The statute covers Immigration Service Expenses, not those for private prison firms. That said, Congress has the sole authority to define its terms. If Congress wants to create a novel use of the concept of "allowance" to authorize pay to those in federal custody under immigration laws, Congress may skirt the FLSA rules for wages, assuming no Constitutional challenges or conflicts with other statutes.

Again, for that to occur, Congress would need to not only operationalize 8 U.S.C. § 1555(d) by setting a new rate in the Appropriations Act involved, Congress also would need to provide a new definition of "allowance." Children, like ICE residents, receive room and board, but the resemblance stops there. First, children may receive allowances in exchange for work performed, or as a "straight allowance."[307] Experts advise that to "get a clear understanding of the value of money, children have to work with money."[308] The practice is age-specific: "when he or she understands that you need money to get things from shops."[309] A survey of rationales and practices found benefits of an allowance to include: children's feeling of independence, learning the value of money, including responsibility for mistakes, and saving.[310] At no point was improving household efficiencies or alleviating boredom indicated. Moreover, none of the guidelines for allowances based on chores suggested that parents rely for most of the household work on their children's labor so that parents might lavish themselves with the bounty of their own more lucrative wages and allow their worker children to live in squalor. In short, the ICE payments resemble the "wages" referenced in their contracts, not family "allowances."

Moreover, regardless of the Congressional authorization to fund an allowance, the Act and its appropriations applied to payments by the government, not the private prison firms.[311] Records released for GEO for its facilities in Pearsall, South Texas and Aurora, Colorado reveal GEO topping off ICE one dollar a day payments, or covering the detainee worker payments in their entirety.[312] For instance, the "Detainee Work Pay" chart indicates that on December 2, 2012, a worker categorized as "TRAY1" was paid one dollar by ICE and two dollars by GEO, as were several other workers classified as

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306. *See, e.g.*, 2 U.S.C. § 389: Officer and witness fees ("(b) Witnesses whose depositions are taken shall be entitled to receive from the party at whose instance the witness appeared the same fees and travel allowance paid to witnesses subpoenaed to appear before the House of Representatives or its committees").

307. Tooraj Sadeghi, *Financial Management in Children: Today Need, Tomorrow Necessity*, 3 INT. J. PEDIATR. 568 (May 2015).

308. *Id*.

309. *Id*.

310. *Id*. at 587.

311. *See* KIM, *supra* note 292, at 14 ("[E]stablishing that language does *not* mean one thing does not necessarily establish what the language *does* mean" (citing Field v. Mans, 516 U.S. 59, 67 (1995) (emphasis in original)).

312. *See, e.g.*, ICE RESIDENT WORKER GRIEVANCES, *supra* note 57.

"TRAY 1" or "TRAY2."[313] Likewise, several workers on laundry duty also earned two dollars from GEO on that day, in addition to the one dollar paid by ICE. On December 31, 2012, GEO covered all payments from one dollar to three dollars per day with ICE contributing nothing.[314] For December 2012, ICE paid residents at GEO's Pearsall facility $6,200 and GEO paid them an additional $11,923.[315] The 2012 contract between ICE and GEO for Pearsall, referencing the 2008, and not the 2011, PBNDS reveals ICE made available $6,200 dollars toward the detainee work program for that month. Records show that when the funds ran out, GEO alone covered the payments at rates of one dollar to three dollars per day.[316] As ICE indicated to the Houston reporter, there is no statutory basis for this.[317]

The variation in wages and their payments by GEO and ICE respectively suggest a rudimentary labor market, with wages radically depressed because of captivity, and not because of bored people compensated with allowances. This evidence further suggests a business model based on forced labor and not ICE residents avoiding boredom. Were GEO unable to physically control their work force, they would need to pay wages of more than one dollar per day or even three dollars. According to 18 U.S.C. § 1589(a) ("Forced Labor"),

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person . . . shall be punished as provided under subsection (d).[318]

GEO's business model knowingly assumes they can physically control their workforce, and on this basis earn profits.[319]

Assuming that Congress at some point sets a rate and budgets appropriations for the work program, the concept of an "allowance" might accommo-

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313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.* at .007160.
317. Carroll, *supra* note 215.
318. 18 U.S.C. § 1589(a).
319. Prior contracts describing "GUARD SERVICES" referenced "Wages for Detainee Work Program" whereas an RFP for Aurora references "Stipend for Detainee Work Program—Reimbursement for this line will be at actual cost of $1.00 per day per detainee." Denver Solicitation, HSCEDM-11-R-00002, at 4 (Mar. 3, 2011), *available at* http://deportationresearchclinic.org/Denver HSCEDM-11-R-00002_Solicitation.pdf. The American Heritage Dictionary defines "stipend" as "A fixed and regular payment, such as a salary for service rendered, or an allowance." *Stipend*, AM. HERITAGE DICTIONARY, https://ahdictionary.com/word/search.html?q=stipend (last visited Feb. 2, 2016). The 2013 Denver RFP, issued after ICE was alerted to concerns about the program, uses the word "stipend." But employers cannot violate labor laws by post-hoc calling wages "stipends." The 2011 contract for GEO's Aurora facility also requires deference to worker protections: "All services and programs shall comply with the Performance Work Statement (PWS) and all applicable state and local laws and standards. Should a conflict exist between any of these standards, the *most stringent shall apply*." 2014FOIA1716, *supra* note 41, at 120 (emphasis added).

date IRCA restrictions for those ICE residents who have acquiesced to rulings on their cases by immigration judges who have found their presence in the United States unlawful and who would be otherwise ineligible for employment. An "allowance" compensation for ICE residents might occur in keeping with a policy short of a full employment. Limiting hours worked, but providing legal compensation per the FLSA and the SCA protects workers in and out of detention centers.[320] The work-program's functional meaning of pay or wages, along with Congress' wage policies in the FLSA, and its failure in almost four decades to allocate funds for work performed by those in custody under immigration laws, requires resolving ambiguities "in favor of persons for whose benefit the statute was enacted . . . ."[321] In this case, the statutes are for the benefit of those in ICE custody, as well as those in neighboring communities locked out of competing for work performed, in violation of the FLSA and the SCA.

8 U.S.C. § 1555(d) indicates Congress shall set the rate of compensation for those in custody under immigration laws "from time to time."[322] The phrases "from time to time" and "the appropriation Act involved" also appear in Article I, section 9, clause 7: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipt and Expenditures of all public Money shall be published from time to time."[323] From "time to time" in this context is a phrase that requires Congress to periodically make its expenditures transparent. In the context of 8 U.S.C. § 1555(d), it associates the payments authorized by the "appropriation Act involved," indicating that Congress has reserved to itself the authority to set the rate of compensation when making appropriations for immigration expenses annually, a time frame inferred as annually by each and every Congress from 1950 to 1978.[324]

Under some circumstances, an authorizing statute mandates duties for an agency even absent appropriations: "If an authorization of appropriations expires, or if Congress fails to appropriate sufficient funds without explicitly denying their use for a particular purpose, those statutory obligations still exist even though the agency may lack sufficient funds to satisfy them."[325] However, 8 U.S.C. § 1555(d) is neither an entitlement program nor an

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320. The McNamara-O'Hara Service Contract Act (SCA) "requires contractors and subcontractors performing services on prime contracts in excess of $2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality . . . ." *McNamara-O-Hara Service Contract Act (SCA)*, U.S. DEPARTMENT OF LABOR, http://www.dol.gov/whd/govcontracts/sca.htm (last visited Feb. 9, 2016).

321. KIM, *supra* note 292, at 30 ("Social Security Act 'is remedial, to be construed liberally . . . and not so as to withhold benefits in marginal cases'") (quoting Smith v. Heckler, 820 F.2d 1093, 1095 (9th Cir. 1987)).

322. 8 U.S.C. § 1555(d).

323. U.S. CONST. art. I, § 9, cl. 7.

324. *See* JESSICA TOLLESTRUP & BRIAN T. YEH, CONG. RESEARCH SERV., R 42098, AUTHORIZATION OF APPROPRIATION: PROCEDURAL AND LEGAL ISSUES (2011).

325. *Id.* at 10.

unfunded mandate, but a discretionary program that has received a permanent authorization for operating expenses, with the caveat that Congress and not the agency must set the rate of the daily allowance for work performed by those in custody under immigration laws.[326]

If Congress had passed an appropriation Act assigning a rate of compensation more recently than 1978, the government could argue that rate would supersede the rate of compensation Congress set in the FLSA. That argument very well might fail, for statutory as well as Constitutional reasons.[327] ICE residents could claim the program violates the Fifth Amendment. Those in ICE custody have a property interest in their labor and their earnings. A law violating the FLSA and other basic standards of employee rights would arguably violate the Takings Clause.[328]

2. *Fair Labor Standards Act (FLSA) (29 U.S.C. § 202)*[329]

This section analyzes those portions of the FLSA indicating an employer-employee relation and its wage protections for those employed by private firms and the federal government while also in ICE custody. It begins with a broad Congressional finding and declaration of policy that demands a comprehensive understanding of its coverage and deference to its specific language and exemptions. 29 U.S.C. § 202(a) states:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of

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326. In 2014, 17% of the federal government's expenditures went for non-defense discretionary programs. CENTER ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: NON-DEFENSE DISCRETIONARY PROGRAMS (2015), *available at* http://www.cbpp.org/research/policy-basics-non-defense-discretionary-programs.

327. There are Fifth, Sixth, Thirteenth, and Fourteenth amendment questions that could be raised if Congress set a wage below the minimum wage for those in custody under immigration laws. Courts will attempt to avoid a construction of a statute that would render the statute unconstitutional, "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also* Immigration & Naturalization Serv. v. St. Ctr., 533 U.S. 289, 300 (2001) ("where an alternative interpretation of the statute is 'fairly possible' . . . we are obligated to construe the statute to avoid such problems") (citations omitted); KIM, *supra* note 292, at 2.

328. "[N]or shall private property be taken for public use without just compensation." Takings Clause, U.S. CONST. amend. V. *See also* Wong Wing v. United States, 163 U.S. 228 (1896). Thank you to Professor Christopher Serkin for pointing this out.

329. The Fair Labor Standards Act of 1938, ch. 676, §1, 52 Stat. 1060 (1938) (codified as amended 29 U.S.C. § 201, et al. (2015)).

> competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
> (b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.[330]

Unlike 8 U.S.C. § 1555(d), the above passage clearly discloses Congress' purpose for the law.[331] The "detainee workers" residing in ICE facilities, including U.S. citizens, legal residents, and those in the country in violation of the immigration laws, are not excluded from coverage under the FLSA by the plain meaning of the statute.[332] The passage includes statements about: (a) the well-being of workers; (b) the deleterious effects that distortions in labor markets have on commerce; and (c) an intent to address labor practices in one firm that may harm workers employed elsewhere or those who are unemployed.[333] The explicit intent of the act is to thwart dynamic exigencies of unfair payments and, by inference, unfair or unjust profits. The Supreme Court has construed the FLSA broadly, to "require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."[334] Even in prison labor litigation some courts have issued decisions that enforce the minimum wage requirements for the benefit of the local labor force.[335]

The FLSA does not indicate that Congress intended to exclude from coverage service workers who are residents of private detention facilities, nor service workers adjacent such facilities.[336] Courts have used this portion of the FLSA to cover not only those working in the United States without employment authorization,[337] but also foreign workers on ships in international waters, who are receiving food and lodging, if the ship is owned by a U.S. firm.[338] It would seem no more prejudicial to the employment prospects

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330. 29 U.S.C. § 202(a).

331. For this reason, courts weigh purposes stated in the statute's text more than those imputed to Congress on the basis of hearing records, reports, and other related materials. *See infra* Part VII.

332. 29 U.S.C. § 201.

333. 29 U.S.C. § 202(a).

334. Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1961) (quoting Walling v. Portland Terminal Co., 330 U.S. 150 (1947)).

335. *See infra* Parts VI, VII.

336. 29 U.S.C. § 201.

337. *See*, *e.g.*, Solis v. Cindy's Total Care, Inc., No. 10-CIV-7242 (PAE) (S.D.N.Y. Dec. 2011).

338. Kaluom v. Stolt, 474 F. Supp. 2d 866, 881 (S.D. Tex. 2007) (In a deposition, Defendant's Manager of Legal Contracts stated in regards to the foreign workers "[t]hat's their standards that they've set and they're happy. They're happy to have these jobs." However, the court reasoned that "[t]he problem with Thomas's reasoning is that . . . [t]hey were working in the Gulf of Mexico on a

of those in Louisiana and Texas to lose jobs to Malaysians at sea than to Malaysians in litigation while housed at Oakdale and Houston.[339] The ICE contracts referencing "detainee workers" are themselves demonstrable evidence that ICE resident workers participate in an industry engaged in commerce. Thus, such employees are depriving other workers of employment. Under the FLSA one dollar per day wages are payments that "constitute an unfair method of competition in commerce." By paying slaving wages to immigrants and U.S. citizens they hold under immigration law, GEO and other prison firms unjustly enrich their shareholders vis-a-vis shareholders in other firms and not just their captive labor.[340]

The FLSA includes no exemption for those workers detained in the immigration system. To reach its result, the Fifth Circuit's *Alvarado Guevara* avoids a plain meaning construction of the FLSA, drawing instead on unsubstantiated imputations of "legislative purpose" and "motive."[341] Tellingly, the Fifth Circuit asserts that the FLSA declaration concerns the "worker in *American* industry," gratuitously using a nativist adjective absent in an act that references simply "industries engaged in commerce."[342] *Alvarado Guevara* fails to note that the Act purposefully includes segments of the labor force that had historically been excluded, such as "domestic service in households."[343] Nor does the *Alvarado Guevara* opinion acknowledge that the FLSA includes specific caveats that ensure that employers do not attempt to alter the intended scope of the law.[344]

One possible response to this analysis would be to point out the reference to a "wage" in the FLSA and to an "allowance" in 8 U.S.C. § 1555(d), and also to recognize the FLSA allows that room and board may be credited as wages.[345] Those arguments are the court's only basis for ignoring the FLSA's stated purpose.[346] And yet there is no specific analysis of the purpose of confinement of those in immigration custody versus that for those in prison,

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vessel that, for the purposes of this Motion, was an American vessel." The court further stressed that "[I]f Defendant is able to employ foreign workers working off of the Coast of Louisiana under working conditions that Congress has deemed unacceptable for American workers, then there is nothing to stop them from 'outsourcing' all of the jobs on the vessels in the Gulf, which would have dire economic consequences for families throughout the Gulf Coast region.").

339. *See* McComb v. Farmers Reservoir & Irrigation Co., 167 F.2d 911, 913 (10th Cir. 1948), *aff'd*, 337 U.S. 755 ("The purpose of the [Fair Labor Standards] Act was to eradicate from interstate commerce the evils attendant upon low wages and long hours of service.").

340. This distortion of commerce is iterative: super profits for private prisons make available more funds for lobbying on behalf of the prison industry and thus distorts the policy-making process, making comprehensive immigration reform less likely. *See* SHAH ET AL., *supra* note 138.

341. Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990).

342. *See* KIM, *supra* note 292, at 16–17 (citing Andrus v. Glover Const. Co., 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.") (quoting Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942))).

343. 29 U.S.C. § 202(a)(5).

344. *Id.*

345. FLSA, 29 U.S.C. § 203(4)(m).

346. *Id.*

nor of whether the value of the work performed exceeds the cost of their room and board.[347]

Congress has chosen to utilize detention for the purpose of implementing its immigration laws, a putative benefit to its constituents, not the private prison industry.[348] 8 U.S.C. § 1555(d) authorizes payments for work performed, not a *quid pro quo* exchange of work for lodging. Monetary and non-monetary inducements, coercion, or barter opportunities for facility construction and maintenance do not have any statutory basis. Ignoring these protections not only harms those in custody, but adversely affects the labor markets of construction workers, plumbers, barbers, food workers, janitorial staff, and so forth.

Were Congress to set a rate for 8 U.S.C. § 1555(d), there would be legitimate questions about how to read the § 1555(d) reference to an "allowance" in relation to the FLSA protection of "wages." The American Heritage Dictionary defines "wage" as "[a] regular payment, usually on an hourly, daily, or weekly basis, made by an employer to an employee, especially for manual or unskilled work."[349] The definition of a wage is consistent with the protocols for ICE facility residents signing up for work at specified times and receiving payments for each day's work. That the hours worked might be capped and compensation used for commissary purchases of commercial products—at retail prices with profits going to the company store—is also consistent with "wage" as used in the FLSA. Just because the government, or any other employer, caps the hours worked does not exempt the organization from the requirements of the FLSA. Institutional employment settings can and do cap hours worked, but still pay minimum wages, including to those who have their room and board covered.[350]

One possible legitimate FLSA exemption for the ICE resident work program would be if it truly did comport with the definition of a "volunteer" per the regulations implementing the FLSA. The PBNDS describes its

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347. The FLSA allows for compensation in the form of room and board, not the costs of private guards. Whether the per diem charges for the former are less than the labor value of ICE resident work—which seems likely—is an empirical question no court has addressed.

348. Some Congresses have made other choices, such as rejecting proposals for mass detention of those in deportation proceedings. *See Deportation and Detention of Aliens*, *infra* note 409 and *infra* Part IV.A.1.

349. *Wage*, AM. HERITAGE DICTIONARY, https://www.ahdictionary.com/word/search.html?q=wage&submit.x=36&submit.y=36.

350. One familiar setting for this audience might be student research assistants. A university may prohibit students employed under the work-study programs from working more than ten hours per week, but this does not mean the wages for these ten hours are less than minimum wages under the FLSA. "The Federal Work-Study Program was established by Congress to help students find employment to meet educational costs while providing work experience related to academic majors and interests. Approximately 2,500 undergraduates participate in the program annually at Northwestern University. *Most students work between six and ten hours per week, and the jobs pay between $7.25 and $1 an hour. Funds are paid directly to students, and are intended to pay for books and other personal expenses. Federal Work-Study funds are not credited toward students' invoices*." Northwestern University Guidelines (emphasis added), *available at* http://undergradaid.northwestern.edu/types-of-aid/federal-work-study.html.

"Volunteer Work Program," and invokes prohibitions against the use of immigrants for forced labor, as per *Wong Wing*.[351] However, federal regulations define "volunteer" as follows:

> An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.[352]

Were the FLSA to be interpreted to exempt those who were willing to work below minimum wage, along the lines of the program defined in the PBNDS, McDonald's could pay retired senior citizens to "volunteer" for eight hour shifts in exchange for a Big Mac or its cash equivalent.

Moreover, the regulations also specify that there can be no hint of coercion: "Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services."[353] ICE might be hard-pressed to expect judges to believe ICE facility residents are cleaning toilets for the companies constraining their liberty in service of furthering the residents' "humanitarian purpose" of supporting the deportation industry. In sum, the conditions under which people in ICE custody are being paid one dollar per day for their work fail to meet any of the criteria defining a "volunteer," nor do they qualify for any other exemptions.

