Progressive Slavery: Violations of the Fair Labor Standards Act in Court-Ordered Rehabilitation Programs

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"I was worn down and exhausted by the whole thing . . . I feel like a slave, honestly. I'm being forced to work and not getting anything out of it."

– Timothy Klick, Cenikor Rehabilitation Participant[1]

"Sometimes, tough love works better. . . They've never achieved anything and don't know how to achieve it."

– Judge Larry Gist former Texas Drug Court Judge[2]

"It was a slave camp, I can't believe the court sent me there."

– Brad McGahey, CAAIR Rehabilitation Participant[3]

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[1] Shoshana Walter, *Review Finds Many Who Work During Rehab Aren't Being Paid*, US NEWS (July 7, 2020, 10:59 AM), https://www.usnews.com/news/us/articles/2020-07-07/review-finds-many-who-work-during-rehab-arent-being-paid.

[2] *Id.*

[3] Amy Julia Harris & Shoshana Walter, *They Thought They Were Going To Rehab. They Ended Up in Chicken Plants*, REVEAL (Oct. 4, 2017), https://revealnews.org/article/they-thought-they-were-going-to-rehab-they-ended-up-in-chicken-plants/ [https://perma.cc/52DE-63VR].

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I. INTRODUCTION

Reformists have long advocated a total overhaul of the American criminal justice system. In particular, two things have drawn the attention of advocates. First, many activists emphasize the importance of ending exploitative prison labor to reduce rates of recidivism and to engage in a more humane treatment of incarcerated individuals. A second concern of progressives deals with a push for health-based treatment of addiction instead of incarceration. Underdiscussed in these communities is the disturbing relationship between unpaid labor and treatment facilities.

Recent reporting by Reveal has begun to shed light on this connection. Presently, there are nearly 300 rehabilitation facilities in forty four states

across the United States that require patients to work without pay.[4] These participants receive room and board, alongside less than twenty dollars per week, far below the federal minimum wage. Only one in five of these programs are licensed.[5] Most important for the purposes of this Note, is despite the lack of licensing, roughly one-third of the facilities identified by Reveal accept court referrals for participants to attend the rehabilitation programs in lieu of prison time.[6] In other words, the shift toward alternative sentencing also contains the pitfall that advocates criticize about incarceration—unpaid labor.

Legally, the general rule is that inmates in prison are not covered under the Fair Labor Standards Act ("FLSA"). The Department of Labor's ("DOL") *Field Operations Handbook*, for example, states that "[g]enerally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison. . . is not an employee within the meaning of the act."[7] However, according to the DOL, there are limited exceptions:

> A different situation exists, however, where inmates are contracted out by an institution to a private company or individual. In such instances an employee-employer relationship is created between the private company or individual and the prisoners. This is true regardless of whether the work is performed within the confines of the institution or elsewhere.[8]

While the majority of courts have found that prisoners are not covered by the FLSA even in the second context,[9] some courts have been willing to recognize instances where an employment relationship was created between

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[4] Shoshana Walter, *The Work Cure*, REVEAL (July 7, 2020) https://revealnews.org/article/the-work-cure/ [https://perma.cc/T62C-7FBX].

[5] *Id.*

[6] *Id.*

[7] DEP'T OF LAB., WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK ¶ 10b27(a) (2016), https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-10 [https://perma.cc/RM8H-MWMX] [hereinafter FIELD OPERATIONS HANDBOOK].

[8] *Id.* ¶ 10b29(b).

[9] *See e.g.,* Burleson v. California, 83 F.3d 311 (9th Cir. 1996); Reimonenq v. Foti, 72 F.3d 472 (5th Cir. 1996); McMaster v. Minnesota, 819 F. Supp. 1429 (D. Minn. 1993) *aff'd.* 30 F.3d 976 (8th Cir. 1994); Alexander v. Sara Inc., 559 F. Supp. 42 (M.D. La. 1983) *aff'd per curiam*, 721 F.2d 149 (5th Cir. 1983); Hudgins v. Hart, 323 F. Supp. 898 (E.D. La. 1971); Huntley v. Gunn Furniture Co., 79 F. Supp. 110 (W.D. Mich. 1948).

inmates and third parties such that the inmates were deemed employees under the FLSA.[10]

Courts, however, have largely left untouched the question of whether court-ordered patients attending rehabilitation centers may be deemed employees under the FLSA. A recent case on point for this issue comes from the Second Circuit in the case *Vaughn v. Phoenix House*.[11] In *Vaughn*, the Second Circuit applied the primary beneficiary test to determine that a court-ordered rehabilitation participant was not an employee for the purposes of the FLSA.[12] In so finding, the Second Circuit noted that rehabilitation participant received "significant benefits," especially because he was able to attend the rehabilitation center instead of jail and received food, housing, therapy, vocational training, and jobs "that kept him busy and off drugs."[13] Yet this application of the primary beneficiary test runs inapposite to prior Supreme Court precedent in *Tony and Susan Alamo Foundation v. Secretary of Labor*, a 1953 case that found that rehabilitation center participants were in fact employees for the purposes of the FLSA.[14]

This Note will provide a brief history of the FLSA and the tests for employee status before exploring how these tests have been applied in the contexts of prison labor and rehabilitation centers writ large. Then, this Note will discuss court-ordered rehabilitation before arguing that the application of the primary beneficiary test is inappropriate for court-ordered rehabilitation center participants as it runs counter to Supreme Court precedent in *Alamo Foundation*, provides legal cover to the growing number of exploitative rehabilitation facilities, and ignores the fact that court-ordered rehabilitation participants are much more similar to prison inmates than they are to the unpaid interns, the primary beneficiary the test was created to address. Finally, this Note will provide a legislative and regulatory solution to these issues by proposing an amendment to the FLSA and suggest the implementation of stricter licensing and enforcement of any rehabilitation center that receives court-referrals.

II. BACKGROUND

To understand why the primary beneficiary test is inappropriate when applied to court-ordered rehabilitation patients, it is necessary to understand the history of the Fair Labor Standards Act and its various tests for defining an "employee." Furthermore, any discussion of court-ordered rehabilitation

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[10] *See e.g.,* Watson v. Graves, 909 F.2d 1549, 1550 (5th Cir. 1990); Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 10 (2d Cir. 1984), *holding modified by* Danneskjold v. Hausrath, 82 F.3d 37, 39 (2d Cir. 1996), *holding modified by* Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61 (2d Cir. 2003).

[11] *See* Vaughn v. Phoenix House New York Inc., 957 F.3d 141, 142 (2d Cir. 2020).

[12] *Id.*

[13] *Id.* at 146 (internal quotations omitted).

[14] Tony and Susan Alamo Found. v. Sec. of Lab., 471 U.S. 290, 291 (1985).

patients must be couched within their broader context in the criminal justice system. To provide such background, this section will discuss the FLSA and its connection to unpaid labor in the American penal system. Then, this section will discuss the use of unpaid labor in rehabilitation programs currently and the relevant precedent regarding unpaid labor and rehabilitation centers.

A. *A Brief History of the Fair Labor Standards Act and the Test for Employee Status*

The passage of the FLSA in 1938 drastically improved the entire employment landscape. Prior to the FLSA, many workers toiled away in mines and factories for less than one dollar per day.[15] The American worker typically worked for ten to twelve hours, six days per week.[16] Congress recognized these conditions ultimately depressed wages, noting in the text of the Act that "the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living . . . burdens commerce . . . [and] constitutes an unfair method of competition in commerce."[17] To remedy this problem, the FLSA imposed minimum wage and overtime laws for the vast majority of American employees.[18]

A threshold question for liability under the FLSA is whether the worker is an employee.[19] Under the FLSA, "employee" has been defined with "striking breadth"[20] because the statute states that "employ" means "to suffer or permit to work."[21] Thus in 1961, in *Goldberg v. Whitaker House Co-op, Inc.*,

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[15] Peter Cole, *The Law that Changed the American Workplace*, TIME (June 24, 2016, 9:30 AM), https://time.com/4376857/flsa-history/ [https://perma.cc/G5HT-PC4R].

[16] *Id.*

[17] 29 U.S.C. §§ 202(a)(3) & (5) (2011).