3. *The Service Contract Act of 1965 (41 U.S.C. § 351)*

The Service Contract Act (SCA), referenced in all ICE facility contracts also does not include exemptions for individuals working while in custody under civil immigration laws. It states: "No contractor who enters into any contract with the Federal Government the principle purpose of which is to furnish services through the use of service employees and no subcontractor there under shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. § 201, et seq.)."[354] ICE facility contracts mandate contractors to follow the SCA.[355]

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351. Wong Wing v. United States, 163 U.S. 228 (1896).
352. 29 C.F.R. § 553.101(a).
353. § 553.101(b).
354. 41 U.S.C. § 351(b)(1).
355. *See supra* Part III; note 6 (for contracts).

4. *Occupation Safety and Health Act of 1970 (19 U.S.C. §§ 651-678)*

The Occupation Safety and Health Act states that its "purpose and policy . . . [is] to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[356] The Act also includes among its purposes, "providing for appropriate reporting procedures with respect to occupational safety and health."[357] The OSHA defines an employer as "a person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a State."[358] An employee is an "employee of any employer."[359] The Act requires OSHA to develop regulations to implement and enforce the Act: "Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger."[360] Nothing in this Act is at odds with 8 U.S.C. § 1555(d).

The Immigration and Naturalization Service operated the Port Isabel facility that was sued by Alvarado Guevara in 1990. Today, private firms, whose supervisory and other contractual operational responsibilities include work performed by ICE residents, run all ICE detention facilities. Ahtna Technical Services currently manages the Port Isabel facility. The PBNDS provides no possibilities for reporting OSHA violations and the Ahtna contract weighs the "detainee rights" portion of compliance at 5%.[361] The standards of evaluation in the contract clearly contemplate facility residents performing work. "Detainees receive safety and appropriate equipment training prior to beginning to work department."[362] However, Ahtna has little or no incentive to follow its own internal grievance procedures, much less OSHA requirements.[363]

5. *Immigrant Reform Control Act (IRCA), Making Employment of Unauthorized Aliens Unlawful (8 U.S.C. § 1324a)*

This Act states: "(1) It is unlawful for a person or other entity . . . to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment."[364] On

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356. 29 U.S.C. § 651(b) (1970).
357. § 651(b)(12).
358. 29 C.F.R. § 1910.2(c) (2015).
359. § 1910.2(d).
360. 29 U.S.C. § 657(f)(1) (1998).
361. Port Isabel Contract, 2008-2013, HSCEDM-08-d-00002, AHTNA TECHNICAL SERVICES 80 (period of performance through 5/31/2013), *see* Source Materials, *supra* note 6.
362. *Id.* at 90.
363. *See supra* Part II.A.4, 5.
364. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 359 (as amended) (the Act has a lengthy history of amendments); *see* 8 U.S.C. § 1324a(a)(1)(A) (2013) ("Notes"), *available at* http://www.law.cornell.edu/uscode/text/8/1324a.

its face, the law would seem to conflict with 8 U.S.C. § 1555(d) and if implemented to cover ICE facility residents would potentially render any employment of ICE residents unlawful. However, the rest of the statute accommodates some work by ICE residents, provided that the employment is consistent with other laws and the Constitution. Providing work opportunities for limited hours at wages set by the FLSA would fit the general goal of the law and also provide a defense against prosecution for which the statute explicitly provides.

IRCA's relevance to the private prison industry depends on the legal status of the ICE resident in question. The only individuals IRCA would disqualify are those who have consented to final removal orders and are waiting for travel documents from their home countries and for ICE to make arrangements for their departure.[365] Indeed, ICE has custody of thousands of people who ultimately have their U.S. citizenship affirmed,[366] and tens of thousands of people whose legal residency is ultimately recognized in an immigration court or by a federal judge.[367] Prior to such pronouncements, the employer would be in the same position of uncertainty about citizenship and legal residency as the government. The employer would not be able to hire an ICE resident "knowing the alien is an unauthorized alien"; it would only know that the resident stands accused of unlawful presence in the United States by ICE.[368]

Firms employing ICE residents also may find relief from IRCA in the final lines of 8 U.S.C. § 1324(a)(h)(3): "As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time . . . authorized to be so employed by this chapter or by the Attorney General."[369] This last authorization could be accomplished by prosecutorial discretion or, preferably, pursuant to the Attorney General initiating a rule-making process to provide such an exemption.

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365. ICE has released no snapshot data on the number of people in their custody who fit this description. No one who fits this description can be held for longer than six months. Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

366. Stevens, *supra* note 235. Executive Office for Immigration Review (EOIR) ad hoc and incomplete data on U.S. citizenship claims between January 1, 2011 and September 30, 2014 reveal 256 cases terminated by immigration judges, 51 closed administratively, and 10 closed by ICE prosecutors, including "109 who were in ICE jails on the date their orders were terminated; an additional 47 had been in ICE custody on charges of alienage and were released before their final hearings." See Jacqueline Stevens, *Deported U.S. Citizen Andres Robles Wins $350,000 Settlement, Records Corrected*, STATES WITHOUT NATIONS (May 31, 2015, 22:26:00-07:00), http://stateswithoutnations.blogspot.com/2015/05/deported-us-citizen-andres-robles-wins.html (using data from EOIR FOIA 2014-23528, available at http://deportationresearchclinic.org/ 2014-23528_-_Copy_of_14-197.xlsx).

367. *See Statistical Yearbook*, U.S. DEPARTMENT OF JUSTICE, http://www.justice.gov/eoir/statistical-year-book (last visited Feb. 9, 2016).

368. 8 U.S.C. § 1324a(a)(1)(A) (2013).

369. § 1324a(h)(3)(B).

Alvarado Guevara takes a different position, claiming that the 1988 Treasury, Postal Service, and General Government Appropriations Act would prohibit the Immigration and Naturalization Service (INS) from employing INS facility residents.[370] However, the opinion does not address the fact that many of those in then-INS and now ICE custody will prevail in their claims of legal residency or U.S. citizenship.[371] *Alvarado Guevara* also is confined to the employment policies of the federal government itself, not those of private firms.

6. *Convict Labor Contracts (18 U.S.C. § 436), Executive Order 11755 (Dec. 29, 1973), as modified by Executive Order 12608 (Sept. 9, 1987) and Executive Order 12943 (Dec. 13, 1994), 48 C.F.R. § 22.201*

The Executive Order imposes conditions on the use of "convict labor" and does not reference those in custody under immigration laws.[372] The order, collapsed into 48 C.F.R. § 22.201, references "prison inmates," "persons on parole or probation," and other categories of individuals who are or were in criminal custody for purposes of punishment and rehabilitation: "The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society."[373] There is no relation between the individuals described above and the individuals in the work program described in the PBNDS or in the ICE facilities. This is a noteworthy observation since 18 U.S.C. § 436 and several associated orders appear in all ICE contracts with prison firms, and a portion of the referenced 48 C.F.R. § 22.201 requires facilities to ensure that "paid employment will not (A) Result in the displacement of employed workers; (B) Be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or (C) Impair existing contracts for services."[374] *Alvarado Guevara* ignores this.[375]

The plain meaning of these laws and regulations can be accommodated by a policy that: (a) enforces payment of minimum wages for all work performed in ICE facilities, per the SCA and FLSA; (b) caps the number of hours worked for those with final removal orders, per IRCA; (c) removes OSHA compliance from the internal grievance review procedures of the PBNDS and places this in the purview of OSHA; (d) exempts contractors from prosecution under 8 U.S.C. § 1324(a) by prosecutorial discretion or rules elaborated by the Attorney General, as specified in 8 U.S.C. § 1324(h); and (e) imposes civil and criminal penalties on agencies, government

370. Alvarado Guevara v. INS, 902 F.2d 395, 395 n.2 (5th Cir. 1990).
371. *See Statistical Yearbook*, *supra* note 354; Stevens, *supra* note 235.
372. Exec. Order No. 11755, 48 C.F.R. 22.201 (1973).
373. 48 C.F.R. § 22.201(a) (2015).
374. § 22.01(a)(4)(iii).
375. 902 F.2d 394 (5th Cir. 1990).

employees, firms, and private employees who violate Forced Labor (18 U.S.C. § 1589),[376] and Trafficking with Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor (18 U.S.C § 1590), including restitution.

B. *Jurisprudence of Prison Labor Cases Relying on the Plain Meaning of the FLSA*

Alvarado Guevara largely ignores the plain text of the FLSA and other statutes, but other widely cited decisions on prison work have taken a different approach.[377] Instead of dismissing prisoners from coverage by invoking the vagaries of legislative purpose, some courts, hewing to the plain text of the Sixth and Thirteenth Amendments, have distinguished between mandatory work performed as a condition of punishment or correction and work performed for purposes of income for commercial enterprises and inmates.[378] This section highlights passages from court decisions on prisoners' claims under the FLSA.

The argument developed below is that implied repeal is the correct interpretive strategy for understanding the legal work conditions of inmates as well as ICE residents. The apparent tensions in the prison cases are between the penal code's authorization or requirement of punishment on the one hand, and its protection of workers' rights to a minimum wage, on the other. Again, the criterion for when a court may find that Congress has implied a repeal of one law by another is when the requirement(s) of one or more statutes in question are logically or physically irreconcilable.[379] Courts have used

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376. The GEO Firm, Inc. has cited the dismissal of a *pro se* complaint brought against the INS by a resident worker alleging violation of 18 U.S.C. § 1589 and the Thirteenth Amendment's prohibition against involuntary servitude. In the aforementioned case, the court held that a "judicially-created exception to 'involuntary' servitude exists for when the government requires the performance of civic duties such as jury duty.'" Motion to Dismiss of Defendant at 14, Menocal v. GEO Group, Inc., No. 1:14-cv-02887-JLK, 2015 WL 4095592 (D. Colo. July 6, 2015) (citing Channer v. Hall, 112 F.3d 214, 218 (5th Cir. 1997)). GEO also points out a similar application of this exception "by the courts to mental health patients who are required to perform a variety of work activities while hospitalized, such as fixing meals, scrubbing dishes, laundry, and cleaning the building." *Id.* In response, Plaintiffs distinguish the relevance of *Channer* on three grounds: 1) *Channer* predates "Congress's enactment of the forced labor statute . . . which . . . did not exist when the Fifth Circuit decided *Channer*"; 2) the scope of forced work Plaintiffs allege is "broader than the standards subsequently adopted by ICE" in its subsequent PBNDS; and 3) the civic duty exception is "inapplicable to for-profit private prison contractors like GEO." Response of Plaintiff to Motion to Dismiss of Defendant at 30-33, Menocal v. GEO Group, Inc., No. 1:14-cv-02887-JLK, 2015 WL 4095592 (D. Colo. July 6, 2015).

377. 902 F.2d 394 (5th Cir. 1990).

378. *See* Watson v. Graves, 909 F.2d 1549, 1554 (5th Cir. 1990); Louis Carter v. Cmty. Coll., 735 F2d 8, 12 (2d Cir. 1984) (quoting Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)).

379. Indeed, many of the cases that have been construed in case books as exemplifying the limits of reading the plain meaning of the statutes occur in the contexts of prison labor cases. This pattern may by simply reflecting the intuitions of judges about incarcerated populations stigmatized as "criminals," and not logical inferences of any "absurdity" in the proposition a society respect the dignity of those in state custody by providing them with the protection of the same laws whose violation deprived them of their liberty. *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal*

various criteria to evaluate prison labor relations, including: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled the employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[380] In a widely cited ruling on behalf of prisoners, the Second Circuit stated: "Congress has set forth an extensive list of workers who are exempted expressly from FLSA coverage. The category of prisoners is not on that list. It would be an encroachment upon the legislative prerogative for a court to hold that a class of workers is excluded from the Act."[381]

Similarly, on September 13, 1990, just a few months after its decision in *Alvarado Guevara*, the Fifth Circuit in *Watson v. Graves* followed the text of the FLSA closely. Seemingly reversing the approach taken in *Alvarado Guevara,* the Fifth Circuit restated the analysis used in *Carter v. Dutchess County*:

> We agree with the *Carter* court that status as an inmate does not foreclose inquiry into FLSA coverage. We also agree that in order to determine the true 'economic reality' of the inmates' employee status, we must apply the four factors of the economic reality test to the facts in the instant case in light of the policies behind FLSA. We must also look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage.[382]

In distinguishing the case at hand from those in which other courts had refused FLSA protections for prisoners, the *Watson* court pointed out that the plaintiffs were offered the opportunity to work, and thus were not working as a condition of their punishment: "[B]y stark contrast, Watson and Thrash were not *required* to work as part of their respective sentences. Therefore, their labor did not 'belong' to the Livingston Parish Jail, and was not legitimately at the disposal of the Sheriff or Warden."[383] In other words, the fact that Watson and Thrash chose, or in the language of the ICE PBNDS "volunteered," to work is precisely what triggered their protections under the FLSA. The *Watson* analysis reverses the approach and findings in *Alvarado*

Justice System Free of Racial Bias: An Abolitionist Framework, 39 COLUM. HUM. RTS. L. REV. 261, 286 (2007-2008). Vu and Schwartz urge its use for analysis of FLSA claims by undocumented workers. Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts through the Haze of Hoffman Plastic, its Predecessors and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1 (2008).

380. *Louis Carter*, 735 F.2d at 12 (quoting Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)).

381. *Id.* at 13 (denying motion to dismiss prisoner lawsuit seeking damages under the FLSA).

382. Watson v. Graves, 909 F.2d 1549, 1554 (5th Cir. 1990). Interestingly, the decision makes no mention of its recent ruling in *Alvarado Guevara*, which entirely ignores the criteria from *Bonnette* used in *Carter*. *Id.*

383. *Id.* at 1556.

Guevara, which looked only to the formal relationship (whether the law prohibited the government's employment of those without employment authorization) and not the functional program and practices.

Other decisions attend to the plain meaning of the FLSA and nonetheless deny coverage to prisoners. Still, these parse the FLSA so as to allow its protections to workers who are ICE facility residents. Stressing the primarily punitive or rehabilitative purpose of the prison programs, as stated in aforementioned state and federal statutes for prison employment and the prison labor statutes protecting adverse effects on commerce and labor, there is a potential implied repeal of the FLSA by penal codes that is not applicable to those workers in custody under civil immigration laws.

In *McMaster v. State of Minnesota,* a Minnesota district court denied prisoners the right to sue under the FLSA, holding that the work is "part of their sentences of incarceration."[384] The court cited with approval a prior decision in which the court "rejected an interpretation of the FLSA under which coverage would turn upon whether inmates performed services for the prison itself or produced goods for distribution beyond prison walls."[385] Moreover, the court rejected the claim that prisoners working for prison industry programs authorized by Minnesota are covered by the FLSA, stating that "[b]y statute, the prison industries are to operate 'for the *primary purpose of providing vocational training, meaningful employment and the teaching of proper work habits to the inmates* . . . and not as competitive business ventures.'"[386] The court held that the work relation at issue was one of "involuntary servitude" and not employment and that "the Thirteenth Amendment's exclusion of prisoner labor from the prohibition on involuntary servitude is a strong indication that as a matter of economic reality, prisoners working for the prison itself are not employed by the prison within the meaning of the FLSA."[387] This determination exempts labor within the prison from FLSA coverage on the grounds that such work is required for their punishment.

A separate analysis relying on the text of the FLSA implies that ICE residents are ineligible for protections under the FLSA because their "standard of living" is accommodated by jailers. In *Harker v. State Use Industries*, the Fourth Circuit held:

> The FLSA does not cover these inmates because *the statute itself states* that Congress passed minimum wage standards in order to maintain a "standard of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. § 202(a). While incarcerated, *inmates have no such needs because the DOC provides them with the food,*

384. McMaster v. Minn., 819 F. Supp. 1429, 1438 (D. Minn. 1993).
385. *Id.* at 1437 n.4 (citing Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992)).
386. *Id.* at 1438 (emphasis added) (quoting MINN. STAT. ANN. § 241.27 (West 2009)).
387. *Id.* at 1437.

> *shelter, and clothing that employees would have to purchase in a true employment situation.* So long as the DOC provides for these needs, [the inmates] can have no credible claim that inmates need a minimum wage to ensure their welfare and standard of living.[388]

The court's inferences about room and board have been cited in other prison labor cases without specifically evaluating whether this means-testing approach comports with the FLSA's text or purpose.[389] Moreover, ICE residents do not have their "health" or "general well-being" taken care of by their guards and employers.[390] For reasons that appear in *Wong Wing* and the legislative history of 8 U.S.C. § 1555(d) Part VI, the reasoning above is not relevant to ICE residents, despite their also being held at government expense.

The *Harker* opinion interprets the FLSA in the context of "State Use Industries," an "organization within the [Department of Correction] created by the Maryland legislative to meet the rehabilitative needs of inmates."[391] The court further states, "[as] part of the DOC, SUI has a rehabilitative, rather than pecuniary, interest in Harker's labors."[392] Where states or other government agencies require work as a condition of punishment, the FLSA's employment protections might present an "irreconcilable conflict" with the policy goals of rehabilitation or vengeance, and thus potentially invalidate the FLSA for convicted criminals.[393] None of these arguments hold for the exclusively civil, administrative policy goals of immigration proceedings, including detention.

In an effort to assert Congress' implied repeal of portions of the FLSA relevant to those in ICE custody, ICE might claim that the Immigration Expenses law passed in 1950 is more specific and passed after the FLSA (1938).[394] But, any theory of statutory construction that would imply repeal

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388. Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1990) (emphasis added).

389. *Harker* is cited by 57 decisions and followed by Danneskjold v. Hausrath, 82 F.3d 37 (2d Cir. 1996), which in turn, is cited in 68 decisions.

390. *See* IMMIGRATION DETENTION TRANSPARENCY AND HUMAN RIGHTS PROJECT REPORT, *supra* note 146.

391. *Harker*, 990 F.2d at 132.

392. *Id.* at 133.

393. Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (quoting United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976)). An implied repeal will only be found where provisions in two statutes are "in irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute." Posadas v. National City Bank, 296 U.S. 497, 503 (1936). The analysis above depends on the Eighth Amendment's prohibition of "cruel and unusual punishment." It is possible that at some future point, the government's uneven enforcement of civil laws for those in and out of its custody could be construed as cruel and unusual. *See* Branch v. Smith, 538 U.S. 254, 273 (2003) (finding that the jurisprudence of the court favors repeals by implication only when Congress has expressly authorized them).

394. *Radzanower*, 426 U.S. at 158 ("It follows under the general principles of statutory construction . . . that the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act.").

of the FLSA and OSHA for those in ICE custody should prevail "only to the minimum extent necessary."[395] Absent appropriations for § 1555(d) by Congress since 1978, there is no conflict between a statute allowing civil residents in immigration custody payment for work performed, as per § 1555(d), and one that requires them to be paid at minimum wage, as per the FLSA. Moreover, the firms, not ICE or Congress, are setting the wages and 8 U.S.C. § 1555(d) has no bearing on these expenditures and the firms' contractual obligations to abide by the FLSA, OSHA, and the SCA.

C. *Jurisprudence of Implied Repeal: FLSA Analysis for Undocumented Workers*[396]

When courts have been asked to disregard the FLSA because the plaintiffs were immigrants without legal work authorization, courts generally have held that the FLSA covers "persons" regardless of lawful status.[397] Using an implied repeal analysis, consistent with the approach to the PBNDS and private firm payments of one dollar per day argued for here, the Department of Labor (DOL) has filed *amicus* briefs and opinion letters indicating the agency's longstanding support of such persons being covered by the FLSA's broad coverage. On September 24, 2012, the DOL filed an *amicus* brief stating: "*Hoffman* cannot be read . . . to alter the FLSA's bedrock minimum wage and overtime requirements, nor did IRCA impliedly repeal the definitions of 'employee' or 'employ' under the FLSA."[398] A few months later, on February 14, 2013, the Eighth Circuit affirmed this analysis.[399]

In similar cases, the courts reference *Madeira v. Affordable Housing Foundation, Inc.*[400] *Madeira* is a textbook case of an implied repeal analysis

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395. Silver v. N.Y. Stock Exch., 373 U.S. 341, 355–57, 357 n.11 (1963).

396. This section is indebted to the analyses in Vu & Schwartz, *supra* note 379, at 1.

397. For an apparent exception see Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137 (2002). The Court uses an intent analysis, asserting, "There is no reason to think that Congress . . . intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally . . . ." The case comes out of a National Labor Relations Board ruling and has been disavowed in subsequent FLSA cases. *See* Vu & Schwartz, *supra* note 379, at 33–34, 34 n.187.

398. Brief for U.S. Dep't of Labor, Amici Curiae Supporting Plaintiffs-Appellees, Lucas v. Jerusalem Cafe, 721 F.3d 927 (8th Cir. 2013) (emphasis in original), *available at* www.dol.gov/sol/media/briefs/lucas(A)-09-24-2012.htm. In *Radzanower*, the general statute on jurisdiction for securities litigation did not repeal the first and more specific statute on venue when the defendant is a bank, as the Court found "no clear intention" for a change. Likewise, nothing in the text of 8 U.S.C. § 1555(d) implies a repeal of portions of the FLSA.

399. Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 939 (2013) ("Having decided the FLSA protects unauthorized aliens and the workers have standing to sue the employers for violating the FLSA, we swiftly reject the employers' challenge to the district court's decision to suppress evidence related to the workers' immigration status.").

400. *Madeira* holds that the Immigration Reform and Control Act of 1986 does not preclude FLSA actions. "[A] number of district courts have concluded, even after *Hoffman Plastic*, that IRCA does not preclude such FLSA awards." Madeira v. Affordable Hous. Found., 469 F.3d 219, 243 (2006). The ruling was affirming the legal claims advanced by the federal government itself. Although plain statutory text squarely resolves this issue, it is noteworthy that the Department of Labor's interpretation of the Act is consistent with this holding. The Secretary has supplied the Court

of the plain text of disputed statutes. The court in *Madeira* found that although enforcing federal labor laws might appear to conflict with immigration policy, the Supreme Court had instructed the government to enforce both unless "compliance . . . is physically impossible."[401] Likewise, in 2011 a nail salon in New York City lost a lawsuit brought under the FLSA by employees, some of which were without employment authorization documents.[402] The court, in this case, rejected the employers' argument that the FLSA did not cover undocumented immigrants.[403]

It is of course possible that if sued under the FLSA, private contractors may assert immunity on the basis of the program's description in the PBNDS 5.8 and in many, but not all, of the ICE contracts.[404] To date, ICE has filed no amicus briefs on behalf of GEO in the *Menocal* litigation.[405] Furthermore, provisions of a contract that violate the FLSA or the SCA are invalid. An errant federal bureaucrat cannot, through an agreement, authorize actions in violation of federal laws. The Supreme Court in *Parker v. Brown* provides immunity to firms taking actions in violation of an otherwise valid federal law if those actions are taken because of state authorization.[406] However, by allowing state legislatures "authority to regulate the commerce with respect to matters of local concern, the *Parker* Court affirms coordination otherwise in violation of the Sherman Act because such actions were taken under the direction of the state legislature.[407] The act of a state legislature implicates questions of federalism that do not arise in the context of these contracts. The plaintiffs in *Menocal v. The GEO Group, Inc.* argued that the contracts actually violate Colorado's state minimum wage law and

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with an August 26, 2010 letter from the Solicitor of Labor that reflects the Department's longstanding interpretation that immigration is not relevant to liability for unearned wages earned under the FLSA. Brief for the United States Dep't of Labor, 469 F.3d 219.

401. *See* Madeira v. Affordable Hous. Found., 469 F.3d 219, 241 n.23 (2006) (citing to Chellan v. John Pickle Co., 46 F. Supp. 2d. 1247, 1277–79 (N.D. Okla. 2006)); Zavela v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 321–25 (D.N.J. 2005); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501–03 (W.D. Mich. 2005); Flores v. Amigon, 233 F. Supp. 2d 462, 463–64 (E.D.N.Y 2002); Singh v. Jutla, 214 F. Supp. 2d 1056, 1060–62 (N.D. Cal. 2002); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); Patel v. Quality Inn S. 846 F.2d 700, 704–06 (11th Cir. 1988).

402. Solis v. Cindy's Total Care, Inc., No. 10-CIV-7242 (PAE) (S.D.N.Y. Dec. 2011).

403. *Id.* at *2 ("an employee's immigration status, or national origin, is clearly irrelevant to a claim for back pay or wages under the FLSA."); *see* Marquez v. Erenler, No. 12 Civ. 8580 (ALC)(MHD), slip op. at 1 (S.D.N.Y. Sept. 2, 2013) (citing Solis v. Cindy's Total Care, Inc., No. 10-CIV-7242 (PAE) (S.D.N.Y. Dec. 2011)). The court also noted that "the courts as well as the Department of Labor have, with some consistency, viewed FLSA claims for such payment unaffected by immigration status." *Solis*, No. 10-CIV-7242 (PAE) (S.D.N.Y. Dec. 2011).

404. *See* Source Materials, *supra* note 6.

405. *See* Menocal Complaint, *supra* note 32.

406. Parker v. Brown, 317 U.S. 341 (1943). Thanks to Rebecca Haw for pointing out the relevance of this and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) to this analysis.

407. *Parker*, 317 U.S. at 350–51 ("[Raisin producer coordination] derived its authority and its efficacy from the legislative command of the state [of California] and was not intended to operate of become effective without that command.").

defendants cite only federal, not state authorities, in rebutting this argument.[408]

Likewise, the case of *California Liquor Dealers Association v. Midcal Aluminum* also calls claims of immunity by the federal contractors into question.[409] In that case, the Supreme Court set forth a two-pronged test for circumstances in which state authorities would immunize private actors from prosecution: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[410] Using this test, the Court held that liquor retailers were not immune from anti-trust litigation under the Sherman Act.[411] The Court found that the state's legislation is "forthrightly stated" but that it "neither establishes nor reviews the reasonableness of the price schedules; nor does it regulate."[412] Assuming the courts find the PBNDS on the work program passes muster as a "clearly articulated" and "affirmatively expressed" policy, there is no evidence of ICE supervision of its implementation.[413] Likewise, ICE is not involved in "review[ing] the reasonableness" of the wages paid, "nor does it regulate."[414]

VI. LEGISLATIVE HISTORY

A. *Legislative History of 8 U.S.C. § 1555(d), 1949 to Present*[415]

Part V reviewed the plain meaning of the relevant labor laws for those in immigration jails. The above analysis reviewed: (a) the explicit statutory language in the FLSA, (b) the absence of any statutory language indicating that private prisons may self-exempt from the FLSA when paying ICE residents, (c) the failure in the last thirty-seven years of Congress to set compensation and appropriate funds for work performed outside the FLSA, and (d) the absence of any rule-making context or process that might provide ICE discretion under the *Chevron* standard. The general jurisprudence in this area would seem to support the conclusion that ICE residents are indeed covered by the FLSA and the federal contracting laws implementing it. However, in some contexts the Court has adduced conditions under which a

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408. Menocal Complaint, *supra* note 32, at 9 ("GEO did not compensate Plaintiffs' work at the required Colorado State Minimum Wage [CMWO] rates specific in the applicable, annual Wage Orders"). Judge Kane ruled that Menocal plaintiffs "are not 'employees under the CMWO. Although immigration detainees appear to fall under the broad definition of 'employee,' so do prisoners, and the CDOL has found that the CMWO's definition of 'employee' should not apply to prisoners." Menocal Order, *supra* note 34. The order cites only to *Alvarado Guevara* and reiterates the flawed analysis and omissions of that decision. *Id.*

409. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 97 (1980) ("State's involvement . . . is insufficient to establish anti-trust immunity under *Parker v. Brown*").

410. *Id.* at 105.

411. *Id.* at 105–06.

412. *Id.*

413. *See supra* Part III.A.3–4 and Part III.B.

414. *See* Lute Letter, *supra* note 190.

415. This section draws extensively on analysis and case citations in RED BOOK, *supra* note 39.

statute's legislative history might help judges construe "legislative intent" that might yield the law's true meaning, one at odds with the plain text.[416] Part VI reviews the relevant legislative background for the program in place and analyzes it in light of the statutory construction relying on "legislative intent."

According to William Eskridge, "The most popular foundation for an archaeological theory of statutory interpretation is probably intentionalism, which directs the interpreter to discover or replicate the legislator's original intent as the answer to an interpretive question."[417] This Part reviews the Congressional record of the law authorizing compensation to those in custody under immigration laws to consider whether ICE's residential work program as operationalized by private firms would be consistent with the intent of the legislators who passed the bill.[418]

It is important to note that the Supreme Court is conflicted about the role legislative history might play in statutory construction.[419] Explaining that the meaning of legislative intent is "slippery," Daniel Farber writes, "legislators depend on institutional actors (sponsors, committees, floor leaders, and staffers), who are charged with drafting statutes and moving them to enactment, to explain the meaning and import of the statutes under consideration, and their goals may be vague and in conflict."[420] 8 U.S.C. § 1555(d) is a case in point. First, it reveals a contradictory and ambiguous record along the lines of what Justice Antonin Scalia describes in his critique of this approach.[421] Second, the legal and empirical contexts for detention under

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416. *See, e.g.*, SOLAN, *supra* note 74, at 109–110; *see also* KIM, *supra* note 292, at 40 n.228 (citing United States v. Great Northern Ry., 287 U.S. 144 (1932)).

417. ESKRIDGE, *supra* note 280, at 14.

418. *Alvarado Guevara* imputes legislative intent on the rate of compensation for residents in immigration detention facilities in passing the Fair Labor Standard Act, but without evidence. Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990). And the opinion says nothing on the intent of the Congress that passed the bill that became codified as 8 U.S.C. § 1555(d), the focus of the discussion below. *Id.* Concerns of method, scope, and space exclude from this review the legislative histories of the additional laws discussed above. As discussed in Part V, the most important one, the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, includes a statement of purpose and this urges an expansive reading that would supersede floor statements and so forth by members of Congress. Because of the time frame in which these laws were passed, and the low numbers of those in custody under immigration laws, reference to their rate of compensation seems unlikely. *See* Service Contract Compliance Act, 41 U.S.C. § 351 (1972); Occupational Health and Safety Act, 5 U.S.C. § 1101-2013 (1970); Immigration Reform and Control Act, 8 U.S.C. § 1324(a) (1986); Federal Procurement Act, 42 U.S.C. § 6962 (1974); Convict Labor Contract Act, 18 U.S.C. § 436 (1940).

419. "Members of this Court have expressed differing views regarding the role that legislative history should play in statutory interpretation." *Compare* County of Washington v. Gunther, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting) ("[I]t [is] well settled that the legislative history of a statute is a useful guide to the intent of Congress . . . ."), *with* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring in judgment) (legislative history is "unreliable . . . as a genuine indicator of congressional intent . . . .")." Shannon v. United States, 512 U.S. 573, 583 (1994) (some internal citations omitted).

420. Farber, *supra* note 80, at 290.

421. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 32 (1998) ("with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent so that any clues provided by the legislative history are bound to be false.").

immigration laws in place in 1950 have little in common with those of today, rendering moot any resort to this history for clues on the law's contemporary application.

This section makes the following observations: 1) immigration detention authority in 1949 was on shaky legal grounds, with members referencing successful habeas petitions brought by those in the custody of then Immigration Services;[422] 2) the members of Congress responsible for ushering through expansive immigration detention authority acknowledged that the Supreme Court had required that persons in immigration detention be housed entirely at government expense, and stated that it would be unconstitutional to force them to work to defray the costs of their confinement; 3) the government stated it required appropriations specific to managing the work program; 4) at the time the § 1555(d) work program passed, no one from the administration or Congress indicated an intention to defray custody expenses; 5) a possibly extant, but unexplained, purpose of the program was to defray costs; and 6) the last time the program had compensation set by Congress was in 1978 and the most recent discussion of the program in a Congressional hearing or report was 1983.[423]

1. *Origins of Work Allowances for "aliens in custody under immigration laws": 1949-1950*

House Report 4645, introduced in the House on May 11, 1949, contains the first legislative reference to "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed."[424] Then-Acting Assistant to the Attorney General, Peter Campbell Brown, stated the general purpose was to "preclude the raising of points of order against the DOJ appropriation bills on the ground that certain expenditures provided for therein have not previously been authorized by law . . . ."[425] Brown singled out the section on the work allowances as "included at the urgent request of the Commissioner of Immigration and Naturalization to meet a practical problem encountered in the work of that [s]ervice."[426] There is no clarification here or elsewhere as to the nature of this problem.

Before turning to the specific history of 8 U.S.C. § 1555(d), the broader context of detention legislation considered in that session bears mention. The work program Congress contemplated in 1950 for individuals held under immigration laws has little bearing on the program in place today. The

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422. *Deportation and Detention of Aliens: Hearing on H.R. 10 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Cong. (1949).

423. In addition, Professor Craig Haney's 2005 Congressional testimony and report on detention mentions the program in passing. *See* Haney, *supra* note 161.

424. H.R. 4645, 81st Cong. (1949).

425. S. REP. NO. 81-1258, at 2 (1950) (letter dated April 19, 1949).

426. *Id.*

worker/employer relation in today's ICE facilities is much closer to the factors contemplated in the FLSA than it is to the economics and management of the multi-faceted alien internment, prisoner of war, and immigrant detention laws and practices of the 1940s.

The Office of the Commission of Immigration and Naturalization (OCIN) letter on wages quoted above appears in the same Congressional session as the Agency's request for modifications to the 1917 Immigration and Naturalization Act (INA) to hold immigrants in custody for six months or longer.[427] At a hearing, Immigration and Naturalization Commissioner, Watson Miller, defended the need for the new law: "The existing law does not grant the Attorney General any specific period within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad . . . . Some courts have ordered the release of deportable aliens by means of the writ of habeas corpus in less than 6 months."[428] This context suggests the DOJ was attentive to an emerging jurisprudence cognizant of rights for those in custody under immigration laws and felt it needed statutory authority for its work program.

The "Red Scare" was the impetus for the 1949 hearings to explore providing detention authority for those ordered deported.[429] Based on concerns about civil rights violations, the 81st Congress rejected H.R. 10, as it had similar bills for several consecutive sessions before that.[430] According to Daniel Wilsher, the period from 1948-1952 "saw 2,000 lawfully resident foreigners held, mostly at Ellis Island, pending expulsion on the basis of secret evidence,"[431] amounting to about 500 per year, and not the hundreds of thousands in custody each year today. The detention authority requested in H.R. 10 was not enacted until the 1952 Immigration and Naturalization

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427. The 1917 Act, after a long list of those deportable, indicates that they, "shall, upon the warrant of the Secretary of Labor, be taken into custody and deported." Immigration Act, H.R. 10384, 64th Cong. § 29 (1917). In 1949 there was no regular system of detaining those who were ordered deported. To do so, courts had held, would require adherence to the rules of the Administrative Procedures Act (APA). Absent this, judges were regularly granting habeas orders requiring the release from I and N custody of those in deportation proceedings after a range of a few days to a few months. *See Deportation and Detention of Aliens: Hearing on H.R. 10 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Cong. (1949) (statement of Watson B. Miller, Commissioner of Immigration and Naturalization).

428. *Deportation and Detention of Aliens: Hearing on H.R. 10 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Cong. (1949) (statement of Watson B. Miller, Commissioner of Immigration and Naturalization).

429. Frank Fellows, R-ME, *Id.*, p. 2 ("Are we going to let [Communists ordered deported] run loose and do as they want, to lecture all over the country and fill everyone full of their ideas; and simply remain helpless.").

430. *Deportation and Detention of Aliens: Hearing on H.R. 10 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Cong. I (1949). "A Bill facilitating the deportation of Aliens from the United States, providing for the supervision and detention pending eventual deportation of Aliens whose deportation cannot be readily effectuated because of reasons beyond the control of the United States." *Id.*

431. DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 59 (2012) (citing DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM Ch. 10 (2003)).

Act.[432] The INA in 1952 authorized but did not mandate detention and in 1954 the INS "announced it was abandoning the policy of detention."[433]

At the 1950 hearings concerning the language codified as 8 U.S.C. § 1555, House Judiciary Committee Chair Joseph Wilson (D-TX) stated that the purpose of the bill was to "enact into substantive law authorization for the expenditure of certain items which frequently recur in the appropriation act dealing with certain administrative expenses incurred by the Department of Justice."[434] Witness George Miller, DOJ Assistant Chief of the Accounts Branch, stated that detainee payments "ha[ve] not appeared in the Appropriations Act, so I think there is nothing controversial in it."[435]

The problem that existed in the 1940s resonates in the program's implementation today. The DOJ[436] implemented a practice without authorization or appropriations[437] and then claimed its de facto implementation should assure Congress of its legality, despite numerous Court opinions in that time frame ruling unconstitutional other DOJ detention and deportation operations specifically referenced in the hearings. The DOJ also disregarded legislation and hearing statements relevant to this program, especially the scope of INS detention authority, and *Wong Wing* ruled unconstitutional any forced labor of those in custody under immigration laws. Moreover, when House members in 1950 expressed concerns about the program's scope and Constitutionality, the DOJ bureaucrat obfuscated, and the members of the Judiciary Committee failed to clarify.[438]

Commissioner Miller initially stated that the INS was already paying aliens for work in the detention camps. He explained that the agency "find[s] that their problem of maintaining these aliens in detention is greatly minimized if they can put an alien to some useful work and *pay him a modest return for the work he does.*"[439] Miller adds, "in order that this will not get out of hand, it can be taken care of by the Appropriations Committee, which

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432. Immigration and Naturalization Act of 1952, Pub. L. No. 81-414, § 252, 66 Stat. 208, 220-21 (1952).