[18] 29 U.S.C. §§ 206–207 (2011). It is worth noting that the FLSA also created exemptions for several classes of employees including professionals, seamen, administrative workers, and more. Importantly, for the purposes of this Note, the FLSA created no such exception for prisoners or rehabilitation participants.

[19] 29 U.S.C. § 213; 29 U.S.C. § 206 (2016) (the minimum wage provision provides that "[e]very employer shall pay to each of his employees . . . wages at the following rates: [listing the different minimum rates for different types of employments].").

[20] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325 (1992) (citing Rutherford Food Corp. v McComb, 331 U.S. 722, 728 (1947)).

[21] 29 U.S.C. § 203(g) (2018).

the Supreme Court was forced to determine how to define this term.[22] In *Goldberg*, the defendant was a cooperative that manufactured, sold, and dealt in knitted goods.[23] While there were a few employees that engaged in finishing work at a factory, majority of work was done by 200 members who worked out of their homes.[24] To become a member, the homeworker would send in a sample and pay three dollars after which point they would be prohibited from producing work other than the knit pieces to be sold by the defendant.[25] Homeworkers would be paid every month on a rate-per-dozen basis.[26] The Court found these homeworkers to be employees, noting that "[i]n short, if the 'economic reality' rather than 'technical concepts' is to be the test of employment . . . these homeworkers are employees."[27]

Although the Court did not provide direction in *Goldberg* on what is meant by the "economic reality," circuit courts have largely applied nearly identical nonexclusive factor tests, including:

> (1) The permanency of the relationship between the parties
>
> (2) The degree of skill required for rendering the services
>
> (3) The worker's investment in equipment or materials for the task
>
> (4) The worker's opportunity for profit or loss, depending on his or her skill
>
> (5) The degree of the alleged employer's right to control the manner in which the work is performed
>
> (6) Whether the service rendered is an integral part of the alleged employer's business.[28]

This test is significantly broader than other employment tests found in tax law or common law; as such it "stretches the meaning of 'employee' to

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[22] Goldberg v. Whitaker House Coop., 366 U.S. 28, 30 (1961). *Goldberg* is not the first time the term "economic reality" was used to discuss employment status generally. However, it was the first instance in which the Court applied it to the FLSA. *See e.g.,* United States v. Silk, 331 U.S. 704, 713 (1947) (applying the economic realities test to the Social Security Act); *Rutherford Food Corp.*, 331 U.S. at 729 (1947) (applying the same test to the National Labor Relations Act).

[23] *Goldberg*, 366 U.S. at 28.

[24] *Id.* at 29.

[25] *Id.*

[26] *Id.* at 30.

[27] *Id.* at 33 (1961) (citations omitted).

[28] *See e.g.*, Imars v. Contractors Mfg. Servs. Inc, 165 F3d 27 (6th Cir. 1998)*;* Karlson v. Action Process Serv. & Priv. Investigations, LLC, 860 F.3d 1089 (8th Cir. 2017); Baker v. Flint Eng'g & Const. Co., 137 F.3d 1436, 1440 (10th Cir. 1998); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311–12 (11th Cir. 2013); Barfield v. New York City Health & Hosps. Corp., 537 F.3d 132, 142 (2d Cir. 2008).

cover some parties who might not qualify . . . under a strict application of traditional agency law principles."[29] This more expansive definition was intentional, serving the FLSA's broad remedial purpose.[30]

A different test is utilized in the context of less traditional working relationships. In a relatively brief Supreme Court decision, *Walling v. Portland Terminal*, railyard workers brought an action alleging their employer violated the FLSA by failing to pay minimum wages for training time.[31] Prior to becoming railway workers, Portland Terminal required that potential applicants receive a seven-day preliminary training.[32] The applicant learned the activities by observation and then was gradually permitted to perform the work under the close watch of railyard supervisors.[33] The trainees' work did not displace any regular employees and did not expedite company business.[34] After successful completion of the training, the applicant could seek employment at the railway,[35] but at no point did the applicant receive pay for these seven days.[36] The Court found that the applicants were not employees within the meaning of the FLSA,[37] and found these facts to be comparable to that of a public or private vocational school.[38] Most importantly, the Court noted that "the definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[39] The phrase "suffered or permitted to work," would grow in importance and later serve as the basis of the tests applied to unpaid interns and in *Vaughn* to court-ordered rehabilitation patients.

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[29] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325–26 (1992).

[30] Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947).

[31] *Id.* at 148.

[32] *Id.* at 149.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Walling*, 330 U.S. at 149.

[37] *Id.* at 153.

[38] *Id.*

[39] *Id.* at 158.

Based on *Walling*, courts and the DOL have adopted what they refer to as the "primary beneficiary test."[40] The DOL, for example, describes the test as looking to:

> 1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee–and vice versa.
>
> 2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[41]

This is a highly flexible, fact-dependent test, where no single factor is determinative.[42] As will be discussed later, one court has applied this test to the issue of court-ordered rehabilitation participants.[43]

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[40] *See* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2018), https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships [https://perma.cc/TKU5-Y4SK] [hereinafter INTERNSHIPS UNDER FLSA]; Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015); Benjamin v. B & H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017); Solis v. Laurelbrook Sanitarium and Sch., Inc., 642 F.3d 518 (6th Cir. 2011).

[41] INTERNSHIPS UNDER FLSA, *supra* note 40, at 1.

[42] *Id.*

[43] *See infra* page 575.

B. *The Interaction of the American Penal System with Unpaid Labor*

Since the end of the Civil War and the adoption of the Thirteenth Amendment, prison has been inextricably linked with the American penal system. In the postbellum world, courts began to rent out offenders in a system known as "convict leasing."[44] Under this early iteration of today's prison labor "[p]ersons guilty of felonies were sent to the state penitentiary, while the county jails housed those convicted of misdemeanors . . . . From there, the prisoners could be leased for 'hard labor' either within the county or elsewhere."[45] This new system of economic subjugation served to preserve the social and economic structures that existed in the American South after the passage of the Thirteenth Amendment.[46] The very existence of this system of convict leasing "was an innovation for the South, which was desperate to maintain life as it existed prior to the Civil War and Thirteenth Amendment's ratification. Black subordination was critical to maintaining political and social tradition as well as an ordered way of southern life."[47] Southern states in the Reconstruction era developed large prisons (many on old plantations), which ultimately disproportionately imprisoned black men.[48]

The disproportionate relationship between Black Americans, mass incarceration, and in turn prison labor never went away, soaring to new heights in the 1970s with the development of the "war on drugs" in 1971, when Richard Nixon dramatically increased narcotics policing.[49] The relationship between race and this so-called war cannot be separated. John Ehrlichman, a top Nixon aide, later shed light on that inextricable connection, remarking:

> You want to know what this was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. We knew we couldn't make it

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[44] Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 941 (2019).

[45] William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, *in* THE ROLE OF CONVICT LABOR IN THE INDUSTRIAL DEVELOPMENT OF BIRMINGHAM 1 (1998) (citations omitted).

[46] *Id.* at 942.

[47] *Id.*

[48] Whitney Benns, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/ [https://perma.cc/D9VH-NVT9].

[49] *See A History of the Drug War*, DRUG POL'Y ALL., https://drugpolicy.org/issues/brief-history-drug-war [https://perma.cc/PC2N-896M].

> illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[50]

The war only continued to grow bigger under the presidency of Ronald Reagan, which marked the beginning of "skyrocketing rates of incarceration."[51] The number of Americans behind bars for nonviolent drug offenses went from 50,000 in 1980 to 400,000 in 1997.[52] This escalation only continued under President Bill Clinton as he proceeded whole-heartedly with the "drug war strategies of his Republican predecessors."[53]

This period also saw the rapid growth of the prison labor industry. In 1979, Congress created the Prison Industry Enhancement Certification ("PIE") program.[54] The overarching goal of the PIE program was "to encourage states and units of local government to establish employment opportunities for prisoners that approximate private sector work opportunities."[55] This provided obvious incentives for large corporations as it provided an on-demand work force and served to keep the growing inmate population occupied.[56] The PIE Certification program, according to the Department of Justice ("DOJ"), "exempts State and local certified departments of corrections from normal restrictions on the sale of prisoner-made goods in interstate commerce."[57] Furthermore, PIE "lifts existing restrictions on these certified corrections departments, permitting them to sell prisoner-made goods to the Federal government in amounts exceeding the $10,000 maximum normally imposed on such transactions."[58] While the program was supposed to "pay them the local prevailing wage[s]," the

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] The PIE Certification Program originally was authorized under the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, § 827 (codified as amended in 18 U.S.C. § 1761).