433. WILSHER, *supra* note 431, at 353 (quoting N.Y. TIMES Nov. 13, 1954). Prior to this the numbers were lower and the average number of days detained also low. *Id*. at 23. The shift in the legal infrastructure arose from the case law arising out of the Chinese Exclusion Act as well as the internment of German-Americans in World War One. *Id*. at 29 & n.114, 117.

434. H.R. REP. NO. 81-2309, at 2 (1950).

435. *A Bill to Authorize Certain Administrative Expenses for the Department of Justice, and for Other Purposes: Hearing on H.R. 4645 and S. 2864 Before Subcommittee No. 2 of the H. Comm. on the Judiciary,* 81st Cong. 6 (1950) (statement of George Miller, DOJ Assistant Chief of the Accounts Branch).

436. *See Deportation and Detention*, statement of Watson B. Miller, *supra* note 415.

437. For a thorough discussion of the program's origins, *see Department of Justice Appropriation Bill for 1945: Hearing on H.R. 4204 Before the Subcomm. on State, Justice, and Commerce Departments, of the H. Comm. on Appropriations,* 78th Cong. (1945) [hereafter "*Hearing on H.R. 4204*"].

438. *See supra* note 424.

439. *A Bill to Authorize Certain Administrative Expenses for the Department of Justice, and for Other Purposes Hearing on H.R. 4645 and S. 2864 Before Subcomm. No. 2 of the H. Comm. on the Judiciary* at 21 (emphasis added).

will specify the rate from time to time."[440] Miller's testimony indicates that from its inception the DOJ understood that the program was to be funded at a rate set by Congress: "whether it is 25 cents or $1.50 a day would be determined by the rate to be fixed of this provision in the Appropriation Act."[441]

According to Miller, the OCIN was then paying aliens in the "center or camp" for maintaining and "policing the place," and "attending some garden farm or plot."[442] When asked whether detainees were being punished, Miller replied, "No, sir; in connection with the immigration laws, probably for deportation while the case is pending or under hearing."[443] Miller explained that the DOJ had been modeling the work details and compensation "along the lines of the prisoner of war provision under the Geneva Convention, whereby prisoners of war who come to prison camps may be used for useful purposes and *paid some small amount*. It is patterned after that."[444] The program grew out of the internment of "enemy aliens" and on behalf of the Army's prisoners of war policies.[445]

The Geneva Convention Relative to the Treatment of Prisoners of War states: "Prisoners of war shall be paid a fair working rate of pay by the detaining authorities directly.[446] The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day."[447] In other words, the genesis of today's ICE resident work program is an international treaty for the treatment of foreign nationals in the custody of an enemy power. This treaty mandates not only a "fair working

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440. *Id.* What he means by "This" is not elsewhere further clarified.

441. *Id.*

442. *Id.* at 30 ("Miller: Any kind of work around the detention center or camp, such as policing the place, cooking, or possibly, attending some small garden farm or plot.").

443. *Id.* at 31.

444. *Id.* (emphasis added).

445. *Hearing on H.R. 4204* 274, *supra* note 427. The hearings reveal that the Geneva Convention in 1944 did not yet apply to civilians deemed "enemy aliens," but the U.S. government in 1941 informed the Japanese that in exchange for the same protections the U.S. expected Japan to extend to U.S. POWs, the U.S. would apply the Geneva Convention to civilian Japanese Americans held as enemy aliens.

446. Geneva Convention Relative to the Treatment of Prisoners of War, art. 62, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

447. *Id.* In 1950, one Swiss franc equaled 23 U.S. cents, which even for that time frame would not have been considered a "fair working rate of pay." During World War Two, the United States paid prisoners of war 80 cents per day. There are several important differences between the background economics of POWs and residents of U.S. ICE detention facilities. Foremost is that the families of POWs were receiving remuneration from their respective governments. While the fact that the detaining power was paying for basic food and housing was taken into account, POWs received small allowances and officers more generous ones. *Id.*; *see* commentary in Art. 62, Part III: Captivity, Section I: Financial resources of prisoners of war; Lawrence H. Officer, *Exchange Rates between the United States Dollar and Forty-one Currencies,* MEASURING WORTH (2015), http://www.measuringworth.com/exchangeglobal/. An additional difference is that of labor markets during these two time frames. The POW labor was being used to supplement in agricultural and other economic sectors a labor force that was at war. Thus unemployment or other effects on the local labor market did not pose the same problems that the substitution of slaving wage labor for minimum wages has on the U.S. labor market today.

rate of pay," but many other provisions for enemy prisoners not presently available to civilian U.S. resident-immigrants or even citizens awaiting immigration court hearings.[448]

In the 1950 hearing to authorize funding, Representative Samuel Hobbs (D-AL), a former federal judge,[449] paraphrased *Wong Wing* , stating "we had no authority to detain them, even in a case of deportation, at hard labor."[450] The precedent Hobbs had in mind also held Congress could not "confiscat[e] their property . . . without a judicial trial," invoking for this analysis the Fifth, Sixth, Thirteenth, and Fourteenth Amendments.[451] At a hearing weeks later, Rep. Hobbs said:

> The no-hard-labor restriction will bring us into collision with some critics because they will say that the Attorney General would be authorized under the bill to make parlor boarders of these people. That is true, but we feel that the free air of America should be protected against the consumption in freedom by these people even though they do cost us money.[452]

This suggests Congressional intent to distinguish the public policy of detention from cost-cutting by relying on the facility's residents for cheap labor to operate it.

In light of such concerns at the time, as well as DOJ Assistant Chief of the Accounts Branch Miller's response that the labor presently performed was "voluntary,"[453] Chauncey Reed (R-IL) asked: "[H]ow do they do it now, without this law?"[454] Miller then contradicted his opening description of the program and replied: "*They do not pay them*."[455] Reed then answered: "[T]hey do not pay them anything, and they do work. It must be voluntary."[456]

The DOJ's defense of the program ended with Miller leaving the inaccurate impression that people were working without compensation.[457] In short,

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448. Among the provisions in the relevant Geneva Convention protocols is one requiring that "the national legislation concerning the protection of labour, and more particularly, the regulations for the safety of workers, are duly applied," Geneva Convention Relative to the Treatment of Prisoners of War, art. 51, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

449. *Hobbs, Samuel Francis, (1887-1952)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000663/ (last visited Feb. 9, 2016).

450. *A Bill to Authorize Certain Administrative Expenses for the Department of Justice, and for Other Purposes: Hearing on H.R. 4645 and S. 2864 Before Subcommittee No. 2 of the H. Comm. on the Judiciary,* 81st Cong. 31 (1950) (referencing *Wong Wing v. U.S.* 163).

451. *Id.*

452. *Deportation and Detention of Aliens: Hearing on H.R. 10 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 81st Congress 14 (1949) (statement of Sam Hobbs, House Representative).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* (emphasis added). Of course the fact that people who are under lock and key and beyond the Red Cross monitoring of prisoner of war camps might very well labor without compensation because they are forced to do so is at least as plausible—and occurs today.

457. *Supra* note 422. At that point Representative Earl Michener (R-MI) remarked on his own kitchen duties in the army, to which Reed replied, "[o]f course you were paid a salary, though, as a

Congress passed a law authorizing funds to those who were allegedly working without pay and on non-essential facility operations so as to conform with U.S. obligations under an international treaty. Soon thereafter, an initial appropriation of one dollar per day for those held under immigration laws the appropriations Act.[458]

2. *1950-1978*

Pursuant to 31 U.S.C. § 1104(b) ("Budget and Appropriations Authority of the President"), for 28 consecutive years thereafter the program discussed above was re-funded with exactly the same language through appropriations bills under the section titled "Immigration and Naturalization Service Salaries and Expenses."[459] During this time frame, the INS still had a policy against detaining those in deportation proceedings.[460]

3. *1979-1980*

In 1979, the INS budget request proposed deleting from the Appropriations Act any reference to the program altogether.[461] The DOJ Appropriations Act for Fiscal Year 1980 reflected this proposed change and was the first time since 1950 the Appropriations Act failed to specify a rate of pay for work performed by aliens held under immigration laws.[462] The INS wrote that it "propose[d] deletion of language which is proposed for inclusion in the Department of Justice Authorization Act,"[463] implying the rate of payments was redundant. [464] The amount does not appear in the DOJ Authorization Act

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soldier," as would be the case for a foreign soldier in a U.S. POW camp. The two then joked about how they were individually responsible for winning the Spanish-American and World War One, respectively. Department of Justice witness Miller took advantage of the tangent and moved the hearing along to the next section of the Act. *Id.*

458. An Act to authorize certain administrative expenses for the Department of Justice and for other purposes, Pub L. No. 81-626, 64 Stat. 380 (1950) (codified in 1966 by Pub. L. No. 89-554, 80 Stat. 378, 656).

459. For the last consecutive year, *see* Act of Oct. 10, 1978, *supra* note 63.

460. *See* WILSHER, *supra* note 431.

461. The Immigration and Naturalization Service Salaries and Expenses statement includes a "Justification of Proposed Language Changes." The statement proposed deleting from the Appropriations Act of 1979: "advance of cash to aliens for meals and lodging while en route; payment of allowances (at a rate not in excess of one dollar per day) to aliens, while held in custody under the immigration laws, for work performed, payment of expenses and allowances incurred in tracking lost persons as required by exigencies[.]" House, Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1980 [hereafter "Appropriations Hearing Rept. for 1980"], Pt. 5: Department of Justice, pub. March 14, 1979, HRG-1979-HAP-0090, pp. 504.

462. Department of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriation Act of 1980, Pub. L. No. 96-68, 93 Stat. 416 (1979).

463. See Appropriations Hearing Rept. for 1980, Pt. 5, *supra* note 451, pp. 504-505.

464. 31 U.S.C. § 1104(b) states that repetition from past appropriations "may be waived or changed by joint action of the Committees on Appropriations of both Houses of Congress." The 1979 Congressional hearings reveal members concerned about INS corruption and civil rights violations reported in a *New York Times* investigative article. There is no reference to the work program. *See* Appropriations Hearing Rept., *supra* note 451. For a primer on the laws and rules of Congressional appropriations, *see* TOLLESTRUP AND YEH, *supra* note 314.

for Fiscal Year FY 1979.[465] Congress affirmed the deletion of this item from the Appropriation Act, but without benefit of an accurate description.[466] Thus, in 1979, for the first time, the resulting bill "Making Appropriations for the Departments of State, Justice, and Commerce, the Judiciary" failed to indicate the per diem allowance for work performed by aliens held under immigration laws.[467]

4. *1980-1981*

The 1979 House and Senate rubber-stamped the INS change omitting the rate without discussion in committee and modified the Appropriations Act accordingly.[468] However, in 1980 the matter arose in House hearings as well as in the DOJ appropriations conference report for the FY 1981 budget.[469]

At one hearing, Representative Jack Hightower (D-TX), Chair of the House Appropriations Committee, quoted from the DOJ budget proposal, referencing "payment of allowances (at a rate not in excess of $4 per day)"—the first time that the DOJ had proposed an increase.[470] He then asked: "Why are you proposing this language in the appropriations bill?"[471]

The sensible response would have been to reference 8 U.S.C. § 1555(d) which delegates to Congress the responsibility of setting the rate of compensation in the "appropriations act involved." Instead, the Acting Commissioner of the INS, David Crosland, replied: "The idea is to be paying people to do work such as maintenance—maintenance of their own detention facilities—that we would otherwise have to pay somebody else to do; so it would reduce the amount we have to pay out, and I guess it is similar to what prisoners are paid in detention facilities in this country."[472] Crosland's rationale contradicts the 1950 description of the program—no party at any point referenced defraying expenses.[473] Likewise, his statement ignores the legislative history of immigration detention, explicitly rejecting connotations of prison labor.

Regardless, Crosland's answer still was not responsive to Hightower's question about the legislative process for its funding. Hightower then pressed

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465. Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, §10(a), 93 Stat. 1040 (1979).

466. Act of Oct. 10, 1978, *supra* note 63.

467. Department of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriation Act of 1980, Pub. L. No. 96-68, 93 Stat. 416 (1979).

468. *Id.*

469. House Appropriations Hearing, February 26-26, March 4-5, 1980, HRG-1980-HAP-0035, p. 618; H.R. REP. NO. 96-1472, pt. 7 (1980) (Conference Report filed in House on H.R. 7584).

470. House Appropriations Hearing, February 26-26, March 4-5, 1980, HRG-1980-HAP-0035, p. 618.

471. *Id.*

472. *Id.*

473. *See* An Act to authorize certain administrative expenses for the Department of Justice and for other purposes, *supra* note 521.

Crosland: "Why was it deleted from the 1980 appropriation?"[474] Crosland said he did not know.[475]

A supplemental written response published in the hearing report states:

> The language was deleted from the fiscal year 1980 appropriation language and included in the fiscal year 1980 authorization bill to avoid duplication. However, 8 U.S.C. § 1555 requires the rate for payment of allowances be specified from time to time in the Appropriation Act. An increase of one dollar to $4 per day is proposed for the payment of allowances to aliens held in custody for work such as serving meals and cleaning. *Since an increase in work allowance is proposed, it was deemed appropriate to include this change in both the appropriation and the authorization bills*.[476]

This statement is inaccurate. On a reading most generous to the INS, it appears as though the agency is implying that the amounts did not need to appear in an appropriation act, unless the INS was seeking to change the rate.[477] However, not only is such a position at odds with how the INS and Congress had been running the program for twenty-nine years, per 31 U.S.C. § 1104(b) and 8 U.S.C. § 1555(d), it also repeats the mischaracterization of the DOJ's authorizing legislation, which omits a specific rate of compensation. Thus, an appropriations act with such information would not be duplicative of the 1980 authorization bill.

In any event, the 1980 House Appropriations Committee did not pass the proposed increase, nor did it reference the program in its report on the bill.[478] In 1980, the Senate Appropriations Committee approved the increase of the per diem compensation to $4 per day for FY 1981.[479] The Appropriations Conference Report handled the discrepancy through Amendment 13, which "[d]eletes language proposed by the Senate which would have increased from one dollar per day, to $4 per day the amount paid to aliens, while held in custody under immigration laws, for work performed."[480] The final appropriations law omits any reference to the rate of compensation.[481]

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474. House Appropriations Hearing, February 26-26, March 4-5, 1980, HRG-1980-HAP-0035, p. 618.
475. *Id.*
476. *Id.* (emphasis added) (INS written response).
477. *Id.*
478. H.R. REP. NO. 96-1091 (1980).
479. H.R. REP. NO. 96-1472, at 7 (1980).
480. *Id.*
481. According to Congressional appropriations rules any discrepancy in funding provisions between the House and Senate defaults to the lower amount. The 1980 appropriations for the DOJ (and thus the INS) was complicated by the fact that President Carter vetoed the Act associated with the hearings because of a section on busing to end desegregation. Vernon Guidry Jr., *Carter Promises Veto of Anti-busing Proposal: Refusal of New Appropriations Bill Also Expected if Amendment is Included*, PRESCOTT COURIER, Dec. 5, 1980, at 2. Congress had anticipated this and had already passed a backup appropriations bill without this section.

5. *1981-1983*

As was the case for the FY 1981 budget submitted under President Jimmy Carter, the INS budget for FY 1982 submitted by President Ronald Reagan again proposed an increase to "$4 per day for work performed by aliens in custody under immigration laws."[482] Yet the program received no mention in any of the committee reports at any funding level in either the authorization or appropriation acts passed that year.[483]

For FY 1983, the same INS budget request as previous years elicited this statement in the House Committee on Appropriation Report: "The Committee has not approved the requested language which would have increased the amount paid to aliens for work performed while in INS detention facilities to $4 per day. This request also was denied in fiscal year 1982 and fiscal year 1981."[484]

Motivated by the influx of Cubans and Haitians, the 1982 hearings focused on whether to radically increase the number and length of immigration detentions, including contracting with the Bureau of Prisons and acquiring more facilities for that purpose.[485] There was no discussion of the immigration service's resident work program. Even if the committees had considered the program, it would still be in the context of a detention system much closer to the one in 1950 than the one today. In 1981, the five Service Processing Centers had a capacity for 1,839 people,[486] and it was for "short-term detention . . . the kind of thing that INS is very well equipped to handle."[487]

Representative Robert Kastenmeier (D-WI) asked whether Congress had been misled by prior DOJ statements indicating the expansion of detention would be "used primarily for short-term detainees."[488] Norman Carlson, Director of the Federal Bureau of Prisons, replied, "I cannot foresee how

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482. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, 633, FISCAL YEAR 1982 (1981).

483. Department of Justice Appropriation Authorization Act, Fiscal Year 1982, H.R. 3201, 97th Cong. (1982); Department of Justice Appropriation Authorization Act, Fiscal Year 1982, S. 9511, S. REP. NO. 97-94 (1982),; Department of Justice Appropriation Authorization Act, Fiscal Year 1982, H.R. 3462, 97th Cong. (1981); H.R. REP. NO. 97-95 (1981).

484. H.R. REP. NO. 97-121, at 39 (1982). There is no reference to the language of 8 U.S.C. § 1555(d) in any appropriations bills thereafter. This is in contrast for funds for the use of prisoners for work performed in the building and renovating of prisons and appropriations for the Federal Prisons Industries. The following are all appropriations acts for the DOJ (and INS) absent appropriations for compensation below minimum wage: Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830; Act of Nov. 28, 1983, Pub. L. No. 98-166, 97 Stat. 1071; Act of Aug. 30, 1984, Pub. L. No. 98-411, 98 Stat. 1545; Act of Dec. 13, 1985, Pub. L. No. 99-180, 99 Stat. 1137; Act of Oct. 18, 1986, Pub. L. No. 99-500, 100 Stat. 1783; Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329; Act of Oct. 1, 1988, Pub. L. No. 100-459, 12 Stat. 2186. For more on the contrast between the legal framework of payments through ICE and that of the payments to federal prisoners see Parts V and VII.

485. *Detention of Aliens in Bureau of Prison Facilities: Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice: Hearing Before H. Comm. on the Judiciary*, 97th Cong. 22 (1982).

486. *Id.* (statement of then-Assistant Attorney General Rudolph Giuliani).

487. *Id.* at 21.