[55] U.S. DEP'T OF JUST., BUREAU OF JUST. ASSIST. FACT SHEET: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1 (1995), https://www.ojp.gov/pdffiles1/bja/193772.pdf [https://perma.cc/RS6Q-HJXB] [hereinafter PIE CERTIFICATION PROGRAM].

[56] Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, THE NATION (Aug. 1, 2011), https://www.thenation.com/article/archive/hidden-history-alec-and-prison-labor/ [https://perma.cc/G79M-CLWS].

[57] PIE CERTIFICATION PROGRAM, *supra* note 55, at 1.

[58] *Id.*

program allows for a number of a deductions for things like "room and board, taxes (Federal, State, FICA, etc.), family support, and crime victim compensation/assistance."[59] Such deductions cannot be allowed to "total more than 80% of gross wages."[60] By 1995, thirty-six jurisdictions had become certified under the program.[61] The program allows "private sector businesses to 'partner' with prison industries through joint venture programs to manufacture products or provide services to the general public."[62]

The Federal Government developed its own program for federal prisons in 1934, under UNICOR, a "government-owned corporation that employs offenders incarcerated in correctional facilities under the [DOJ's] Federal Bureau of Prisons (BOP)."[63] In 1951, the number of inmates employed by UNICOR was 3,803,[64] but climbed to 21,688 BOP inmates by 1998.[65] The increase in federal employees in UNICOR is a direct result of "the increase in the federal inmate population, which has led to FPI [Federal Prison Industries] expanding its industries,"[66] and the fact that in 1990, Congress passed the Crime Control Act. Under Title XXIX, Section 2905 of the Act, all physically able federal inmates who are not a security risk are required to work by law.[67]

The consensus amongst both courts and scholars alike is that prisoners are not typically covered by the FLSA and need not be paid minimum wages

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[59] *Id.* at 1–2.

[60] *Id.*

[61] *Id.* at 3. The jurisdictions include Alaska; Arizona; California; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Maryland; Minnesota; Missouri; Montana; Nebraska; Belknap County, New Hampshire; Stafford County, New Hampshire; Nevada; New Mexico; North Carolina; Oklahoma; Oregon; Red River County, Texas; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington State; and Wisconsin.

[62] Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010), https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/ [https://perma.cc/US5P-HF4C].

[63] NATHAN JAMES, U.S. CONG. RESEARCH SERV., FEDERAL PRISON INDUSTRIES 1 (2007).

[64] *Id.* at 7.

[65] *Id.*

[66] *Id.*

[67] Title XXIX, § 2905 of the Crime Control Act of 1990 (Pub, L. 101-647) required that all offenders in federal prisons must work (the act permitted limitations to this rule on security and health-related grounds).

or overtime.[68] However, under the DOL *Field Operations Handbook*, there are limitations. The guidelines state:

> Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, or prison farms, road gangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the act. . . . A different situation exists, however, where inmates are contracted out by an institution to a private company or individual. In such instances an employee-employer relationship is created between the private company or individual and the prisoners. This is true regardless of whether the work is performed within the confines of the institution or elsewhere.[69]

This approach has been adopted by some courts.[70]

C. *The Current Case Law Regarding Prisoners and FLSA Liability*

A small number of cases, including *Watson v. Graves*, demonstrate the circumstances under which a prisoner can be considered an employee under the FLSA.[71] In *Watson,* Kevin Watson and Raymond Thrash both served their sentences in Livingston Parish Jail.[72] Neither defendant was sentenced to hard labor.[73] During their time at Livingston Parish, Watson and Thrash participated in a work release program, under which they went to work for a corporation owned by the Sheriff's son-in-law Daryll Jarreau.[74] Jarreau signed an agreement with the Prison, under which:

> (1) Jarreau was responsible for the trusty's actions while they were in his custody; (2) the trusties could not go beyond the Livingston Parish line; (3) the trusties were not allowed access to drugs or alcohol; (4) trusties were not allowed to operate motor vehicles, machinery, or heavy equipment; (5) Jarreau had to provide transportation to and from the

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[68] FIELD OPERATIONS HANDBOOK, *supra* note 7, ¶ 10b27(a).

[69] *Id.*

[70] SUSAN PRINCE, FAIR LABOR STANDARDS HANDBOOK FOR STATES, LOCAL GOVERNMENTS, AND SCHOOLS ¶ 218 (2019) (discussing rules regarding prisoners).

[71] *See e.g.,* Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990); Carter v. Dutchess Cmty. Coll., 735 F.2d 8 (2d Cir. 1984), *holding modified by* Danneskjold v. Hausrath, 82 F.3d 37 (2d Cir. 1996), *holding modified by* Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61 (2d Cir. 2003).

[72] *Watson*, 909 F.2d at 1550.

[73] *Id.* at 1551.

[74] *Id.*

> prison; (6) the trusties assigned were selected by the prison officials; and (7) the trusties had to remain on the job site.[75]

Irrespective of the time worked, the skill required, or the nature of the work performed, both Watson and Thrash received only twenty dollars per day.[76] Typically, this meant working a twelve-hour workday.[77]

After they served their respective sentences, Thrash and Watson filed suit against the Sheriff, the Warden, and the Jarreaus alleging violations of the FLSA and the Thirteenth Amendment.[78] The defendants moved for summary judgment, which the district court granted for the defendants on both claims.[79] The district court found that none of the defendants violated the Thirteenth Amendment.[80] Additionally, the district court found that the Jarreaus could not be found liable under the FLSA as the inmates were not employees for the purposes of FLSA coverage.[81]

The Fifth Circuit affirmed the district court's decision with regards to the Thirteenth Amendment; however, the court also overturned the district court on the FLSA issue, holding that Watson and Thrash were employees.[82] The Fifth Circuit noted that there are two types of prison labor cases.[83] The court noted that the most common type is where "outside, private, for-profit firms [conduct] operations within a prison . . . and typically utiliz[e] prisoners who have been sentenced to hard labor."[84] The Fifth Circuit also stated that in this context, the economic reality test typically leads courts to conclude that the inmates were not employees under the FLSA "because primary control over the inmates, and determination of the hours to be worked and the nature of the work to be performed rested with the prison."[85]

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Watson*, 909 F.2d at 1550.

[79] *Id.* at 1550.

[80] *Id.*

[81] *Id.* The Fifth Circuit divides the defendants into two different classes, referring to the Warden and Sheriff as "the public defendants" and the Jarreaus as "the private defendants." *Id.* at 1550.

[82] *Id.* at 1550.

[83] *Id.* at 1553.

[84] Watson, 909 F.2d at 1553.

[85] *Id.*

The court also recognized a separate context where inmates work *outside* the prison for and under the supervision of private contractors.[86] In so finding, the court cited the Second Circuit case *Carter v. Dutchess Community College*,[87] where the Second Circuit stated "we emphatically hold that the fact that [Carter] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of FLSA."[88] The Fifth Circuit adopted the *Carter* holding, finding that the mere fact that the worker is an inmate does not preclude the possibility of an employment relationship.[89]

The court ultimately held that under the economic realities test, the plaintiffs were employees.[90] This decision was based on the fact that, when working for Jarreau, the plaintiffs were not supervised by any prison officials, Jarreau kept the inmates as long as he needed them, controlled the employee work schedules and wages, and had the de facto power to hire and fire.[91] The court emphasized that the work was done *outside* the prison.[92] According to the court, the low rate Jarreau paid his workers set his competitors at a disadvantage as they lacked access to inmate employees, ultimately creating "the very problems that FLSA was drafted to prevent—grossly unfair competition among employers and employees alike."[93]

The cases that have found that prisoners are employees are in the minority; most courts have affirmatively held that prisoners are not covered by the FLSA even when they are required to work by the government for private contractors.[94] When courts do so, the courts utilize the economic realities test, paying special attention to the fact that "(1) [t]he company could not hire, fire, or ultimately control the prisoners, and (2) the lack of a formal contractual relationship between the company and the prisoners."[95]

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[86] *Id.* at 1553–54.

[87] Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 9 (2d Cir. 1984).

[88] *Watson*, 909 F.2d at 1550 (citing *Carter*, 735 F.2d at 15).

[89] *Id.* at 1554.

[90] *Id.*

[91] *Id.* at 1554.

[92] *Id.* at 1555.

[93] *Id.* at 1556.

[94] *See, e.g.,* Burleson v. California, 83 F.3d 311 (9th Cir. 1996); Reimonenq v. Foti, 72 F.3d 472 (5th Cir. 1996); McMaster v. Minnesota, 819 F. Supp. 1429 (D. Minn. 1993) *aff'd by* 30 F.3d 976 (8th Cir. 1994); Alexander v. Sara Inc., 559 F. Supp. 42 (M.D. La. 1983) *aff'd per curiam*, 721 F.2d 149 (5th Cir. 1983); Hudgins v. Hart, 323 F. Supp. 898 (E.D. La. 1971); Huntley v. Gunn Furniture Co., 79 F. Supp. 110 (W.D. Mich. 1948).

[95] PRINCE, *supra* note 70, ¶ 218; *see, e.g.,* Woodall v. Partilla, 581 F. Supp. 1066 (N.D. Ill. 1984); Sims v. Parke Davis and Co., 334 F. Supp. 774 (E.D. Mich. 1971) *aff'd per curiam*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

D. *Court-Ordered Rehabilitation*

Since the invention of the first drug court in 1998, the number of drug courts in the United States has skyrocketed.[96] These courts were created to combat the continuous cycle of release and incarceration created by the addiction crisis within the country.[97] Generally, these programs are open to non-violent offenders charged with drug or drug-related offenses.[98] Once it is determined that a defendant is eligible, the defendant enters a plea and is transferred to the drug court program.[99] The type of plea is determined by whether the specific jurisdiction follows a pre-adjudication or post-adjudication model.[100] In the former model, the defendant generally must waive their right to a speedy trial, the right to a jury trial, and their right to confront witnesses before the case is transferred to the drug court.[101] Upon successful completion, the pre-adjudication model dismisses the charges.[102] In a post-adjudication setting, the defendant enters a guilty plea and is placed on probation.[103] Under this model, the successful completion of the program results in the expungement of the defendant's conviction.[104] If a defendant fails to complete the rehabilitative program, the defendant faces the possibility of formal adjudication and sentencing or the revocation of the probationary sentence.[105]

One of many possible outcomes in the drug court system is court-ordered residential rehabilitation. These programs typically last six months to

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[96] Shachar Eldar, *Attempt, Legality, and Intention: Rethinking Attempt Liability in the Aftermath of the English Law Commission Report No. 318,* 48 CRIM. L. BULLETIN ART. 3, 956 (2012).

[97] *Id.*

[98] Peggy F. Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 449. (1999).

[99] Andrew Armstrong*, Drug Courts and the De Facto Legalization of Drug Use For Participation*, 94 J. CRIM. L. & CRIMINOLOGY 133, 143 (2003).

[100] Hora, s*upra* note 96, at 956.

[101] *See* Martin Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM. L. BULL. 216, 216–18 (2002).

[102] Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 FED. PROBATION 13, 14 (2008).

[103] *See id.* at 15.

[104] Andrew Armstrong, *Drug Courts and the De Facto Legalization of Drug Use For Participants in Residential Treatment Facilities*, 94 J. CRIM. L. & CRIMINOLOGY 133, 146 (2003).

[105] *See id.* at 146–48.

two years.[106] Defendants in these scenarios are required to live on-site and participate in counseling.[107] If the defendant fails to complete the program or is noncompliant with the program's rules, judges can revoke their sentence at which point the defendant would be sent to jail or prison.[108]

An unintended consequence of this system, however, is the prevalence of unpaid labor in these programs. In July 7, 2020, Reveal, an investigative journalism platform, identified at least 300 rehabilitation facilities in the United States that required patients to work without pay.[109] According to Reveal, "[t]he participants receive room and board and in some cases a small stipend or allowance typically amounting to less than $20 per week—well below the minimum wage."[110] Since no federal or state agencies collect the data, Reveal measured the scope of the problem through external data sources including "hundreds of current and former employees, rehab participants and state regulators and reviewed thousands of pages of tax records, financial documents, and wage and injury reports."[111] Based on their research, Reveal was able to determine that these programs exist in forty-four states and that at least 60,000 people per year attended such programs.[112] Only one in five of these programs were licensed.[113] Most interestingly, for the purposes of this Note, is despite the lack of licensing roughly on-third of the facilities identified by Revel accept court referrals for participants to attend the rehabilitation programs in lieu of prison time.[114]

Reporting by Reveal reflects the manners in which these rehabilitation programs take advantage of these court-ordered patients for profit. For example, one court-ordered participant at Christian Alcoholics & Addicts in Recovery ("CAAIR") named Jefferey Weaver was sent by the program to work at a poultry plant.[115] Weaver developed a hernia from his work at the plant.[116] CAAIR filed for and collected Weaver's workers compensation while Weaver received nothing. A month later, Weaver was kicked out of

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[106] Lauren Baldwin, *Sentencing Alternatives to Jail and Prison*, NOLO: CRIM. DEF. LAWYER, https://www.criminaldefenselawyer.com/Sentencing-Alternatives-To-Jail-Time.cfm [https://perma.cc/KY5G-9E4N].

[107] *Id.*

[108] Baldwin, *supra* note 106.

[109] Walter, *supra* note 4.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Amy Julia Harris & Shoshana Walter, *How a Drug Court Rehab Kept Its Participants' Worker's Comp*, REVEAL (Oct. 6, 2017) https://revealnews.org/article/how-a-drug-court-rehab-kept-its-participants-workers-comp/ [https://perma.cc/ZT5Y-EXES].

[116] *Id.*

CAAIR for failing to work, and sent back in front of a judge who sentenced him to seven years in prison.[117] Similarly, Fred Barbee broke his ankle working at the processing plant; since he could no longer work, CAAIR kicked him out and he ended up back in drug court where he received a two year prison sentence.[118] One participant even remarked, "It was a slave camp, I can't believe the court sent me there."[119]

Furthermore, corporations are also receiving benefits from these arrangements. One particularly notable offender is the nationally renowned Cenikor Foundation.[120] Among the tasks performed by participants were moving boxes in warehouses for Walmart, building oil platforms for Shell, working in an Exxon refinery, slaughtering chickens on assembly lines, and caring for residents at assisted-living facilities.[121] These jobs are often performed without much attention paid to the actual safety of the workers. Investigators for Reveal note:

> At some job sites, participants lacked proper supervision, safety equipment and training, leading to routine injuries. Over the last decade, nearly two dozen Cenikor workers have been seriously injured or maimed on the job, according to hundreds of pages of lawsuits, workers' compensation records and interviews with former staff. One worker died from his on-the-job injuries in 1995.[122]

These deals are extremely lucrative for Cenikor, earning $7,000,000 in 2018 alone from its lucrative contracts.[123] Despite these rampant abuses, Cenikor has long been hailed by influential policy makers, including President Ronald Regan.[124] At least two locations of the Cenikor Foundation, Houston and

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[117] *Id.*

[118] *Id.*

[119] Harris & Walter, *supra* note 3.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] CENIKOR FOUND., CONSOLIDATED STATEMENT OF ACTIVITIES 1 (2018), https://www.documentcloud.org/documents/5956070-Cenikor-Vocational-Services-Revenue.html#document/p1/a495030 [https://perma.cc/Z6JQ-XAL5].

[124] Remarks from Ronald Reagan, Remarks at the Cenikor Foundation Center in Houston, Texas (Apr. 29, 1983), available at https://www.reaganlibrary.gov/archives/speech/remarks-cenikor-foundation-center-houston-texas [https://perma.cc/DCR6-WYM6].