488. *Id.* at 22.

long they would be incarcerated because we haven't had that experience . . . [I]t is essentially a new approach . . . ."[489] Congress had been led to believe that the maintenance work for the detention facilities was done by the federal prisoners and not immigrants in custody under civil laws.[490] Referencing 1,330 Cubans, Carlson said, "Virtually all of the prisoners now at the Atlanta Penitentiary, Mr. Chairman, are Cuban detainees. There is something in the neighborhood of 150 to 200 American prisoners who do the maintenance work in the institution . . . They are there essentially to maintain the institution."[491]

In the same time frame as Congress was shifting to a new program for detention, the INS ceased to reference the program authorized by 8 U.S.C § 1555(d) in its budget proposals. As a result, the program disappeared entirely from the appropriations acts. 1982 is the last year that any agency of the executive branch requested an increase in the rate of its per diem allowance for the U.S. citizens and aliens held under immigration laws. According to statements before the 1982 committee, there were 2,000 immigrants in the federal prisons under ICE custody.[492] In July of 1984, 1,714 people were in INS custody.[493]

B. *Legislative History and Intent Analysis*

1. *Jurisprudence*

Of course all programs grow and change over time, and agencies must have some discretion for delegating rules for activities not anticipated by Congress. The question this section takes up is whether the legislative history of 8 U.S.C. § 1555 and the FLSA, when interpreted by canons used for assessing legislative intent, authorizes ICE's one dollar per day payments. This section also examines whether the program now in practice in private prisons, and as stated in the PBNDS 5.8—enhancing essential operations through "detainee productivity," and improving morale through compensating ICE residents employed by private prisons at one dollar to three dollars per day—includes policies contemplated by the legislative body that passed 8 U.S.C. § 1555(d).

The Supreme Court has provided two limiting criteria for disregarding a statute's plain meaning in favor of an intent imputed to the legislature:

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489. *Id.*
490. *Id.*
491. *Id.* at 29. There is no clarification of how work is performed and compensated at other INS facilities.
492. *Id.* at 8, 32.
493. Arthur Helton, *The Legality of Detaining Refugees in the U.S.*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 363 (1986). Helton cites to "Statistics Supplied by the INS, copies of which are on file at the offices of NYU Review of Law and Social Change." *Id.* at 360 n.57, 365 n.90.

> For even those who would support the power of a court to disregard the plain application of a statute when changed circumstances cause its effects to exceed the original legislative purpose would concede, I must believe, that such power should be exercised only when (1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, *and (2) it is clear that they cause the challenged application of the statute to exceed its original purpose*.[494]

Given that today's program was unanticipated in 1950, is there anything in the legislative record to suggest Congress intended to deprive the service worker labor force from the protections afforded under the FLSA? The record below shows that the program Congress approved in 1950 emerged from practices of prisoner of war camps where internees generally did not work to maintain the facility. Hearing reports and testimony suggest that Congress never authorized a program exploiting those in the custody of a for-profit private prison industry clearly covered by the FLSA. Likewise, the failures of the Department of Justice and Homeland Security to request a specific rate of compensation for payments to those in custody under immigration law also eludes the statutory requirement of 8 U.S.C. § 1555(d).

2. *Legislative Intent for 8 U.S.C. § 1555(d)*

In interpreting legislative intent, the Court considers the timing and character of legislative statements, favoring pre-enactment statements and conference reports in particular.[495] "[N]ext in sequence are the reports of the legislative committees that considered the bill . . . ."[496] The only mention of 8 U.S.C. § 1555(d) in a hearing report is the memorandum from the DOJ with the initial request of Congress, but it provides no program details or rationale. Hearing statements typically are not granted much weight,[497] with the exception of "testimony by the government agency that recommended the bill," which is "entitled to special weight."[498]

In this context, the silences and statements by the DOJ witness Miller and Representative Hobbs in the 1949-1950 time frame are relevant. First, the DOJ provided little clear information on the scope or condition of the program as implemented. Second, the legal context for setting the wages was to appear to comply with the Geneva Convention. Third, Representative Hobbs explicitly stated that not defraying costs by relying on detainees to

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494. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (emphasis added).

495. "The most authoritative single source of legislative history is the conference report . . . . The reason the conference report occupies the highest run on the ladder is that it must be voted on and adopted by both houses of Congress and thus is the only legislative history document that can be said to reflect the will of both houses." RED BOOK, *supra* note 39, at 2-98 to -99.

496. *Id*. at 2-99.

497. *Id.* at 2-103.

498. *Id.*; *see also* Shapiro v. United States, 335 U.S. 1, 12 n.13 (1787); SEC v. Collier, 76 F.2d 939, 941 (1935).

work for their room and board was the price of deporting people without trials.

Were there a transparent and consistent institutionalization of labor policy for those in detention under immigration law, then international legal precedents might supersede invocations of the FLSA, part of domestic law, on behalf of ICE residents. But the U.S. government has never deferred authority for its detention programs to international law. That said, on the record, Representative Hobbs opposed forced labor, but said nothing about the possibility of immigrants working for wages below the minimum wage. Yet no one, including Representative Hobbs, signed off on a policy that would subsidize the private prison industry and distort the service economy by setting wages permanently at a level that would be less than two percent of the wages paid those under minimum wage laws.[499]

Another way to think about Miller's reference to the Geneva Convention is that it would provide ICE residents far more protections than they have presently. Consider the 1944 hearing on the work program for the "enemy aliens" referenced by the DOJ in the 1950 hearing:

> Mr. Kerr. What do these enemy aliens do? Do you let them sit around all day long?
> Mr. Harrison. No. As you know, our treatment of enemy aliens is covered by the terms of the Geneva Convention. That Convention provides that wherever possible they be given work to do, that is, certain kinds of work . . . .
> Mr. Kerr. What do they do?
> Mr. Harrison. All kinds of things around the camp and outside of the camp. They raise their own vegetables; they have very large vegetable gardens. They have a carpenter shop in which they are working, and they helped in the construction of the camp, and they perform any employment in the camp that is susceptible of their services.
> Mr. Stefan. They are paid 80 cents per day?
> Mr. Harrison. Yes, it is about 80 cents a day, in accordance with the terms of the Geneva Convention; that is what the Army paid them before the Army turned them over to us. They do everything that has to be done in a regular little community, and that is what this is, just a community town such as we have in Crystal City, Tex. They are permitted to do any work *except that which has to do with maintenance and management of the camp*; everything else that can be done, all kinds of services, such as the preparation of their own food; their own cooking.[500]

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499. *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968-2016*, U.S. DEPARTMENT OF LABOR, http://www.dol.gov/whd/state/stateMinWageHis.htm (last visted Feb. 9, 2016) [hereinafter *Historical Minimum Wage Laws*]; *see also infra*, Table One.

500. *Hearing on H.R. 4204* at 273-74, *supra* note 427 (emphasis added). The full names of those above are John Kerr (NC), Karl Stefan (NE), and INS Commissioner Earl Harrison.

Note the specific exclusion from the work program of exactly the work ICE now authorizes in its contracts with private prison firms. The purpose of the initial program was neither punishment of camp residents, nor incentivizing their departure, nor saving money for the government, but establishing something akin to a displaced persons camp.[501] Those so held were not under heavy surveillance and were encouraged to be as self-sufficient as possible.[502] The country was at war and manpower and commodities were scarce.[503] Commissioner Harrison noted that individuals in immigration detention were regularly working outside the camp on farms, railroads, and "watching for fires," and were paid the "prevailing wage," not 80 cents per day.[504] The context out of which the payments originated was far more humane than the warehousing of individuals now in ICE detention facilities.[505]

If the courts use the standard of legislative history, it is reasonable to infer that Commissioner Harrison's 1944 and Commissioner Miller's 1950 testimonies on behalf of payments to those in internment or detention camps imply a legislative intent to follow international law's standards of worker care and compensation for internees, not to subsidize private prisons. Thus, in addition to higher wages, ICE would need to provide much higher levels of civil and worker rights protections than those of the PBNDS.

The statements and exchanges above may be of interest to legal historians. However, we need to be cautious about weighing any of those statements too heavily. "[T]o be considered legislative history, material should be generally available to legislators and relied on by them in passing the bill,"[506] neither of which occuurred when the bill was first passed. The DOJ never provided a written explanation of the program's purpose for the Congressional Record, nor did this appear in the hearing reports, and few members of Congress were familiar with the program.

Standard conventions of statutory construction discount both post-enactment statements as well as proposals that do not become law.[507] Thus,

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501. *Id.* at 274.
502. *Id.*
503. *See, e.g.*, *id.* at 76, 247, 295, 298.
504. *Id.* at 274–75. The report provides a detailed table on the prevailing wages in different regions.
505. *Id.*
506. RED BOOK, *supra* note 39, at 2-103 to -04 (quoting 2A SUTHERLAND, *Statutes and Statutory Construction* § 45.04 § 48:04 (6th ed. 2000)).
507. *Id.* at 2-104. ("Courts have not found expressions of intent concerning previously enacted legislation that are made in committee reports or floor statements during the consideration of subsequent legislation to be relevant either." (citing O'Gilvie v. United States, 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute"), Huffman v. Office of Personnel Management, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (post-enactment statements made in the legislative history of the 1994 amendments have no bearing in determining the legislative intent of the drafters of the 1978 and 1989 legislation))); *see also* Solid Waste Agency v. U.S. Army Corp., 531 U.S. 159 (2001) (refusing to allow evidence of failed legislative proposals to inform interpretation of plain text of statute, and the connection between the subsequent history and the original congressional intent is 'considerably attenuated') (internal quotations omitted). The General Accountability Office (GAO) report on statutory construction states, "GAO naturally follows

under this approach, the 1982 statement of INS Acting Commissioner Crosner, 32 years after the law's enactment, would be discounted.[508] Crosner's imputation of a cost-cutting intent also is at odds with the absence of this rationale in the Congressional record and the 1950 Congress' increase in its appropriation acts from 80 cents to one dollar per diem payments to those in custody under immigration laws.[509]

C. *Discussion of a Theory of Legislative Intent for Interpreting the FLSA and 8 U.S.C. § 1555(d)*

The texts and legislative histories of the FLSA and 8 U.S.C. § 1555(d) are very different. The FLSA includes a broad statement of purpose that on its face requires coverage for ICE residents employed by private prison firms. 8 U.S.C. § 1555(d) contains no language about compensation relative to the FLSA, but it does contemplate payments changing, presumably increasing. One possibility would be to say that changing circumstances simply allow an agency to interpret a statute as it sees fit, not because of any specific precedents on agency discretion *per se*, but because of broader underlying principles of what Eskridge calls dynamic statutory construction. "[A] statutory interpreter is a relational agent[510] . . . and a relational interpreter should have freedom to adapt the statute's directive to changed circumstance."[511] Using this approach, ICE or a private firm may claim that it should be able to adapt the statute's directive to assign compensation to ICE residents as it sees fit, while ICE residents in any FLSA litigation will say that the law has to be read to accommodate their need for higher levels of payments, at the very least to keep pace with inflation and insure the program has oversight.

A theory of dynamic statutory construction also might require minimum wage obligations of private prisons employing ICE residents. Still, recall the above discussion of the prison labor cases. Courts have pointed out "Congress's concern with unfair competition in the FLSA will not be subverted by declining to apply its minimum wage standard to convict labor in prison-structured programs."[512] And yet, government's prerogative to require pre-

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the principle that post-enactment statements do not constitute legislative history." The GAO report conclusions here and elsewhere are important because matters of appropriations and statutory construction are squarely in the purview of this agency.

508. KIM, *supra* note 292, at 42 n.240.

509. *See supra* Part VI. A. 1, on legislative intent, 1949-1950.

510. ESKRIDGE, *supra* note 280, at 127. A "relational agent" is a concept Eskridge draws from contract law, someone who affects a contract goals over time, in the context of unanticipated exigencies. *Id.* at 125.

511. *Id.* at 127.

512. Hale v. Arizona, 993 F.2d 1387, 1397 (9th Cir. 1993).

trial custody does not authorize exemptions from the FLSA laws.[513]

It is unfortunate from the perspective of the rule of law that the erasure of the rate of the per diem allowance from the budget came at the same time when Congress was also attempting to monitor DOJ expenditures more closely. Not only was the INS violating the spirit and letter of 31 U.S.C. § 1104(b), the INS and Congress also failed to heed Congress' efforts to regain control of the DOJ expenditures. In this time frame, Congress mandated that all DOJ expenditures for all agencies and activities occur only after authorized for appropriations *for that fiscal year.* According to Public Law 94-503, § 204:

> No sums shall be deemed to be authorized to be appropriated for any fiscal year beginning on or after October 1, 1978, for the Department of Justice (including any bureau, agency, or other similar subdivision thereof) except as specifically authorized by Act of Congress *with respect to such fiscal year*. Neither the creation of a subdivision in the Department of Justice, *nor the authorization of an activity of the Department, any subdivision, or officer thereof, shall be deemed itself to be an authorization of appropriation for the Department of Justice, such subdivision, or activity with respect to any fiscal year beginning on or after October 1, 1978*.[514]

This law, in effect in 1990, goes unnoted by the *Alvarado Guevara* court.[515]

In sum, the de facto INS work program on which the 1950 legislation was based began under the auspices of the Geneva Convention; did not support camp maintenance and management; and immigrants held there in the 1940s were compensated at 80% of the average daily per capita price of their detention,[516] which at the time was one dollar per day.[517] The program in

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513. *See* McGarry v. Pallito, 687 F.3d 505, 513 (2d Cir. 2012) ("[I]t is clearly established that a state may not 'rehabilitate' pretrial detainees," denying state prison officials' motion to dismiss a Thirteenth Amendment claim by pro se Vermont detainee.).

514. H.R. REP. NO 97-548, at 2 (1982) (emphasis added); *see also* 28 U.S.C. § 501, revisions, as well as Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2427.

515. 902 F.2d at 394.

516. *See Hearing on H.R. 4204* 273, *supra* note 427 (" . . . this 1945 estimate was arrived at on a per capita basis, showing the amount of cost for food and provision, per capita rate of .5409 for food, and taking all of the other costs as set out in the estimates for 1945 shows the average at $1.0054 [sic]u.").

517. Another way to compare the reimbursements in 1950 and today is by comparing the ratio of compensation to the minimum wage. One dollar was 12.5% of minimum wage for an eight-hour day. 8 hours x $1/hour = $8/day; minimum wage in 1950 was 75 cents. *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-2009*, U.S. DEPARTMENT OF LABOR, http://www.dol.gov/whd/minwage/chart.htm (last visited Feb. 9, 2016). Current federal minimum wage is $7.25/hour and requires payments of no less than the state minimum wages. *Compliance Assistance—Wages and Fair Labor Standards Act (FLSA)*, U.S. DEPARTMENT OF LABOR, http://www.dol.gov/WHD/flsa/index.htm (last visited Feb. 9, 2016). In Washington, where GEO operates the Tacoma Northwest Detention Facility, the rate is $9.47/hour. *See Northwest Detention Center*, GEO GROUP, http://www.geogroup.com/Maps/LocationDetails/52 (last visited Feb. 9, 2016); *Historical Minimum Wage Laws*, *supra* note 499 (last visited Feb. 9, 2016). If ICE residents had those wages today, they would earn

1950 was explained in terms that were ambiguous, contradictory, and arguably, deceptive. About three decades later, the INS removed the program from the budget during a period of time when private prisons organized to take over INS facilities[518] and when detentions began to increase sharply. Congress has since failed to revisit the work program.[519]

VII. ANALYSIS OF WORK PROGRAM "PURPOSE"

When a statute's plain meaning or legislative history would produce an outcome that judges deem absurd there is a third approach to statutory interpretation: the statute's purpose or "purposivism." According to William Eskridge, "[t]he Supreme Court often interprets statutes in ways that reflect statutory purpose or current values instead of original legislative intent, and agencies (like EEOC) are even more likely to do so."[520] In 1943 the Court held, "[h]owever well these rules [of statutory construction] may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[521] This approach emphasizing a general purpose is the least favored of the three main approaches to statutory construction discussed so far. The analysis often turns on the judges' intuitions and on their ad hoc support from a range of selectively cited sources. Empirical research indicates that when judges invoke a statute's purpose, the outcome is more likely to align with judges' political predispositions than those decisions based on a statute's plain meaning.[522]

Lawrence Solan points out that the line of decisions associated with this canon can be traced back to *United States v. Kirby*,[523] an 1868 case cited in *Church of the Holy Trinity*.[524] Kirby was convicted of violating a federal law prohibiting deliberate interference with the passage of the mail "or of any

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$7.25/day to $9.47/day. *CPI Inflation Calculator*, BUREAU LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 9, 2016).

518. *See The CCA Story: Our Company History*, CCA, http://cca.com/our-history (last visited Feb. 9, 2016) ("Back in 1983, three enterprising leaders came together, united under the banner of a game changer that would transform the way government and private business work together.").

519. *See supra* Part VI.A.1-5 and Department of Justice appropriations acts and related hearing reports 1983 to 2002 and Department of Homeland Security appropriation acts and related hearing reports, 2003 to 2014.

520. ESKRIDGE, *supra* note 280, at 15.

521. KIM, *supra* note 292, at 3 (quoting SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943)).

522. *See* Miles & Sunstein, *supra* note 76.

523. 74 U.S. 482, 482 (1868).

524. SOLAN, *supra* note 74, at 61; Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892).

driver or carrier . . . carrying the same."[525] By arresting the mail carrier for murder, Sheriff Kirby had interfered with the delivery of the mail and was convicted.[526] The Court overturned the conviction on the grounds that it "made no sense to think that Congress would have wanted it otherwise."[527]

In light of the suspicion that scholars and leading jurists, most notably Antonin Scalia, have directed toward purposivism, the heavy reliance on this approach when deciding prison labor cases is noteworthy. As indicated above, the FLSA includes a broad statement of purpose whose plain meaning seems to encompass minimum wage protections for prisoners. But other portions and the Act's legislative history may also appear to exempt prisoners from these wage protections. Section VII(A) reviews prison cases and discusses judges' heavy reliance on the purposive standard, a distinctive pattern that raises questions about bias.[528] Section VII(B) analyzes decisions on pre- and post-conviction inmates in civil detention pursuant to criminal laws. Section VII(C) questions the understanding of the purpose of the FLSA in the *Alvarado Guevara* decision.

In their assessments of the purpose of the FLSA, the judges in these cases tend to emphasize: (1) the incommensurability of punishment with wage protections; (2) the insulation of service labor in prisons from the national labor market; (3) the absence of a profit motive in prisoner employment by state agencies (or agencies under state control); (4) the fact that prisoners' basic needs of room and board are provided; and (5) the fact that in most cases the work is mandatory and a condition of their punishment.

This Article suggests the following: first, that the FLSA covers firms and employees based on whether an employee/employer relation exists, and not on whether this relationship is the primary goal or purpose of an organization's objectives; second, that service labor in general and labor in prisons are indeed part of the national economy; third, that private prisons have a profit motive, making them distinct from their state equivalents; and fourth, that the provision concerning room and board has no legal bearing on FLSA protections for those detained under immigration laws.