Fort Worth, house court-ordered participants.[125] These participants work at the Houston Astrodrome, NRG Park, Livestock show and rodeo, and a plastic bottle manufacturing center.[126]

Corporations and these centers themselves have not been the only ones to profit from this system, judges and politicians have also been among those to rake in the cash. A particularly disheartening example is retired Oklahoma Judge Tomas Landrith. In 1997, Judge Landrith created the first drug court program in Pontonoc County Georgia, the first rural drug court in the United States.[127] In 2008 Landrith received the Trailblaze award, an award given "to an [Oklahoma Bar Association] member . . . who by their significant, unique visionary efforts have had a profound impact upon our profession and/or community and in doing so have blazed a trail for others to follow"[128] At the time, local news outlets praised Landrith, noting that the "Pontotoc County drug court program is very successful and has twice been named as outstanding Drug Court of the Year in Oklahoma" and praised Landrith for his involvement at all phases of the program.[129] In fact, at the time it was noted that "[m]ost drug court programs in Oklahoma follow the policies and procedures manual written by Landrith and his Pontotoc County drug court team."[130] Despite the seemingly revolutionary program, Landrith's operation of the drug court had a self-enriching dark side. Landrith has sent his own drug court participants to Southern Oklahoma Addiction Recovery ("SOAR"), a rehabilitation center on which Landrith himself founded.[131]

To add insult to injury, investigations show that the patients at many of these facilities are not actually getting much therapy despite that being the entire purpose of their deferred sentence. Patients at these facilities regularly report working twenty to eighty hours per week.[132] This leaves very little time for addiction treatment. The programs themselves claim that this is all work therapy, and that the labor is the treatment.[133] Furthermore, while some of

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125 Walter, *supra* note 4.

126 *Id.*

127 *Award Winning*, THE ADA NEWS (Dec. 9, 2008), https://www.theadanews.com/news/award-winning/article_fc5568d8-d63f-5598-8ac5-dd63a9421adb.html [https://perma.cc/P539-Z9Z2].

128 *Id.*

129 *Id.*

130 *Id.*

131 Amy Julia Harris & Shoshanna Walter, *Inside a Judge's Rehab: Unpaid Work at Coca-Cola Plant in Ada*, TULSA WORLD (Dec. 10, 2017) https://tulsaworld.com/news/state-and-regional/inside-a-judge-s-rehab-unpaid-work-at-a-coca-cola-plant-in-ada/article_35f7dd49-9a1f-5ecd-9259-a22a62b817da.html [https://perma.cc/DRP2-AKAQ].

132 Shoshana Walter, *At Hundreds of Rehabs, Recovery Means Work Without Pay*, REVEAL (July 7, 2020), https://revealnews.org/article/at-hundreds-of-rehabs-recovery-means-work-without-pay/ [https://perma.cc/EKK9-3F9R].

133 *Id.*

the programs do offer rehabilitation services such as drug counseling and classes, others only utilize church services and bible studies.[134]

E. *Current Precedent Regarding Unpaid Labor in Rehabilitation Centers*

While the Supreme Court has not addressed the use of unpaid labor in the context of court-ordered rehabilitation, it has confronted the general matter of unpaid labor in rehabilitation centers. In 1977, the Secretary of Labor filed suit against the Tony and Susan Alamo Foundation (the "Foundation") alleging that the Foundation violated the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act with respect to approximately 300 associates.[135] The Foundation operated a large number of commercial businesses, including everything from motels to the production of candy.[136] These endeavors were largely run by the associates, a group of "drug addicts, derelicts, or criminals" who had come to the Foundation for rehabilitation.[137] Despite the fact that these workers largely ran the Foundation's businesses, the workers received no wages.[138] Instead, the Foundation provided the workers with food, clothing, shelter, transportation, and medical benefits.[139] The district court found that not only was the Foundation covered by the provisions of the FLSA despite its incorporation as a nonprofit religious organization, but also that the associates were employees under the "economic reality test" of employment.[140] The Eighth Circuit affirmed the district court's holding of the associates' employment status, noting: "[b]y entering the economic arena and trafficking in the marketplace, the Foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The requirements of the [FLSA] apply to its laborers."[141] The Supreme Court upheld the district court's decision, emphasizing that the associates were "entirely dependent upon the Foundation for long periods, in some cases several years."[142] Further, the Court noted that the fact that compensation

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[134] *Id.*

[135] Tony and Susan Alamo Found. v. Sec. of Lab., 471 U.S. 290, 293 (1985).

[136] *Id.* at 292.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* at 293 (citing Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961)).

[141] Donovan v. Tony and Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1983).

[142] *Donovan*, 471 U.S. at 301.

was received primarily in the form of benefits rather than cash was immaterial as the benefits were essentially wages in another form.[143]

Despite the Supreme Court's ruling in *Alamo Foundation*, in 1996 the Ninth Circuit found that a resident of a rehabilitation center was *not* an employee under the FLSA.[144] In *Williams v. Strickland*, a plaintiff filed suit against the Salvation Army alleging violations of the FLSA's wage and hour laws.[145] Williams was a participant in a Salvation Army residential rehabilitation program for six months, attended in-house counseling and an alcohol abuse program.[146] As part of his treatment, Williams engaged in "work therapy" on a full-time basis working in the Salvation Army's furniture restoration shop.[147] Williams would repair the furniture which was then sold through one of the Salvation Army's thrift stores.[148] Williams also worked for the Salvation Army sorting food and clothing donations at the facility.[149] Williams, like the workers in *Tony and Susan Alamo Foundation*, received food, clothing, and shelter, as well as a stipend of seven to twenty dollars per week.[150] The district court granted Salvation Army's motion for summary judgment, finding that under the economic realities test Williams was not an employee.[151] The Ninth Circuit affirmed, holding that Williams was not an employee under the FLSA as he "had neither an express nor an implied agreement for compensation with the Salvation Army and thus was not an employee."[152] The Ninth Circuit distinguished the case from *Tony and Susan Alamo Foundation*, stating that in the instant case William's relationship with "solely rehabilitative" versus *Tony and Susan Alamo Foundation* where associates work "contemplated both rehabilitation and compensation."[153] The court noted that "Williams's work therapy was not performed in exchange for in-kind benefits, but rather was performed to give him a sense of self-worth, accomplishment, and enabled him to overcome his drinking problems and reenter the economic marketplace."[154] Furthermore, the court

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143 *Id.* at 304.

144 Williams v. Strickland, 87 F.3d 1064, 1067 (9th Cir. 1996).

145 *Id.* at 1065.

146 *Id.*

147 *Id.*

148 Id.

149 *Id.* at 1065.

150 *Williams*, 87 F.3d at 1065.

151 *Id.*

152 *Id.* at 1067.

153 *Id.*

154 *Id.* This assertion by the Ninth Circuit seems to run counter to the very evidence they cite in support of its proposition. The Court cited testimony by Williams in which he states:

pointed to the fact that Williams was required to sign up for welfare and food-stamps and turn the benefits over the Salvation Army to offset the cost of his room, board, and clothing.[155] The court found that "these benefits were given to Williams to enable him to pursue his rehabilitation and Williams was required to help offset their cost."[156]

More recently, the Second Circuit addressed the question of whether a participant in a residential rehabilitation facility pursuant to a state-court approved agreement is an employee for the purposes of the FLSA.[157] Vaughn, the plaintiff, filed suit against Phoenix House alleging that he was not paid for work he performed as a patient there.[158] Vaughan had entered into a residential drug treatment program at Phoenix House as part of a court-approved agreement "in lieu of incarceration for existing criminal charges."[159] As a patient at Phoenix House, Vaughn worked eight hours a day, six days a week for which he was not paid. The district court granted the motion to dismiss brought by Phoenix House and found that Vaughn's "allegations do not make out a plausible claim that [he] was Phoenix House's employee and thus entitled to wages under the FLSA" because he "was undoubtedly the primary beneficiary of his treatment at Phoenix House's facilities."[160] The Second Circuit affirmed the district court's ruling, comparing Vaughn's position to that of an intern and therefore applying the primary beneficiary test.[161] Under their iteration of the primary beneficiary test, the court evaluated a "non-exhaustive set of considerations" including:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation.

> [b]ut I wanted employment to—I wanted to redevelop my work skills because I had been out of shape more or less, out of the work force for so long that I wanted to reestablish certain skills, get in the habit of working during the day and, you know, help myself on that end. So I felt it ain't like I'm sitting around from the time I have to be at work from 7:00 to 4:00, sitting around doing nothing. I be busy all that time and I don't even think of alcohol.

Id. This testimony could clearly stand for the proposition that Williams was seeking an employment relationship.

155 *Id.*

156 *Williams*, 87 F.3d at 1067.

157 Vaughn v. Phoenix House New York Inc., 957 F.3d 141, 142 (2d Cir. 2020).

158 *Id.* at 143.