A. *Purposivist Standard Denies FLSA Protections for Prisoners and Pre- and Post- Conviction Inmates*[529]

To exempt those in pre- or post-conviction confinement from protections under the FLSA, courts have relied heavily on the rationales used in cases

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525. SOLAN, *supra* note 74, at 61 (quoting from *Kirby,* 74 U.S. at 482).
526. *Id.*
527. *Id.* at 62.
528. It is perhaps worthwhile to note that it was a white plaintiff, Finbar McGarry, whose 2012 lawsuit overcame the government's motion to dismiss in Vermont. McGarry v. Pallito, 687 F.3d 505 (2d Cir. 2012).
529. For an excellent overview and summary of the relevant literature see Ryan Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213 (2009) and Sinha, *supra* note 31.

concerning criminal confinement,[530] and even on the *Alvarado Guevara* precedent itself.[531] In 2009, the Seventh Circuit dismissed a FLSA lawsuit brought against the state by persons civilly committed for violent sex offenses.[532] The court held that Wisconsin law treats sexual offenders committed to post conviction treatment facilities as "patients," noting that "[p]atients may voluntarily engage in therapeutic labor which is of financial benefit to the facility if such labor is *compensated in accordance with a plan approved by the department*,"[533] even if this violates Wisconsin and federal minimum wage laws. In *Miller v. Dukakis*, the Second Circuit reached the same result, but by classifying what Massachusetts calls "sexually dangerous persons" (SDPs) as "prisoners" and then applying the FLSA analysis: "There is nothing arbitrary, unreasonable, or inimical to the FLSA in this classification of SDPs as prisoners."[534] The analysis in this case and others redefines class members to suit professional intuitions about incarcerated populations[535] and ignores large portions of the FLSA, including its purpose statement. These decisions seem to make inferences about a population stigmatized by race and criminal status and to avoid adjudicating the plaintiffs' cause of action and their rights under the Fifth, Sixth, and Thirteenth Amendments.

These cases, like many of the prison cases, fail to recognize that the employer-employee relationship may trigger FLSA protections.[536] Likewise, they also reject the formulation of that relationship in the widely cited *Bonnette* (finding that the FLSA applies to "chore workers," and not exempting those who may live with a state aid recipient).[537] To steer clear of

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530. *See* Sanders v. Hayden, 544 F.3d 812, 814 (2008) ("If the words 'confined as a sexually violent person' are substituted for 'imprisoned' in the first sentence and 'secure treatment facility' for 'prison' in the second sentence, the quoted passage applies equally to the present case, as held in *Hendrickson v. Nelson*, No. 05-C1305 (E.D. Wis. Aug. 10, 2006)" (citations in original)).

531. Villarreal v. Woodman, 113 F.3d 202, 206 (1999) ("Thus, numerous courts have addressed the issue of whether an inmate is an 'employee' under the FLSA. However, no court of appeals has addressed the specific question of whether a pretrial detainee is an 'employee' under the FLSA. Nevertheless, we find these cases helpful because pretrial detainees are similar to convicted prisoners in that they are incarcerated and are under the supervision and control of a government entity. Alvarado Guevara v. I.N.S., 902, F. 2d 394 (5th Cir. 1990).").

532. State *ex rel*. Hung Nam Tran v. Speech, 782 N.W.2d 106, 110 (Wis. 2010); *see also* Hale v. Arizona, 993 F.2d 1387, 1394–96 (9th Cir. 1993) (holding that inmates working in prison programs were not "employees" of the prison entitled to minimum wage under FLSA).

533. *Id.* (quoting WIS. STAT. § 51.61(b) (2007-9)) (emphasis added).

534. Miller v. Dukakis, 961 F.2d 7, 9 (1st Cir. 1992).

535. *See* Roberts, *supra* note 379.

536. *See, e.g.*, Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992) ("The statute itself provides little assistance . . . . When it comes to such appeals to 'plain' or 'clear' language, perhaps our best guide consists of our common linguistic intuitions, and those intuitions are at least strained by the classification of prisoners as 'employees' of the DOC or of the State.").

537. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1471 (9th Cir. 1983) (finding that "chore workers" hired by California state aid recipients were employees and that the government and the aid-recipient supervisor receiving funds for home assistance by neighbors or family members (none of whom were coerced to work) were joint employers. ("The type of work being performed by the state employees in the homes of the recipients under the chore worker program was not the type traditionally performed by states in the exercise of their sovereign responsibilities. Rather, these

this precedent for prison cases, Judge Posner offers an analysis of the FLSA that would deprive most of the U.S. workforce of minimum wage protections:

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset the cost of keeping them, or to keep them out of mischief or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was *too outlandish* to occur to anyone when the legislation was under consideration by Congress.[538]

Thus, these decisions rely on a single purpose for the statute—incarceration as punishment—and infer that the FLSA's failure to advance this goal is evidence of its inapplicability.

Additionally, these decisions emphasize the fact that the prisons in certain cases are state-owned or run.[539] The widely cited *Gambetta v. Prison Rehabilitative Industries (PRIDE)* develops a lengthy analysis of the whether PRIDE is a non-profit entity and whether the DOC is still the final arbiter of worker placement.[540] In that case, the court concludes that because "PRIDE is operating, in a sense, as an arm of the Department of Corrections," the court should rely on the "cases from our sister circuits involving the applicability of the FLSA to prison industries which generate income for the prison."[541] As will be discussed further below, those cases use *Vanskike* and *Danneskjold v. Hausrath*[542] to assert broad limits over prisoner life, including work assignments construed as a condition of criminals' punishment or correction.

In *Vanskike*, the Seventh Circuit acknowledged that prison labor includes service work and that minimum wages for prisoners could be necessary for avoiding a detrimental impact on service worker employment.[543] Nonetheless, the Seventh Circuit did "not believe that Congress intended the FLSA to dictate such a result, even given its goal of preventing unfair competition."[544] The opinion reasons that insofar as the Ashurst-Sumners Act specifically

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services have been traditionally performed by domestic employees in the private sector.")). This case is especially on point: institutional work of doing laundry and serving food also is traditionally done by service workers in the private sector. Bonnett has been cited in over 600 cases, with just four categorized as "criticism." Lexis Academic database, Shepherdize™ (consulted Jan. 24, 2016).

538. State *ex rel*. Hung Nam Tran v. Speech, 782 N.W.2d 106, 110 (Wis. 2010) (emphasis added) (quoting Sanders v. Hayden, 544 F.3d 812, 814 (7th Cir. 2008)).

539. *See, e.g.*, *Vanskike*, 974 F.2d at 809 (citations omitted) ("There is no indication that the DOC has a pecuniary, in contrast to a rehabilitative or penological interest in inmate labor.").

540. Gambetta v. Prison Rehab. Indus. (PRIDE), 112 F.3d 1119 (11th Cir. 1997).

541. *Id.* at 1125.

542. 82 F.3d 37 (2d Cir. 1996).

543. *Vanskik*e, 974 F.2d. at 811.

544. *Id.* at 811.

addresses the problem of private sector competition over goods, its silence on competition in the service sector "belies the notion that any and all uses of prison labor by the government unduly obstruct fair competition . . . . A governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity: while the latter amounts to an unfair windfall, the former may be seen as simply paying the costs of public goods—including the costs of incarceration . . . ."[545] Given Congress' silence with respect to competition in the service sector and to the governmental character of the work performed, the opinion seems to affirm that the purpose of the FLSA is not to address this portion of the economy.[546]

In *Danneskjold* the Second Circuit also found that the FLSA does not cover work performed by inmates.[547] The court ruled that prison work programs entailing voluntary participation has a function identical to those entailing forced labor:

> Voluntary work serves all of the penal functions of forced labor . . . and therefore, should not have a different legal status under the FLSA . . . The prisoner is still a prisoner; the labor does not undermine FLSA wage structures; the opportunity is open only to prisoners; and the prison could order the labor if it chose. Indeed, to hold otherwise would lead to a perverse incentive on the part of prison officials to order the performance of labor instead of giving some choice to inmates.[548]

Here, the court in *Danneskjold* reasoned that a prison's total control over inmates renders prisoner choices so circumscribed as to be *pro forma* and effectively nonexistent, which is consistent with the punitive and controlling objectives of incarceration for criminals and those in custody under civil immigration laws as well.[549] Note that in addition to conflating so-called voluntary labor with forced labor inside a prison, the decision also assumes that the work program's furtherance of a prison's economic efficiency and its undermining of labor markets are merely incidental to the penal institution's overarching statutory objectives.[550]

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545. *Id.* at 811–12.

546. *Villareal* and other decisions also cite to *Danneskjold* ("prisoners' living standards are determined by what the prison provides; and most such labor does not compete with private employers," citing *Vaniske*, 974 F.2d at 810-11. *See Vaniske* at 812 n. 6 (noting that 29 U.S.C. § 203(m) allows employers to deduct "reasonable costs . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employee.").

547. *Danneskjold*, 82 F.3d at 43.

548. *Id.*

549. *Id.*

550. *Id.*

B. *Purposivist Standard for Prisoners and Residents Held Under Immigration Laws*

The court opinions reviewed above are riddled with logical and empirical problems, as well as bias symptomatic of the difficulties that scholars have noted in the use of the purposivist canon of statutory construction more generally.[551] However, judges may not simply invent or disregard laws that fail to comport with the purpose that the judge prefers, as in *Alvarado Guevara*.[552] Not only does judicial reliance on pseudo-histories undermine the goal of historical accuracy, as Vermeule suggests, it also undermines the ability of average citizens to meaningfully pursue legal remedies.[553]

Consistent with this pattern, GEO asserted in their Rule 60 Motion for Reconsideration[554] that the judge's order allowing the class action suit to proceed because "the 'plain text' of the TVPA could be read to encompass the plaintiff's allegations" that GEO using forced labor, "is contrary to Congressional intent and should be rejected as 'absurd' . . . ."[555] Judge Kane denied the motion.[556] In response GEO filed a motion requesting an interlocutory appeal claiming that "GEO will suffer irreparable injury," in part because "there is still a real possibility that detainees or inmates at other [GEO] facilities may file similar suits even during the pendency of this litigation."[557] GEO's motion to file an interlocutory appeal also points out that the case has "attracted national publicity, some of which notes the 'historic' nature of the court's rulings."[558] Insofar as the purposive approach to statutory analysis produces results that are likely to reflect *ad hoc* or institutional biases, there is special reason to be cautious about its application to stigmatized populations with few economic and political resources. The rule of law requires equal protection for everyone in an employer-employee relationship.

1. *Purpose of Prison Not to Provide Living Wages to Workers*

This section analyzes Judge Posner rationale for not allowing FLSA relief to prisoners. In *Bennett,* Judge Posner states: "[P]eople are not imprisoned

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551. Some scholars attribute such difficulties to Holy Trinity Church v. United States, 143 U.S. 457 (1892) (holding that "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words."). *See e.g.*, Vermeule, *supra* note 83, at 1833–38.

552. Alvarado Guevara v. I.N.S., 902 F.2d 394, 396 (5th Cir. 1990) ("[I]t would not be within the legislative purpose of the FLSA . . . . The congressional motive for enacting the FLSA . . . .").

553. Vermeule, *supra* note 83, at 1896.

554. Motion for Reconsideration of Order Denying GEO Group Inc.'s Motion to Dismiss, Menocal v. GEO Grp., Inc., Civil Action No. 1:14-cv-02887-JLK (D. Colo. Aug. 4, 2015).

555. *Id.* at 2.

556. Order on Motion for Reconsideration at 3, Menocal v. GEO Grp., Inc., Civil Action No. 1:14-cv-02887-JLK (D. Colo. Aug. 26, 2015).

557. Motion for an Order Certifying an Interlocutory Appeal and Motion to Stay Litigation Pending Appeal, at 18, 22, Menocal v. GEO Grp., Inc., Civil Action No. 1:14-cv-02887-JLK (D. Colo. Sept. 22, 2015).

558. *Id.* at 23. Judge Kane denied the appeal (Order on Motion for Interlocutory Appeal, Menocal v. GEO Grp., Inc., Civil Action No. 1:14-cv-02887-JLK (D. Colo., March 17, 2016).

for the purpose of enabling them to earn a living."[559] This observation is generally true. But line cooks, guards, and judges are not appointed for the purpose of enabling such individuals to earn a living. The purpose of each employment decision is usually to advance larger economic or policy objectives. For instance, the purpose of employing judges is to ensure law enforcement and justice, not to provide attorneys a monthly paycheck. Judge Posner analysis would deprive not only prisoners, but also everyone else, of FLSA protections.

If this argument about an organization's purpose fails to remove employees from the FLSA's coverage, it would seem that Judge Posner next sentence might further that goal: "The prison pays for their keep."[560] This observation is also generally true. However, Judge Posner selectively ignores other similar contexts in which the FLSA applies. For instance, does receiving tuition from either parents, universities or federal or state governments authorize universities to pay students less than the minimum wage for their work in dining halls or in the college library?[561] No court has suggested that because their parents, the university, or the government "pays for their keep" that the FLSA exempts students from its coverage. Judge Posner continues: "If [the prison] puts [prisoners] to work, it is to [a] offset the cost of keeping them, or [b] to keep them out of mischief or [c] to ease their transition to the world outside, or [d] to equip them with skills and habits that will make them less likely to return to crime outside."[562] The analysis here suggests that even if some of these goals are permissible for prisoners, they do not apply to ICE-facility residents any more than they would apply to college students.

Much of prison work today has indeed been organized in a punitive fashion, consistent with the organization of prison life more generally, giving rise to confusion about the economic and punitive character of prison work in judicial opinions. Consider other institutions that are designed for a public purpose but that do not require labor from the individuals who actually accumulate immediate and enduring benefits and pleasures from their occupancy. For instance, US high schools require students to keep their desks or lockers clean, and to throw away their own garbage, but not to put trash into a compactor or clean the toilets, even though such tasks could be accommodated during recess or after school. If a high school principal required students to complete this work at one dollar per day and a student resisted and asserted her rights under the FLSA, would Judge Posner assert that the purpose of high school is not to earn a living and that the duties imposed were legitimately offsetting the costs of school? Would he be more inclined to allow this offset for public than private schools? Would he ignore relevant

559. Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005).
560. *Id.*
561. ICE performs both these jobs as well. *See Florence Scope of Work*, *supra* note 59.
562. *Bennett*, 395 F.3d at 410.

labor laws? Would he disregard the impact of such a decision on the local workforce and identify taxpayer savings to allow the use of one dollar per day student labor to perform maintenance and repairs?

Prison work is often, though not always, punitive, and sometimes rehabilitative; but it certainly offsets costs. Under the implied repeal approach urged here, prison labor may be used in certain contexts without FLSA protections and may entail savings or offsetting costs, but only as a consequence, not as a permissible objective. On this analysis, the crucial distinction is between work that serves punitive or rehabilitative ends and work that does not. If either of those two objectives is met and Congress has no other goal, then uncompensated *prison* labor or labor at wages below the minimum wage may be legal.

Some, disputing the logic of *Vanskike*,[563] will point out that such labor will undercut the price of service labor in the larger labor market. Inmates who are cleaning showers, serving meals, digging holes, and performing laundry details are all doing work that has an occupation code for federal contracts, thereby depriving those in nearby communities of those employment possibilities.[564] But this could be justified with the policy rationale of prison's punitive or rehabilitative purpose. That is, a legislature's desire for using incarceration as punishment or correction of criminals can imply a partial repeal of otherwise valid labor laws. Leaving aside the substantive rationality of these intentions, prison work programs, forced or otherwise, may be exempted from the FLSA *as long as the purpose of the labor is genuinely punitive or rehabilitative and not simply to save the prison money*.[565]

Further evidence that judges should evaluate work programs in their specific contexts and not discount the effects of service work on the adjacent work force is that the Ashurst-Sumners Act of 1935[566] does just that. It limits the impact of cheaply produced goods on affected markets, and it also limits prison deductions from inmate wages. The Act allows "deductions which shall not, in the aggregate, exceed 80 per centum of gross wages . . . ."[567] Were Congress to follow the line of thought Judge Posner imputes to it, Ashley-Sumners would not protect prisoner earnings. In short, Congress has

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563. Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992) ("Prisoners are essentially taken out of the national economy upon incarceration.").

564. *See id.*

565. *See* McMaster v. Minn., 30 F.3d 976, 978 (11th Cir. 1994) (citing Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) ("Because prisoners . . . worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, the economic reality is that their labor belonged to the institution. We hold, therefore, that they were not 'employees' of the prison entitled to be paid minimum wage under the FLSA.")).

566. Ashurst-Sumners Act, 18 U.S.C. §§ 1761-1762, 1761(b) (1935).

567. § 1761(c)(2). For instance, gross wages for an 8 hour day at $7.25 would be $58, of which the 20% set aside for the prisoner would be no less than $11.60 and possibly higher, regardless of the costs of incarceration. *See Historical Minimum Wage Laws*, *supra* note 499.

already passed the legislation Judge Posner asserted was "outlandish." [568]

Judges also argue that the silence on service work in 18 U.S.C. §§ 1761-62 means that service work within the prison walls fails to trigger FLSA protection. This point is true for 18 U.S.C. §§ 1761-62, but it does not imply an exemption of the FLSA for those in ICE custody. The policy needs served by passing labor laws for goods, including those imported from foreign countries, are different from those for service work in prisons or civil detention facilities. There is only a limited amount of time required for cleaning and maintaining a specific facility consistent with contractual requirements. Congress' focus on tangible commodities highlights the fact that service labor is constrained by the finite quality of maintenance needs within the institution.[569] For this reason, the potential impact of prison labor accumulated in goods on the labor market is exponentially higher, and also less transparent than service work, indicating a need for special legislation. It is plausible to read Ashurst-Sumners as addressing the problem of tracking the source of goods in the national economy while also authorizing the FLSA to target the exploitation of prisoner service work.

Moreover, as noted in Parts III and IV, Congress' sole purpose for passing the SCA was to ensure that in making available government work to private contractors and removing jobs from the federal government, service workers would nonetheless have the protections of collective bargaining agreements or of a pay rate structure substantially above the minimum wage. The SCA includes no exemption for work performed by residents in federal detention facilities.

Before turning to the legally and practically unique context of labor performed by residents of ICE facilities, two further characteristics of service labor undertaken by those in custody bear note: first, the differences between private prisons and state-run prisons; and second, the differences between pre- and post-conviction service labor. Insofar as the prison industry is part of the national economy, workers employed therein under the SCA are as well. Moreover, the FLSA reasonably could be construed to serve the same purpose for service work within the prison walls as Ashurst-Sumners does for goods. For reasons noted above, a separate law is not necessary to achieve this objective.