159 *Id.* at 144.

160 *Id.*

161 *Id.*

> Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[162]

The Second Circuit found that in Vaughn's case, factors one, five, and seven "weigh[ed] strongly against finding that Vaughn was an employee of Phoenix House." The court found that only factor six weighed in Vaughn's favor while the factors two, three, and four provided "mixed guidance."[163] The Second Circuit, noted "the importance of [f]actor [s]ix in the context of this case differs from that of an unpaid intern."[164] Ultimately, the Second Circuit noted that Vaughn received "significant benefits," especially because he was able to attend the rehabilitation center instead of jail and received food, housing, therapy, vocational training, and jobs "that kept him busy and off drugs."[165]

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[162] *Id.* at 145–46 (citing Glatt, v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016)); *see also* INTERNSHIPS UNDER FLSA, *supra* note 41 (both relying on the DOL's list of factors for the primary beneficiary test).

[163] *Vaugh*, 957 F.3d at 146.

[164] *Id.*

[165] *Id.* (internal quotations omitted).

III. ANALYSIS

The application of the primary beneficiary test to court-ordered rehabilitation patients is wrong both as a matter of policy and as a matter of law. First, the use of unpaid labor in these programs serves to prevent the graduates of these programs from ultimately achieving success on the outside. Second, it provides court sanctioned cover to the growing body of exploitative rehabilitation centers. Third, the primary beneficiary test's application in a rehabilitation context generally runs counter to the precedent set by the Supreme Court in *Tony and Susan Alamo Foundation*. Fourth, the appropriate test for these workers is the one applied by both the Department of Labor and the Fifth Circuit in *Watson v. Graves*.[166] In order to remedy these problems, Congress should amend the Fair Labor Standards Act to preclude the usage of the primary beneficiary test. Additionally, states should implement strict licensing requirements for any facility where court-ordered rehabilitation patients are sent.

A. *Use of the Primary Beneficiary Test in this Cases Involving Court-Ordered Rehabilitation Centers Could Hinder Patient Success*

Precluding patients in these scenarios from being classified as employees could generate negative outcomes in terms of their actual rehabilitation. Specifically, it hinders the success of these patients in rehabilitation programs as unpaid labor leaves them in a weak financial position upon completion of these programs. This is the same consequence as that in the context of unpaid labor in prisons. In that context, advocates note the negative effect that low prison wages have on recidivism. Wendy Sawyer at the Prison Policy initiative remarks:

> Making it hard for incarcerated people to earn real money hurts their chances of success when they are released, too. With little to no savings, how can they possibly afford the immediate costs of food, housing, healthcare, transportation, child support, and supervison [sic] fees? People with felony convictions are often ineligible for government benefit programs like welfare and food stamps, and face barriers to finding stable housing and employment. And they may leave prison with just a bus ticket and $50 of "gate money," if they have no other savings. So the meager earnings from prison work assignments can be essential to

[166] *See* Watson v. Graves, 909 F.2d 1549, 1556 (5th Cir. 1990).

> a person's success—and even survival—when they return to their community.[167]

Her point is well taken given the fact that sixty-one percent of inmates have jobs that pay on average about $0.63 per hour.[168] Studies also bare out her assessment, in one study only fifty-five percent of former inmates reported any income in their first year after release.[169] The median earnings for these formerly incarcerated people was a mere $10,090 a year.[170] Additionally, the vast majority of prison jobs teach few skills relevant to the labor market.[171] Between 700,000 out of 870,000 prisoners "work as janitors, groundskeepers, and kitchen workers . . ."[172]

In the prison context, scholars have long recognized a negative relationship between post-incarceration employment and recidivism rates.[173] However, not just any job will do. Research suggests that wages and job quality are important determinants of recidivism in prisoners.[174] Minimum wage jobs are often insufficient for successful reentry.

This parallels the court-ordered rehabilitation context. Patients are sent to these facilities without many resources to begin with. Yet, in many cases patients are charged fees to even participate in these programs.[175] Then, instead of providing meaningful skills for gainful employment, rehabilitation center participants work in low-wage positions. For example, in *Vaughn*, the

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[167] Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?* PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/734L-8CZH]*; see also* Annie McGrew & Angela Hanks, *It's Time to Stop Using Our Mass Incarceration System for Free Labor*, MOYERS (Oct. 23, 2017) https://billmoyers.com/story/time-stop-using-mass-incarceration-system-free-labor/ [https://perma.cc/MSM7-MRS7] ("If these programs paid decent wages, they could increase economic stability of inmates, effectively easing the path to re-entry. They would allow inmates to pay off debts from their interactions with the justice system and reduce recidivism.").

[168] Matt Davis, *How can Felons be Rehabilitated When Prison Labor is Good for Big Business?*, BIG THINK (Aug. 19, 2019) https://bigthink.com/politics-current-affairs/prison-labor-slavery?rebelltitem=4#rebelltitem4 [https://perma.cc/536V-5YQD].

[169] David J. Harding et al., *Making Ends Meet After Prison*, 33 J. POL'Y ANALYSIS & MGMT. 440, 440 (2014).

[170] *Id.*

[171] Sawyer, *supra* note 167.

[172] Josh Halladay, Note, *The Thirteenth Amendment, Prison Labor Wages, and Interrupting the Intergenerational Cycle of Subjugation*, 42 SEATTLE U. L. REV. 937, 954 (2019).

[173] *See* Tianyin Yu, *Employment and Recidivism: Continued Evidence-Based Education*, EBP SOC'Y (Jan. 30, 2018), https://www.ebpsociety.org/blog/education/297-employment-recidivism [https://perma.cc/5HER-EFFP].

[174] *See* KEVIN SCHNEPEL, IZA WORLD OF LAB., DO POST-PRISON JOB OPPORTUNITIES REDUCE RECIDIVISM? 1 (2017), https://wol.iza.org/uploads/articles/399/pdfs/do-post-prison-job-opportunities-reduce-recidivism.pdf?v=1 [https://perma.cc/2DL4-EXSL].

[175] Walter, *supra* note 132 ("At least a quarter of the facilities identified by Reveal charge participants fees in addition to requiring them to work without pay.").

plaintiff worked as a janitor.[176] Other centers have participants working at chicken factories,[177] warehouses, or retail storefronts.[178]

Unfortunately, due to the lack of transparency regarding program participants, their relative success in terms of re-offending is unknown. Some centers do put forth data tout high success rates; for example, Cenikor "claims that 67% of graduates remain drug-free three years after entering the program . . ."[179] However, that number ignores the fact that less than eight percent of participants graduate.[180] The data that is available suggests that these low graduation rates are common.[181] For court-ordered patients, leaving early means returning to prison.[182] Still, given the similarities to the prison context (low skilled labor combined with lack of mental health treatment) it is likely that the results are the same.

B. *The Use of the Primary Beneficiary Test Provides Cover to the Growing Number of Exploitative Rehabilitation Centers*

The exploitation of rehabilitation patients, specifically court-ordered patients, has become pervasive; the usage of the primary beneficiary test in these cases would provide cover to nearly exploitative rehabilitation centers. The primary beneficiary test, especially as applied in *Vaughn*, would provide cover for such abuse. This is because under the test, court-ordered rehabilitation participants would always lose.

Under the model followed by current rehabilitation centers, three factors will always way against a finding that the participant is actually an employee. As stated previously, the test looks at the extent to which the participant and the rehabilitation center "understand that there is no expectation of compensation" and that it is conducted "without entitlement to a paid job at the conclusion" to the program.[183] Participation in these programs is not truly voluntary, given the lack of meaningful choice between jail and rehab. Because of this, participants are not entering these programs with the expectation of compensation. It is much more akin to another way of "doing

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[176] *See* Vaughn v. Phoenix House New York Inc., 957 F.3d 141, 142 (2d Cir. 2020).

[177] Walter, *supra* note 132.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Vaughn v. Phoenix H. New York Inc., 957 F.3d 141, 145 (2d Cir. 2020).

time." Furthermore, these programs are careful not to set any expectations of compensation, instead treating the work itself as a benefit of participation in the program by deeming it to be "work therapy." Similarly, there is not any expectation of employment after the program, because it is akin to a prison sentence. Because it is akin to a sentence, the duration factor also will always weigh against the finding of an employment relationship.

The test weighs also the benefits afforded to the individual against the benefits to the purported employer to determine whether there is an employment relationship. The benefits offered to the participants, according to these rehabilitation centers, are massive. In *Vaughn*, the court paid special attention the fact that the defendant "was permitted to receive rehabilitation treatment there in lieu of a jail sentence, and was provided with food, a place to live, therapy, vocational training, and jobs that kept him busy and off drugs."[184] Because of this, the Second Circuit found that the plaintiff was not an employee.[185] However, the benefits described by the Second Circuit could also plausibly describe every single one of these exploitative programs. So, permitting the use of the primary beneficiary test in this specific context could give cover not only to organizations like Phoenix House where the work appears to largely be in the facility, but also for organizations like CAAIR and Cenikor Foundation.

C. *The Use of the Primary Beneficiary Test in the Rehabilitation Context Directly Contradicts Supreme Court Precedent*

The use of the primary beneficiary test in *Vaughn* and the court-ordered rehabilitation context generally runs counter to the Supreme Court's holdings and rationale from *Tony and Susan Alamo Foundation*. Several of the factors relied on in *Vaughn* are explicitly rejected by the Supreme Court in *Tony and Susan Alamo Foundation.*

The court in *Vaughn* articulated the factors of the primary beneficiary test, typically applied to interns, as follows:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

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[184] *Id.* at 146.

[185] *Id.*

> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[186]

While the Second Circuit in *Vaughn* recognized that these factors needed to be tailored to the specific context of the case, it still found that Vaughn was not an employee.[187] In particular, the court found that "[f]actors [o]ne, [f]ive, and [s]even weigh 'strongly' against finding that Vaughn was an employee of Phoenix House."[188] This finding was despite the fact that language in *Tony and Susan Alamo Foundation*, suggests that factors one and seven are non-dispositive in a rehabilitation context.

Factors one and seven in the *Vaughn* test center around the understandings of the two parties as to the nature of the relationship. However, in *Tony and Susan Alamo Foundation,* the Court rejected these factors as being dispositive in the rehabilitation context.[189] In *Tony and Susan Alamo Foundation*, the rehabilitation participants were not the ones to bring the case. This was in part because the associates themselves protested being defined as employees.[190] The Secretary of Labor in that case could not find any worker who viewed their work at the Foundation as anything other than

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[186] *Id.* at 145–46 (citing Glatt v. Gox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016)).

[187] *Id.* at 145–146.

[188] *Id.* at 146.

[189] Tony and Susan Alamo Found. v. Sec. of Lab., 471 U.S. 290, 300–01 (1985).

[190] *Id.*

volunteering.[191] The associates went so far as to state that "no one ever expected any kind of compensation, and the thought is totally vexing to my soul."[192] The Court found that these protestations, however sincere, cannot be dispositive; the test of employment under the Act is one of "economic reality."[193] This directly undermines the application of the primary beneficiary test used by *Vaughn* in this context.

Further, the Court rejected the concept that benefits, the cornerstone of the primary beneficiary test, precluded a finding of employment in the rehabilitation status.[194] The Court in *Tony and Susan Alamo Foundation* found that the benefits received such as housing, training, food, and transportation were received in exchange for services.[195] The Court noted that "the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are . . . wages in another form."[196]

The court found the rehabilitation context distinguishable from the Supreme Court case on which the primary beneficiary test is based, *Portland Terminal*.[197] The court noted that in the rehabilitation center context, the associates were "entirely dependent upon the Foundation for long periods. . . ."[198] In contrast, the court noted that in *Portland Terminal*, the training course lasted a little over a week.[199]

Finally, the Second Circuit's understanding of the FLSA articulated in *Vaughn* runs counter to Supreme Court's guidance in *Tony and Susan Alamo Foundation*. In *Tony and Susan Alamo Foundation*, the Court noted the dangers of an exception to the FLSA for employees who claimed they voluntarily performed work, finding that such an exception would negatively impact the wages of other workers.[200] The Supreme Court remarked that "exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses."[201] Additionally, the Court stated "if the prohibition cannot be made, the floor for the entire industry falls and the

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[191] *Id.* at 300.

[192] *Id.* at 301.

[193] *Id.*

[194] *Id.* at 301 ("[T]he fact that the compensation was received primarily in the form of benefits rather than cash is in this context immaterial.").

[195] *Tony and Susan Alamo Found.*, 471 U.S. at 301.

[196] *Id.* at 302.

[197] *Id.* at 301.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 302.

[201] *Tony and Susan Alamo Found.*, 471 U.S. at 302.

right . . . [of] employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage."[202]

Permitting rehabilitation centers to force court-ordered patients to work under the primary beneficiary test may have such a wage depressing effect. As stated previously, at least 300 rehabilitation facilities in the United States require patients to work without pay.[203] These programs exist in forty-four states and include at least 60,000 people per year.[204] The fact that these patients are performing work for corporations like Walmart, Shell, Exxon, and slaughterhouses[205] necessarily means that these positions are not given to workers on the outside who would be subject to the minimum wage and overtime requirements of the FLSA.

The same can be said for jobs performed by residents inside the facility. In the context of *Vaughn* specifically, the complaint states that *Vaughn* worked a number of jobs.[206] First, Vaughn remarked that he worked as a point person.[207] In that capacity he essentially acted as a floor supervisor, communicating to residents when meals were called, clearing the floor during fire drills, making entries on a "point sheet," and sitting at a desk conveying information to residents.[208] Vaughn also alleged that he worked as an overnight coordinator where he as required to make coffee, snacks, and performed rounds on the male floors.[209] He worked in the garbage room and warehouse.[210] All of these positions were eight hour shifts, six days a week.[211] Once again, these jobs could have been performed by a worker not within the facility who would have been paid in accordance with the FLSA.

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[202] *Id.* (citing Gemsco, Inc. v. Walling, 324 U.S. 244, 252 (1945)).

[203] Walter, *supra* note 4.

[204] *Id.*

[205] Amy Julia Harris & Shoshana Walter, *They Worked in Sweltering Heat for Exxon, Shell, and Walmart. They Didn't Get Paid a Dime*, REVEAL, https://revealnews.org/article/they-worked-in-sweltering-heat-for-exxon-shell-and-walmart-they-didnt-get-paid-a-dime/ [https://perma.cc/WHP5-66T4].

[206] Complaint at 2–3, Vaughn v. Phoenix House Programs of New York Inc., No. 14-CV-3918, 2015 WL 5671902 (S.D.N.Y. Sept. 25, 2015).

[207] Vaughn v. Phoenix House Found., Inc., 2019 WL 568012 at *1 (S.D.N.Y. Feb. 12, 2019), *aff'd sub nom.* Vaughn v. Phoenix House of New York Inc., 957 F.3d 141 (2d Cir. 2020).

[208] *Vaughn*, 2019 WL 568012 at *1.

[209] *Id.* at *5.

[210] *Id.* at *6.

[211] *Id.* at *8.

D. *The Economic Realities Test Should Govern*

The Supreme Court found that under the facts of *Tony and Susan Alamo Foundation*, the economic realities test should govern.[212] The same is true in the context of rehabilitation facilities benefiting from the labor of court-ordered participants. This is because court-ordered rehabilitation patients are more analogous to prisoners, as opposed to the apprentices for which the primary beneficiary test was created.

Court-ordered rehabilitation patients are most like prisoners. Like prisoners, their presence at these programs is per the direction of a judge; their decision to attend was not voluntary;[213] they are kept within the confines of the rehabilitation center; and their time in the program is of a specific duration. The connection is strengthened by the fact that if a court-ordered participant fails the rehabilitation program or is kicked out of the rehabilitation center, they return to drug court where they are sentenced to prison time. These similarities were recognized by the Southern District of New York in Vaughn when the district judge stated, "the facts of this case are more analogous to the prison context or to court-mandated community service than they are to the internship context." [214]

The differences between these rehabilitation center patients and interns are stark. While interns typically receive some vocational training, there is often no training required for work in these rehabilitation centers. As discussed previously, the participants are performing low wage jobs at factories, warehouses, and storefronts. This is entirely different from the sort of educational experiences contemplated in internships and in *Portland Terminal*.[215] Concededly, if programs provided vocational training or even therapy, they could fall within the benefits contemplated by the test. However, that is not the reality of many of these programs as they currently exist. Because these participants are more like prisoners than they are to interns, the test should be the same. The economic realities test should govern.