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568. In *McMaster,* the court similarly concluded that "Congress' purpose in enacting the Ashurst-Sumners Act was to protect private business, not to protect the inmate worker." *McMaster*, 30 F.3d at 981.

569. As Karl Marx points out, the value of commodities reflects the labor power concentrated in the means of production as well as the immediate object of labor. CAPITAL [1867], vol. I, esp. A.1.14-16 ("[The commodity's value] changes with every variation in the productiveness of labour. This productiveness is determined by various circumstances, amongst others, by the average amount of skill of the workmen, the state of science, and the degree of its practical application, the social organisation of production, the extent and capabilities of the means of production, and by physical conditions."). The capacity of emerging means of production to congeal labor, e.g., assembly-line machinery or computers, is infinite. But the capacity to absorb service labor for the maintenance of a prison facility is limited.

Judge Posner takes a different view, one informed by his own preference for private firms providing the same benefits and externalities as state-run agencies. In a brief opinion echoing his prior "outlandish" characterization of FLSA claims in state-run corrective facilities, Judge Posner wrote:

> We cannot see what difference it makes if a prison is private. *Ideally, neither the rights nor the liabilities of a state agency should be affected* by its decision to contract out a portion of the service that state law obligates it to provide. Otherwise the 'make or buy' decision (the decision whether to furnish a service directly or obtain it in the market) would be distorted by considerations irrelevant to the only factor that should matter: the relative efficiency of internal versus contractual provision of services in particular circumstances.[570]

Instead of basing his analysis on the numerous actual differences between private firms and state agencies, Posner is guided by his own "ideal" vision. Another ideal also might be considered: that no economic sector should be adversely affected by a judge's decision imputing meaning to a statute that would relieve it of wage obligations that Congress did not explicitly authorize, especially when the result is one of privileging firms in that sector over others.[571] One would expect Judge Posner to be wary of judicial interventions that select one industry in which labor costs will be exempt from federal wage protections. Such rulings artificially lower the labor costs for the prison sector and gives firms such as CCA and GEO an unfair advantage over those firms and sectors that judges have not exempted from the FLSA.

2. *Profits and Correctional Purposes Not Legitimate Grounds for the FLSA Exemption*

Though Judge Posner dismisses the legal relevance of the differences between private and publicly run prisons, other decisions are less cavalier. The bulk of the *Gambetta* decision hangs on precisely this question.[572] The *Gambetta* court explains that even where a non-profit entity organizes prison labor, the Florida Department of Corrections still controls the work programs, including prescribing the "education, work, and work-training for each inmate entering the correctional system . . . . Having concluded as a

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570. Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005) (emphasis added).

571. Otherwise, the decision to produce crops or prisons, for instance, would be distorted by the only factor that should matter if one follows Richard Posner's heuristic of economic rationality: the relative outlays and profits absent judicially implemented subsidies for a particular segment of the economy. RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW (1973).

572. Gambetta v. Prison Rehab. Indus. (PRIDE), 112 F.3d 1119, 1220 (11th Cir. 1997) ("This appeal presents an important question of economic and penological concern of first impression in this circuit, wherein prisoners . . . seek the benefits of federal minimum wage laws when they engage in correctional work programs operated by a non-profit corporation established by the State . . . . Because we conclude as a matter of law, however, that the employer in this matter is a state instrumentality, we need pursue only a more limited inquiry.").

matter of law that PRIDE is an instrumentality of the State of Florida, we now ascertain the impact of that status upon the applicability of the FLSA."[573] The opinion concludes by stating: "We are persuaded by the reasoning of our sister circuits, and we join them in the conclusion *that inmates that work for state prison industries* are not covered by the FLSA."[574] State-authorized prison industries producing goods for governments and non-profits have a specific statutory authority that affords FLSA-like protections to the economy and inmate-workers, in contrast to the labor used for the benefit of the firms invoking 8 U.S.C. § 1555(d).

Under a purposive analysis, the contrast between the larger economic context contemplated by the prison labor laws and the outlays under "Immigration Expenses" is of great significance. Congress established a system of *ad hoc* payments from funds authorized for agency expenses, neither requiring immigrants to work for the government nor incentivizing the use of this labor to defray costs. Neither the statute nor its legislative history contemplate depriving service workers in the detention industry of the FLSA's protections. The statute also does not allow for the exploitation of those housed and in custody under immigration laws, including legal residents and US citizens.

The analysis of labor in contexts that are non-punitive and therefore quasi-civil but still part of the criminal justice system is also relevant to evaluating the legality of ICE-facility resident labor. The decisions in pre- and post-conviction settings have facts and laws that differ from those for immigration facility residents, and thus limit their precedential relevance to these contexts. The pre- and post-conviction opinions concerning the validity of FLSA and Thirteenth Amendment protections have more variation than the court orders for prisoner employment cases. For example, the *Villareal* court asserts that "pretrial detainees who perform services at the direction of correction officials and for the benefit of the correctional facility are not covered under the FLSA,"[575] an unfortunate lapse of logic that follows directly from *Alvarado Guevara,* the sole precedent on which the decision relies for linking the conditions of pre-trial detainees to prisoners.[576] Like *Alvarado Guevara*, *Villareal* also selectively applies rationales from decisions about "correctional facilities" to "pre-trial detainees," even though the latter are afforded a presumption of innocence.[577]

In *McGarry v. Pallito*, a Vermont pre-trial detainee claimed that the guards compelling him to work in the jail laundry violated the Thirteenth Amend-

573. *Id.* at 1122, 1123.
574. *Id.* at 1124 (emphasis added).
575. Villarreal v. Woodman, 113 F.3d 202, 202 (11th Cir. 1997).
576. *Id.* at 206.
577. McGarry v. Pallito, 687 F.3d 505 (2d Cir. 2012).

ment.[578] The district court dismissed the complaint.[579] The *pro se* plaintiff Finbar McGarry appealed and the Second Circuit remanded:

> [I]t is clearly established that a state may not "rehabilitate" pretrial detainees. The Supreme Court has unambiguously and repeatedly held that a state's authority over pretrial detainees is limited by the Constitution in ways that the treatment of convicted persons is not. In *McGinnis v. Royster*, 410 U.S. 263, 273 (1973) the Supreme Court concluded that "it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence." *See also Bell,* 441 U.S. at 536 (noting that a state may "detain [a person] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, *or otherwise violate the Constitution*." (emphasis added)); *Houchins v. KQED, Inc.* 438 U.S. 1, 37-38 (1978 (Stevens, J. dissenting) (noting that certain penological objectives, such as punishment, deterrence, and rehabilitation are inapplicable to pretrial detainees); *cf. Salerno*, 481 U.S. at 747 (distinguishing between "impermissible punishment" and "permissible regulation" of pretrial detainees).[580]

This case was not brought under the FLSA and the work under examination was mandatory.[581] Still, as courts craft rules availing constitutional protections to those in civil detention, the legal, if not physical, infrastructure may begin to distinguish itself on their behalf.

In *Tran*, another post-conviction case, the court observed that the Wisconsin legislature changed a policy for those housed in mental health facilities.[582] Until 1980, the law allowed patients to "voluntarily engage in therapeutic labor . . . of financial benefit to the facility" if they were paid the federally-mandated minimum wages.[583] However, a 1981 amendment changed this policy, stipulating that such labor should be "compensated in accordance with a plan approved by the department . . . ."[584] The Plaintiffs argued that the Warden may not set a rate of compensation inconsistent with that

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578. *Id*.
579. *Id.*
580. *Id.* at 513 n.7 (2d Cir. 2012) (quoting *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) ("Where the regulation at issue imposes pretrial, rather than post-conviction, restrictions on liberty, the legitimate penological interests served must go beyond the traditional objectives of rehabilitation or punishment." (internal quotation marks omitted)) and ("Normally, where it is alleged that 'a prison restriction infringes upon a specific constitutional guarantee,' this Court will evaluate the restriction 'in light of institutional security.' *United States v. Cohen*, 796 F.2d 20, 22 (2d Cir. 1986).").
581. 687 F.3d 505.
582. State *ex rel.* Hung Nam Tran, 324 Wis. 2d at 577 (quoting WIS. STAT. § 51.61(1)(b)).
583. *Id.*
584. *Id*. at 578 (quoting WIS. STAT. § 51.61(1)(b) (1981-82) and § 51.61(1)(b) (2007-08)).

allowable under the FLSA.[585] The Wisconsin Court of Appeals, using purposive statutory construction, authorized the state agency to set the rate below the state's minimum wage.[586]

C. *Implications of a Purposive Analysis of the FLSA*

Sections A and B laid out some of the problems confronting a purposive approach, including its conflation of punitive and rehabilitative ends with economic, cost-saving ones. Such an analysis poses seemingly insuperable difficulties for firms housing ICE residents that are seeking exemption from the FLSA. First, the policy mandate of immigration detention expressed in ICE contracts today clearly distinguishes the conditions of ICE housing from that of prisoners. Second, the purpose of the ICE resident work programs is to benefit the private prison industry, not to correct or punish ICE facility residents. Third, pre- and post-conviction detention arises in the context of Sixth Amendment protections of criminals, but those in ICE custody lack these and also protections by regulations. Finally, Ashurst-Sumners suggests Congress does not find protecting labor markets or inmate wages from the effects of work contracted under conditions of coercion an "outlandish" purpose of its legislation.

Using the purpose of punishment to justify slaving wages for individuals detained under immigration law is worrisome. GEO's and CCA's business model is incentivizing Congress to pass minimum daily bed mandates for a population that lacks any Sixth Amendment rights, thus triggering ICE's largely frictionless arrest of otherwise free people, most of whom are productive members of the work force.[587] By allowing such individuals to work while in detention for relatively low pay, the prison industry benefits immensely while hurting other sectors. Such a system is not required by the civil policing of immigration law[588] and is a major obstacle to those advocating lower-priced alternatives to detention.

1. *The Humanitarian Objectives of Immigration*

As discussed above, courts have noted the rights of those in civil or pre-trial detention to be free of punitive measures directed to those convicted of crimes. Insofar as immigration agencies have affirmatively stated a humanitarian vision for such environments, courts should be distinguishing

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585. *Id.*

586. *Id.*

587. "In 2014, the labor force participation rate of the foreign born was 66.0 percent, compared with 62.3 percent for the native born." BUREAU OF LABOR FORCE STATISTICS, LABOR FORCE CHARACTERISTICS OF FOREIGN-BORN WORKERS SUMMARY, *available at* http://www.bls.gov/news.release/forbrn.nr0.htm.

588. Alternatives to detention range from monetary bonds taken on a monthly basis from an employee's wages, as done in World War One, to ankle bracelets, the latter of which have produced high rates of appearances in immigration courts. Julie Turkowitz, *Immigrant Mothers Released from Holding Centers, but with Ankle Monitors*, N.Y. TIMES (July 29, 2014).

the custody of those in immigration custody from those incarcerated as a condition of punishment.

Part Four took note of ICE's contemporary statements favoring distinguishing conditions of immigration custody from those of prisons. A purposive assessment should also consider the longer history of the agency's custody intentions. A 1915 Department of Labor report made the following observation:

> For a satisfactory administration of the immigration laws, the character and condition of immigrant stations at ports of entry are of prime importance. So far, therefore, the Department of Labor is permitted by law and equipped for the purpose, it aims to make these stations as much like temporary homes as possible. While regulation and exclusion and therefore detention, are necessary in respect of immigration laws, it should be understood by all who participate in administering these laws that they are not intended to be penalizing. It is with no unfriendliness to aliens that immigrants are detained and some of them excluded, but solely for the protection of our own people and our institutions. Indifference, then, to the physical or mental comfort of these wards of ours from other lands should not be tolerated. Accordingly, every reasonable effort is made by the department, within the limits of the appropriations, to minimize all the necessary hardships of detention and to abolish all that are not necessary.[589]

The description above does not apply to the institutionalization of federal convicts in 1915.[590]

> The IGSA with the City of Adelanto, California states:
>
> A. Purpose: The purpose of this Intergovernmental Service Agreement (IGSA) is to establish an Agreement between ICE and the Service Provider for the detention and care of persons detained under the authority of the Immigration and Nationality Act, as amended. All persons in ICE custody are "Administrative Detainees." This term recognizes that ICE detainees are not charged with criminal violations

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589. RPT.'S OF DEP'T OF LABOR 1914: RPT. OF SEC.'Y OF LABOR & RPT.'S OF BUREAU 69-70 (1915). It is true that that these stations were only for arriving immigrants and not those ordered deported. But that is only because the latter were not confined at all. Thus the earlier measures, as well as current laws, favor the liberty of those who have already entered legally, heightened protections that would seem to favor more protections for those who have been U.S. residents than those who are just arrived. *Id.*

590. The Congressional and judicial objective in establishing immigration courts was to ensure low-level agents did not mistakenly deny entry, residence, or mistreat in custody those whose presence is either mandated by international law or would improve our communities and economy. Immigration adjudication for a brief period was under the purview of the Administrative Procedure Act. JOANNA GRISINGER,THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 83-86 (2012); *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 170-173 (2007). ICE housing conditions that resemble prisons do not conform with this goal any more than would shackling and otherwise humiliating those in line for screening by Border Patrol at air and land ports of entry.

> and are only held to assure their presence through out the administrative hearing process and to assure their presence for removal from the United States pursuant to a lawful final order by the Immigration Court, the Board of Immigration Appeals or other Federal judicial body.
>
> B. ICE is reforming the immigration detention system to move away from the penal model of detention. A key goal of reform is to create a civil detention that is not penal in nature and serves the needs of ICE to provide safe and secure conditions that accommodate the needs of a diverse population . . . .[591]

This development further reiterates the historical purpose of immigration proceedings.[592]

2. *Economic Purpose of Immigration Detention*

Moreover, the purposes of the program that ICE advances—efficiencies of operations and alleviating the "negative impact of confinement"[593]—may be advanced through wages paid at the wage rates set by Congress. The *Gambetta* and *Vanskike* decisions discussed the absence of a profit motive in the low wages paid to inmates,[594] but the immigrant detention industry is on very different footing and bears scrutiny not only under the FLSA but also the TVPA, especially 18 U.S.C. § 1589.

Prison companies brag in their annual reports about their high profits as well as resources devoted to maintaining steady contracts for fixed bed space: CCA's 2012 Annual Report filed with the Securities and Exchange Commission states, "We have staff throughout the organization actively engaged in marketing this available capacity to existing and prospective customers. Historically, we have been successful in substantially filling our inventory of available beds and the beds that we have constructed. Filling these available beds would provide substantial growth in revenues."[595] Responsive to

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591. The contract goes on to list numerous provisions for the ICE residents that would not be contemplated for inmates, e.g. "They must provide housing environments with abundant natural light, outdoor recreation, contact visitation, noise control, freedom of movement, programming opportunities consistent with detainee demographics, and modern and fully functional medical facilities." Adelanto IGSA (2012), *available at* http:deportationresearchclinic.org/Adelanto-IGSA-2011-FOIA-2014-1845-2.pdf.

592. In contrast with this official purpose, consider the reality of the administration of the immigration work program through protocols and forms that are literally identical with those of the prisons. For instance, the forms and log sheets that CCA distributes to those in ICE custody are the same as those that CCA uses in its prisons. El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128, at 32. The form was sent responsive to the author's request for the forms ICE and its contractors distribute. Form 8-5A states at the top "Corrections Corporation of America Documentation of Inmate/Resident Work Place Safety Orientation." *Id.* at 7. The log sheets and codes CCA uses for its grievances, including for facility work, are also the same as the ones they use in the prisons. Among the dozens of ICE work forms, logs, and work descriptions reviewed for this Article, none are specific to those held under immigration laws; they are simply duplicates of those the private firms use in their criminal facilities.

593. 2011 PBNDS, *supra* note 24, at 382-87.

594. *See, e.g.*, *Vanskike*, 974 F.2d at 809.

595. CORR. CORP. AM., ANNUAL REPORT 53 (2013) (Form 10-K).

lobbying by CCA and other private prison firms, Congress has mandated "[t]hat funding made available under this heading shall maintain a level of not less than 34,000 detention beds through September 30, 2014 [for ICE]."[596] According to Piper Madison, "In the last two years, major private prison companies Corrections Corporation of America (CCA) and the GEO Group have spent at least $4,350,00 on lobbying the federal government, primarily to win immigration-related contracts."[597] Mission accomplished. Insofar as even the most draconian deportation policies could be implemented in a variety of ways, specifying the funding of mandatory space serves only one purpose: increasing profits for the prison companies. The 34,000 daily mandatory minimum bed space occupation required of ICE has no corollary in the prison system.

The Supreme Court has ruled that the government does not have an obligation to provide the utmost protection of all rights at all times, but that the government can employ a cost-benefit calculation.[598] However, this rationale applies to when an agency may use its discretion not to pass a rule, and does not authorize unsafe working conditions or slaving wages in violation of federal law.

3. *Forced Work Impermissible under* Wong Wing

Under *Wong Wing*, the plenary authority to regulate immigration is confined to detention. It does not authorize Congressional actions in violation of other due process rights or federal laws.[599] Even Congress may not impose work requirements on those in immigration custody, if such requirements do not comport with the Thirteenth Amendment.

The Supreme Court has affirmed the reasoning in *Wong Wing* in recent years,[600] as well as in thousands of cases across the country. Thus, the precedents cited in *Alvarado Guevara,* referring exclusively to prisoners who are removed by the Thirteenth Amendment from coverage under the FLSA and other laws,[601] has no bearing on residents of immigration centers.

Even those decisions that have allowed the payment of slave wages to those awaiting trial or post-conviction are still distinguishable from the contexts of immigrants in civil detention. Per *Wong Wing,* the Sixth Amendment prerogative to a full range of due process rights, especially the right to a

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596. Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5.

597. Piper Madison, *Meet the Private Prison Industry's Lobbyists Who Could Shape Immigration Reform*, GRASSROOTS LEADERSHIP (Feb. 6, 2013), http://grassrootsleader.org/blog/2013/02/meet-private-prison-industry-s-lobbyists-who-could-shape-immigratin-reform/.

598. Mathews v. Eldridge, 424 U.S. 319, 348 (1976) ("At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.").

599. *Zadvydas,* 185 F.3d at 289 (1999) (emphasis added by court) (internal citations omitted).

600. See Lexis Academic database, Shepherdize™ (consulted Jan. 24, 2016), showing 1244 federal court citations to *Wing*, and noting eight opinions that distinguished their cases from the *Wong Wing* precedent.