E. *Solutions*

Notwithstanding the foregoing, more needs done to ensure that these rehabilitation centers are not utilizing participants to circumvent the principles of the FLSA. Therefore, legislators must enact the following solutions. Federal legislators should amend the FLSA to limit the use of the

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[212] Tony and Susan Alamo Found. v. Sec. of Lab., 471 U.S. 290, 301 (1985).

[213] In *Vaughn*, the court found it to be voluntary. *See Vaughn*, 957 F.3d at 143. However, such an assertion ignores the fact when the alternative is prison, there is no meaningful choice.

[214] Vaughn v. Phoenix H. Found., Inc., 2019 WL 568012 at *3 (S.D.N.Y. Feb. 12, 2019), *aff'd sub nom.* Vaughn v. Phoenix H. New York Inc., 957 F.3d 141 (2d Cir. 2020).

[215] *Compare with* Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (a weeklong observational program teaching possible applicants the ins and outs of railroad work).

primary beneficiary test. Additionally, state legislatures should increase licensing requirements and enforce those requirements.

1. A Legislative Solution

Within very recent years, the exploitative nature of rehabilitation programs has come to the attention of law makers. On November 19, Senators Elizabeth Warren and Tammy Baldwin requested a formal look into the use of unpaid labor at federally funded substance rehabilitation centers.[216] The Senators emailed the Government Accountability Office, requesting that the office investigate "mandatory vocational requirements at drug and alcohol rehabilitation facilities that receive federal funding."[217] The Senators noted that "[t]his practice appears to be a violation of federal labor law, but has escaped federal enforcement."[218] The Senators also noted that the existence of these programs appears to run counter to the FLSA and Tenth and Fifth Circuit precedent.[219] Baldwin and Warren requested that the Government Accountability Office investigate:

> (1) the extent to which federal funding was provided to rehabilitation facilities with mandatory work requirements;
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> (2) whether the evidence shows that mandatory work requirements support addiction treatment and recovery; and
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> (3) what oversight exists to ensure individuals in rehabilitation programs are fairly compensated, and that programs follow relevant labor and employment law.[220]

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[216] Samir Ferdowsi, *Senators Demand Investigation into Rehab Centers that Use Patients for Free Labor*, VICE (Nov. 23, 2020, 11:57 AM), https://www.vice.com/en/article/n7vzdg/senators-demand-investigation-into-rehab-centers-that-use-patients-for-free-labor [https://perma.cc/9KRJ-PQK5].

[217] Letter from Senators Elizabeth Warren & Tammy Baldwin to The Honorable Gene L. Dodaro, Comptroller Gen. of the U.S. 1 (Nov. 19, 2020), https://www.warren.senate.gov/imo/media/doc/2020.11.19%20Letter%20from%20Senators%20Warren,%20Baldwin%20to%20GAO%20requesting%20study%20of%20work%20requirements%20at%20drug%20and%20alcohol%20rehabilitation%20facilities.pdf [https://perma.cc/L3DM-2FXY].

[218] *Id.*

[219] *Id.* at 1–2.

[220] *Senators Warren and Baldwin Seek GAO Investigation of Mandatory Work Requirements at Drug and Alcohol Rehabilitation Facilities Receiving Federal Funding*, ELIZABETH WARREN (Nov. 23, 2020), https://www.warren.senate.gov/oversight/letters/senators-warren-and-baldwin-seek-gao-investigation-of-mandatory-work-requirements-at-drug-and-alcohol-rehabilitation-facilities-receiving-federal-funding [https://perma.cc/W6E4-C6V5].

The GAO replied, committing to begin investigating in about five months' time.[221]

Lawmakers should not simply investigate but instead should amend the FLSA to preclude the use of the primary beneficiary test in at least the rehabilitation context. This would provide clarity for courts while also putting pressure on these more exploitative programs to conform their behavior to acceptable labor standards.

2. Stringent Licensing and Funding for Enforcement

In addition, states should implement stringent licensing requirements for any facility that houses court ordered participants while also increasing the funding for the enforcement of these licensing provisions. Licensing requirements at the state level are an important step. While more licensing requirements should be imposed on these programs generally, it is especially important in the court-ordered context, as the labor and attendance of such participants is arguably less voluntary than the labor of self-admitted participants. Reveal's reporting showed that fewer than one of five rehabilitation programs were licensed.[222] Additionally, the majority of states do not require these programs to get licensed or report rehabilitation publicly as they do not offer medical treatment.[223] The increase in licensing requirements for these centers would permit law makers to exercise greater oversight and ensure that exploitative labor is not being used.

However, licensing on its own is likely insufficient to combat these labor abuses; enforcement is also key. Oklahoma, for example, has a statutory requirement that drug court providers must be licensed.[224] Specifically, drug courts must use treatment providers inspected and certified by the Department of Mental Health and Substance Abuse Services. However, despite this, judges in Oklahoma are sending participants to uncertified programs, distinguishing between "recovery" and "rehabilitation."[225] While the Oklahoma DMHSAS is aware of judges are using uncertified providers, these judges have not been disciplined for these violations.[226]

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[221] Letter from Orice Williams Brown, Managing Director of the U.S. Gov't Accountability Off. to Senator Elizabeth Warren (Dec. 4, 2020), https://www.warren.senate.gov/imo/media/doc/21-0109%20Warren.pdf [https://perma.cc/DTS5-32U8].

[222] Walter, *supra* note 132.

[223] *Id.*

[224] Harris & Walter, *supra* note 3.

[225] *Id.*

[226] *Id.*

IV. CONCLUSION

While this Note does discuss the darker side of court-ordered residential rehabilitation, it should not be read as a wholesale campaign against the usage of these programs. The reality is the use of rehabilitation programs as a general matter is laudable. The American incarceration system is overloaded with prisoners who could benefit massively from the use of rehabilitation programs as an estimate fifty percent of all prisoners meet the criteria for a diagnosis of drug abuse or dependance.[227] Incarceration by itself is insufficient to address America's addiction crisis as nearly twenty-five percent of individuals released from prison will return with three years for violations such as testing positive for drug abuse.[228] Evidence-based drug treatment can absolutely help reduce reoffending. Drug court graduates have rearrest rates of half of their counterparts.[229] Furthermore, the use of rehabilitation programs in lieu of imprisonment is a massively effective cost saving measure. On average, incarceration in the United States costs $31,000 per year,[230] ultimately costing taxpayers about eighty billion dollars per year.[231] As an economic matter, the use of rehabilitative methods over incarceration just makes sense.[232]

That, however, does not mean that the exploitative nature of some of America's rehabilitation programs does not need to be addressed. Among the Fair Labor Standards considerations there are additional problems including fraud and Thirteenth Amendment violations. A solution must be found that balances the efficacy of these programs with the very real risk of exploitation. Limiting the use of the primary beneficiary test and increasing licensing

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[227] CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, PUB. NO. 213530, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 2 (2006), https://bjs.ojp.gov/content/pub/pdf/dudsfp04.pdf [https://perma.cc/H8XE-WMTN].

[228] PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, PUB. NO. 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 2 (2002), https://bjs.ojp.gov/content/pub/pdf/rpr94.pdf [https://perma.cc/S8SP-JP22].

[229] Roger H. Peters & Mary R. Murrin, *Effectiveness of Treatment-Based Drug Courts in Reducing Recidivism*, 27 CRIM. JUST. BEHAV. 72, 75 (2000).

[230] Eliza Mills, *How Much Does It Cost to Send Someone to Prison?*, MARKETPLACE (May 19, 2017), https://www.marketplace.org/2017/05/19/how-much-does-it-cost-send-someone-prison/ [https://perma.cc/NS87-AF7Q].

[231] Nicole Lewis & Beatrix Lockwood, *The Hidden Costs of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [https://perma.cc/5HAV-SBAE].

[232] U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST. RESEARCH IN BRIEF: A GUIDE FOR DRUG COURTS AND OTHER CRIMINAL JUSTICE PROGRAMS 1 (2014), https://www.ojp.gov/pdffiles1/nij/246769.pdf [https://perma.cc/6WPB-PCKU].

requirements will go a long way to ensuring those in rehabilitation programs are treated fairly.