601. *See supra* Part IV.

trial by a jury and right to government-paid attorney, means a higher level of confidence that those in penal custody merit this treatment than those in immigration custody.[602] While *Wong Wing* concerned hard labor, the language of the decision is still relevant for considering the relationship between 8 U.S.C. § 1555(d) and the FLSA.[603] Leaving aside the *de facto* forced work that occurs in ICE facilities, *Wong Wing* would seem to suggest that 8 U.S.C. § 1555(d) should be read to mandate wages to ICE residents consistent with the provisions of the FLSA.[604] Any other payment results from the coercion inherent to confinement, not a freely negotiated contract. Nothing in the original Congressional record suggests a legislative purpose of subsidizing privatized detention through authorizing one dollar per day wages. Congress also failed to authorize ad hoc labor markets within facilities, with GEO and CCA topping off the one dollar per day ICE reimbursements with additional one dollar to two dollar payments of their own.[605]

4. *Corrosive to Democracy and the Rule of Law*

Finally, these slaving wages enhance the prison industry's profitability to the detriment of other industries that abide by the FLSA. The current practice distorts markets in exactly the fashion that the Ashurst-Summers Act and the FLSA seek to prevent. Removing from the FLSA a narrow sector of the economy artificially enhances the prison industry's profitability.[606] When other industries pay subminimum wages and benefit from unauthorized immigration from Mexico, the government uses labor laws to arrest employers.[607] And even those working for less than minimum wage are not forced by

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602. *See* Morales, *supra* note 25.

603. Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("But when Congress sees fit to promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.").

604. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) ("Another rule of statutory construction . . . where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

605. Jacqueline Stevens, *Colorado Judge Swats Down GEO's Motion to Reconsider Class Action Lawsuit Brought by Captive Labor Force, New Evidence of GEO Labor Violations*, STATES WITHOUT NATIONS, Sept. 17, 2015 (discussing GEO South Texas detention detainee pay for July 2009 showing "ICE total 6722.00 and GEO total 8007.00 and total pay 14,729.00." ICE FOIA Release 2013 FOIA 32547.005599-5600.).

606. The prison firms obtain super profits in violation of labor and other laws to which other firms or industries comply. CCA and GEO both recently reorganized as Real Estate Investment Trusts, a change made possible by the low ratio of labor and other expenses to those for real estate and buildings. *See* Nathaniel Popper, *Restyled as Real Estate Trusts, Varied Businesses Avoid Taxes*, N.Y. TIMES (Apr. 21, 2013), http://www.nytimes.com/2013/04/22/business/restyled-as-real-estate-trusts-varied-businesses-avoid-taxes.html. The Geo Group ("GEO is the first fully-integrated equity real estate investment trust specializing in the design, development, financing, and operation of correctional, detention, and community reentry facilities worldwide.") http://geogroup.com.

607. Jeremy Redmon, *Immigration Authorities Take Aim At Illegal Hiring Practices In Georgia*, ATL. J. CONST. (Jan. 30, 2013), http://www.ajc.com/news/news/national-govt-politics/immigration-authorities-take-aim-at-illegal-hiring/nWBPt.

confinement to sell their labor to just one employer and thus earn more than one dollar per day. In sum, the data show GEO, CCA, ATSI, and other firms negotiating with ICE to hire workers at one dollar per day for the purpose of avoiding paying U.S. workers the minimum wages set by Congress. Further, the off-the-books payments made from imprest funds seem to violate various laws at the foundation of U.S. democracy.[608] These violations and the use of the super profits earned thereof unfairly advantage the prison industry over those abiding by the FLSA.

VIII. CONCLUSION

The use of unpaid work to support an institution of incarceration serves longstanding rehabilitative policies for criminals. Work within the grounds of a correction house was designed primarily to save inmates' souls and not to save corporations money.[609] The current policy as applied to individuals in ICE custody lacks any basis in common law, the Constitution, or the current U.S. Code. None of these, including the motives at the passage of 8 U.S.C. §1555(d), support the exploitation of indigent ICE residents working at slaving wages in order to subsidize the prison industry.

In sum, a plain meaning approach to interpreting 8 U.S.C. § 1555(d) cannot justify payments below minimum wage because the statute requires that allowances be funded at a rate set by Congress and budgeted in an appropriations act. Current programs are setting the rate based on the ad hoc determinations of ICE officials, private prison firms, and private prison guards. Moreover, the legislative intent approach fails to justify payments below minimum wage because the Congress that authorized the program never contemplated the use of the program as a means of defraying expenses for the government much less as a subsidy to the private prison industry. Finally, a purposive construction—entailing a reading of all laws implicated—could exempt the program from the OSHA, the FLSA, and the Forced Labor Act, but only because a purposive approach allows judges' intuitions to trump the plain text and legislative intent, and could be used to substantiate any outcome. Hewing to the most relevant substantive issues and precedents, especially *Wing* and *Bonnette*, requires availing residents of ICE-controlled facilities the protection of the FLSA and all other labor laws.

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608. U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law; and a regular Statement and Account of these Receipts and Expenditures of All public Money shall be published from time to time.").

609. Marion, *supra* note 529, at 217 n.36 ("Considered a major reform in punishment at the time, the Walnut Street Prison required its inmates to work 'in order to attack idleness, though to be a major cause of crime.'") (citing Stephen Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 348 (1998) and quoting William Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1161-62 (2004) ("The focus was primarily on the moral rehabilitation of the prisoner and only secondarily on the idea of having prison work defray some of the costs of incarceration.")).

TABLE ONE

EL CENTRO[610] ACTUAL DISBURSEMENTS (NOVEMBER 2009 TO OCTOBER 2010)[611] AND 2014 (180 DAYS)

ADP (**June, 2010**)[612]	ADE (2010)	Actual 12 Month Pay-Work Program Disbursements, Per Firm Records (Nov. 2009-Oct. 2010)[613]	Payments at California Minimum Wage ($8/hour)[614]	Payments Per 6 Hours Service Contract Act at Lowest Level[615] and 2 Hours Minimum Wage (est.)	Amount of Profits for Ahtna Technical Services Incorporated from Nov. 2009 to October 2010 from Paying Slaving Wages (est.)	Average Daily Employment (63,426 Days Paid/Total Person Days, 2010)
457	173	at $1/day, $63,426	at 8 hours, $3,678,708	$5,581,488	at minimum wage 8 hours/day, $3,615,282	30%
			at 6 hours, $3,044,448		at minimum wage 6 hours/day, $2,981,022	
					FLSA + SCA rates $5,518,062	
April 2014[616]	**April 2014**	**April 2014**	**April 2014 at $8.50**	**April 2014**	**April 2014**	
462	190	for 180 days, $34,200	for 180 days, $2,325,600		for 180 days at minimum wage 8 hours/day, $2,291,400	41% on April 22, 2014

TABLE TWO

GEO TACOMA, WASHINGTON - REPORTED PAYMENTS TO ICE RESIDENTS FOR WORK PERFORMED MAY 2012 TO APRIL 2013[617]

Total Paid	**Minimum Wages due for at $9.04/hour (May to December, 2012)**	**Minimum Wages due at $9.19/hour (Jan. to April, 2013)**	**Total Compensation at Minimum Wage for 8 hour day**	**GEO Profits from Slaving Wages at Tacoma**
$124,313	81,219 days worked	43,094 days worked		
	Actual labor value $5,873,760	Actual labor value $3,168,272	$9,042,032	$8,917,719

610. El Centro, California, Asset Protection and Security SVC LP. The El Centro Facility closed as of October 1, 2014.

611. El Centro Monthly Imprest Payments, 2000-2010, *supra* note 128.

612. FOIA 14-06388, FY2007-FY2012 Average Daily Population by Requested Facilities, ADE = Average Daily Employment 63426/365, at deportationresearchclinic.org/ICE-FOIA-14-06388-FY2007-FY2012.pdf.

613. *See supra* note 140, at 8.

614. California Minimum Wage, State of California, *available at* https://www.dir.ca.gov/iw/MW-2014.pdf/ ($8.00/hour effective January 1, 2008; $9.00/hour effective July 1, 2014)

615. El Centro Contract, HSCEDM-R-00008 (Attachment 3), occupation Dishwasher at $8.76/hour and min. $3.24 benefits = $12/hour. 72 + 16 = 88, note this is for 2010, wages determinations change annually and vary by region, at http://deportationresearchclinic.org/EL_CENTRO-Section-J_02-02-09.pdf.

616. 2015-ICFO-00563, *supra* note 129.

617. 2013FOIA, *supra* note 57.

TABLE THREE

DATA ON PRIVATE PRISON FIRM PROFITS FROM DETAINEE WAGES, 2014 FROM ICE 2014 RELEASE FOR APRIL 22, 2014

Facility	Firm	Detainee Wages at $1/day	Annual Profits Based on Minimum Wage at 8 hrs/day (by state)[2]	April 22, 2014, # Employed	ADE (%)
Adelanto, CA CDF	GEO	$109,865	$7,910,280 - $109,865 = $7,800,415	379	28
Eloy, AZ CDF	CCA	$146,000	$922,227,000 - $146,000 = $9,081,200	400	27
Florence, AZ CDF	Asset Protection and Security	$48,910	$3,091,112 - $48,920 = $3,042,192	368	36
Florence IGA	CCA	$55,115	$3,483,268 - $55,115 = $3,428,153	151	46
Houston CDF	CCA	$105,120	$6,096,960 - $105,120 = $5,991,840	288	31
Miami, CDF	AKAL Security	$67,525	$3,916,450-$67,525 = $3,848,925	185	33
Broward, FL CDF	GEO	$54,750	3,473,340-$54,750 = $3,418,590	150	28
Port Isabel	Ahtna Technical Services	$127,750	$7,409,500-$127,750 = $7,281,750	350	38
San Diego CDF	CCA	$93,440	$6,727,680-$93,440 = $6,634,249	256	39
Tacoma CDF	GEO	$126,290	$6,966,886-126,290 = $6,840,596	346	28

APPENDIX 1

KROME, MIAMI FOOD SERVICE STAFFING (2012)

PERFORMANCE WORK STATEMENT FOR FOOD SERVICE

WORKLOAD DATA FOR FOOD SERVICE

Table 1:—ICE/ERO Food Service Meal Served Workload

	Last Quarter April—2012 30 Days	May—2012 31 Days	June—2012 30 Days	Average Meals Per Day 91 Days	CY 2010 365 Days	CY 2011 365 Days
KRO-Miami Total Meals	56,108	61,808	59,449	1,949	1,953	2,156
Detainees plus Auth users	53,563	57,967	57,944	1,862	1,870	2077
Satellite/ J-Pat Meals	2,545	3,841	1,505	87	82	82

FOOD SERVICE OPERATION PARAMETERS

FOOD SERVICE OPERATIONAL PARAMETERS

Table 2:—ICE/ERO Food Service Operational Parameters (Authorized Staffing Levels)

	Hours		Staffing			Population Served		
Shift	**Hours**	**Feeding Begins**	**Food Service Admin/SUP GS-1667-11**	**Cook Supervisor WS-9**	**Cook WG-8**	**Average Number Detainees Workers per Shift**	**Number Detainees Served per Seating**	**Number Sittings per Meal**
First Shift	430A 1200P	Breakfast 0600 AM	1	1	6	**10	****65	****9
Second Shift	1100A 700P	Lunch 1100 AM		1	5	**10		
Add Shift Rations	0900A 1730P	Dinner 1630 PM				**10		
Add Supervisor Shift	0830A 1630P							

WORKLOAD—APRIL THROUGH JUNE 2012
91 DAYS

Forecast

Location	Location Number of Current FTE's Food Service Supv., Cook Supv, Cooks	Average # of Meals prepared Per day per FTE	Average Number Detainees Workers Per Day	Forecasted # of meals/day over the next 12 months
KRO-Miami	***14	171	**30	2400 per Day

* At KRO-Miami, Detainees work an average of 2.5 to 4 hours per shift.

** An Average of 10 Detainee Workers for Breakfast, Lunch and Dinner per shift.

*** At KRO-Miami, FTE's there is currently one vacancy FTE Contract Cook.

**** Average based on population count.

APPENDIX 2

EXCERPT FROM SOLICITATION FOR PROVIDING UNARMED GUARD SERVICES AT EL CENTRO SERVICE PROCESSING CENTER

115 N. Imperial Avenue, El Centro, California 92243-1739
Period of Performance 4/2/2001 through 6/30/2009

The following RFP questions are not dated but appear to be from 2008. The section from which this is excerpted elsewhere projects performance from 2009 through 2014, at 434. The Question and Answer section from which this is excerpted is from pp. 428–462:[1]

If paint details are performed, who provides respirators?
A. The government provides respirators.

37. Is there a Legal Orientation Program?
A. No.

45. A full time Nakamoto compliance officer is present. Would the Government provide a copy of recent monthly reports.[2]
A. No.

100. Subsection 6—Detainee work details. Can ICE provide a range or estimate of how many hours or days of detainee work details there are? Can these work details generally be monitored by positions listed in Attachment 1 or are extra people needed for this task? What tasks do detainees regularly perform?
A. Please refer to Section B CLIN. The RFP will be revised to reflect an estimated quantity of 39,712 detainees work days per year. Offerors should propose $1.00 per detainee work day for 39712.[3]

Fcare undated but appear to be from 2009:

1. [P]lease clarify if all the food service positions have been included in this breakdown . . . .

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1. Department of Homeland Security Immigration and Customs Enforcement Office of Detention and Management, *El Centro SPC, Solicitation Number ACL-0-R-0004*, 407-462, *available at* http://www.ice.gov/doclib/foia/contracts/acl2c0003asofp00027akalsecurity.pdf/.

2. "Nakamoto is rich in compliance monitoring and technical assistance experience; in fact, Nakamoto's Federal Detention Division facilitates the ONLY on-site monitoring contract for the 300-plus Immigration and Customs Enforcement detention facilities." *Federal Detention Division,* NAKAMOTO GROUP, INC., http://www.nakamotogroup.com/Expertise.aspx (last accessed 9/21/02013).

3. The contracts typically state an amount available for one dollar per day employment, and that these may be increased with the agreement of ICE. Until ICE releases the reports for reimbursements it has received from the private prison firms the actual amounts spent on this program across facilities cannot be ascertained. For instance, the payments under this program in El Centro during part of this time frame were over $62,000/year, approximately twice that indicated in the response above.

A: It is the responsibility of the contractor to submit post position descriptions for each position. Staff structure is currently as follows: Project Manager - 1; Asst Project Manager - 1; Cook II - 3; Cook I -4; Food Service Worker - 4. The RFP will be amended to include the statement that no detainee shall be used in preparation of food.

In a separate response the government states, "The food service employees and Recreation Specialists are new positions."[4]

Another exchange on the topic states:

11. Please confirm there is no CBA for Food Service employees?
A: There is not currently a CBA for Food Service Employees.[5]

86. Page 22, L-1(d) Has there been any history of 'lack of volunteer' detainee labor to support laundry or food service?
A. Yes, lack of volunteer detainee labor frequently occurs.[6]
Also among the documents is a form to indicate residents's completion of work training.[7]

Varick SPC, 2010[8]

A handout titled "Detainee Voluntary Work Program" states:

The Varick Federal Detention Facility may utilize volunteer workers in the following areas: 1) Recreation—custodial duties; 2. Processing - custodial duties; 3. Housing units - custodial duties in common areas; 4. Main hallway and traverse areas (visiting/court holding area) - custodial duties; 5. Library - detainee librarian Or any other areas as deemed appropriate by the Facility Director.

The Varick Detainee Handbook states: Any detainee wanting to work in processing, recreation (including barbers), SMU [Segregated Management Unit], and all work detail positions must put in a written request to the Detainee Services Manager for review and approval. Wages are $1.00 per day. Ordinarily, you will not be permitted to work in excess of 8 hours daily,

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4. See 2011FOIA13921, 10 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf/.
5. *Id.*
6. Absent sufficient numbers of resident employees, guards simply force residents to work these shifts for no pay at all. *See supra*, Part III.
7. 2011FOIA13921. (El Centro's "Detainee Worker Roster" form states: "THE DETAINEES LISTED BELOW PERFORMED WORK FOR THE U.S. GOVERNMENT ON: August 31, 2011." 11 such forms at El Centro, one for each "barrack of workers," e.g., "Alpha North Barrack Workers. The form states, "The Worker Roster must be turned into the Detainee Funds Manager daily." The form has at the top left hand corner the logo for ATSI and has the form number QAM20111022.)
8. ATSI, Detainee Voluntary Work Program, Rev. 6, 11-Jan-2010, from Release from ICE to Jacqueline Stevens in the case of 2011FOIA13921, 10 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf.

five days per week, or 40 hours weekly unless a request is made and approved by the Assistant Facility Director.

The Handbook notes as well, "Detainees who participate in the volunteer work program are required to work according to an assigned schedule. Unassigned absences from work or unsatisfactory work performance will result in removal from the voluntary work program."

The "Varick's Daily Detainee Payroll" resembles many of the other documents for this program does not include the word "Volunteer" or its cognates, and states, "Detainee is paid $1 per each day of work and cannot work more than five days per week."

(c) Florence CCA[9]

The "Detainee Voluntary Work Program Agreement" form issued as "Proprietary Information" by the Corrections Corporation of America, effective 04/25/2010, states nearly verbatim the terms of employment as the ATSI Varick material, but with a few additions, including that the detainees are "required . . . to participate in all work related training," and that "Detainees must adhere to all safety regulations and to all medical and grooming standards associate with the work assignment. Compensation will be at $1.00 per day."[10]

CCA also provided a document titled Corrections Corporation of America Documentation of Inmate/Resident Work Place Safety Orientation." It has a blank for the Assigned Work Place and states in bold, "Completion of this form is required in each area/department that inmate/resident is assigned to work." The "Orientation Acknowledgment" (updated 6/24/09) is issued to "insure that all inmates [sic] at Florence Correctional Center receive verbal orientation."[11]

The "Inmate Handbook" (3-22- 2011) distributed to ICE residents states:

> Regularly scheduled work performed by inmates/detainees at FCC is voluntary. Housekeeping of your living area, however, is mandatory. Further, if a staff member requests you perform a task, it is expected that you comply with that request. Refusal may result in disciplinary action. Inmates/detainees who wish to work must complete a request for services form to the Case Manager [sic]. You must have medical clearance from Health Services prior to being assigned to food service or a barber job. Job assignments include laundry worker, pod porter, hall porter, etc. You will be required to attend a training session and sign

9. *Id.*
10. *Id.*
11. *Id.* at 7.

> a job description prior to beginning your duties. If your job requires the use of any chemicals you will be properly trained in its [sic] use. The use of any flammable, toxic, and caustic materials will be under direct supervision.[12] CCA Florence also distributes to those waiting for their immigration hearings a "Prisoner Information Request" form for inquiries about the Work Program[13] and is in English and Spanish.[14]

To download entire contracts, please go to http://deportationresearchclinic.org.

12. *Id.* at 26.
13. *Id.* at 30.
14. Release from ICE to Jacqueline Stevens in the case of 2011FOIA13921, 30 (Sep. 11, 2011), *available at* http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf.