

Prison work in law and reality: comparative perspectives from Brazil, the UK, and the US

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Abstract

International law provides that work by sentenced prisoners ought to prepare them for life after release. Yet reliable data on the nature, extent and impacts of prison work is lacking in much of the world, and what there is suggests that much prison work is far from voluntary, is unpaid or poorly paid, is unskilled or low-skilled, and does little to improve employment prospects on release. This paper compares how prison work is defined and governed in law and shaped by policy, and how it is organised in practice. It describes the operationalisation of key legal provisions relating to prison work in three countries, and compares the *purposes* for prison work defined in law, the *protections* available to working prisoners, and the *incentives or penalties* used to secure participation. It also summarises the limited data available showing *how many* prisoners perform *which kinds of work* in each country. Finally, it argues that efforts to bring prison work provision into closer compliance with international standards should be sensitive to local variation, and suggests clarifying questions which could be used in such a reform process.

Keywords

prison work, brazil, united states of america, united kingdom, human rights, comparative legal research, prison labour

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Introduction

'Work' in prison is contradictory. Penal policy presents it as a means for 'reform' or 'rehabilitation', or for safer, better-functioning prisons;¹ by contrast, journalists and activists often represent it as the exploitation of prisoners for others' benefit.² In both international and national law, it is separated from work in the wider economy, and ordinary labour rights do not apply.

Although work features in imprisonment everywhere, the *forms* of work prisons require prisoners to engage in vary substantially. So do the *outcomes* prisons use work to produce, and the *incentives and penalties* they use to secure compliance. Against this local variability, the applicable normative/human rights frameworks can seem vague in their wording, and difficult to operationalise. This raises a question: how can the standards they create best be interpreted and applied at the national level, since identical reforms in different penal contexts could generate unintended and undesirable outcomes?

In this article, we illustrate this argument comparatively, noting similarities and differences in the legal frameworks and practical realities of prison work in three countries covered by an ongoing research project. The article has four sections. First, we briefly describe the ongoing research on which we base our claims. Second, we describe key international legal provisions on prison work, and summarise evidence on its effects in practice; we suggest particularly that work capable of producing meaningful rehabilitative impacts represents only a tiny proportion of what is actually available to prisoners. Subsequent sections build from this. Third, we compare the three countries covered by the project—Brazil, the UK and the USA—comparing whether and how the law defines *purposes* for prison work, what *protections and working conditions* apply, what *incentives or penalties* are used to secure participation, and what is known about *how many prisoners perform which kinds of work* in each country. Finally, we draw together evidence from the preceding sections in a discursive conclusion, and suggest that efforts to improve the provision of work opportunities in prisons should proceed with care, paying careful attention to national circumstances and to specified questions.

¹ Ministry of Justice, *Education and Employment Strategy* (Ministry of Justice 2018); 'Labor Partnership: PIE Programs | Arizona Correctional Industries' (Arizona Correctional Industries) <<https://aci.az.gov/labor-partnership-pie-programs/>> accessed 24 February 2023.

² Beth Buczynski, 'Shocking Facts About America's For-Profit Prison Industry' <<https://truthout.org/articles/shocking-facts-about-americas-for-profit-prison-industry/>> accessed 8 November 2022; Sadhbh Walshe, 'How US Prison Labour Pads Corporate Profits at Taxpayers' Expense' *The Guardian* (6 July 2012) <<https://www.theguardian.com/commentisfree/2012/jul/06/prison-labor-pads-corporate-profits-taxpayers-expense>> accessed 5 September 2022; Tim Requarth, 'How Private Equity Is Turning Public Prisons Into Big Profits' <<https://www.thenation.com/article/archive/prison-privatization-private-equity-hig/>> accessed 7 November 2022; April Fisher and Diana Kennedy, 'Prison Laborers Are Paid Pennies to Maintain the Prisons They're Incarcerated In' <<https://truthout.org/articles/prison-laborers-are-paid-pennies-to-maintain-the-prisons-theyre-incarcerated-in/>> accessed 19 July 2022.

1 The project

This article draws on research findings from an international comparative project, ‘Unlocking Potential: towards effective, sustainable, and ethical provision of work opportunities for prisoners and prison leavers’. The project examines prison work in law and practice in the UK, Brazil and the USA. As the latter are federal countries with considerable local variation, our research focuses on three contrasting states in each, along with the nations of the UK.³ The project investigates how norms, values, and policies surrounding prison work are understood by practitioners, policymakers, prison monitors, partner organisations that provide work in prisons, and prisoners themselves; and to identify examples of good practice and effective collaboration.

In the project and this paper, we use the following definitions:

prison work structured activities, done by sentenced prisoners within or outside prison facilities, in which participation is secured using penalties or incentives including remuneration.

Prison labour a subset of prison work activities, fitting the above definition but seeking to realise economic value from prisoners’ labour by producing goods or services for use beyond the facility, and which might involve outside organisations providing work or training.

We exclude activities otherwise fitting these descriptions but with purely educational aims, or which aim to address the individual-level causes of offending behaviour.

The project thus far has consisted of a literature review and research on international and national law and policy on prison work. We have also conducted over fifty semi-structured expert interviews, with individuals who have knowledge of prison work in the UK, the USA and Brazil.⁴ They include prison staff, government officials, policymakers, provider organisations, academic researchers, former prisoners, and prison standards monitors. These interviews have refined our emerging understanding of the topic. Where they are referred to, we have indicated this using a footnote attributing claims to “interviews with expert informants”. We also aim, via forthcoming fieldwork, to produce case studies of prison work as implemented in different prison facilities in each country.

2 Prison work in the law and in criminological research

2.1 Legal separation

Generally, work in prison is legally differentiated from work in the wider economy. This is largely a result of reforms which curtailed the exploitation of unfree labour, by public authorities and private capital. Before these reforms, exploitation took varied forms: both

³ In Brazil: Maranhão, São Paulo and Santa Catarina; in the US, Arizona, California and Texas.

⁴ The interviews were approved by Birkbeck’s internal Research Ethics approval process.

the British and Portuguese empires used forced convict labour in their colonies,⁵ while in the US, prison labour was integral to capitalist industrialisation in Northern states, and segregationist oppression in Southern states.⁶

Dating from the early-to-mid twentieth century—the heyday of the ‘rehabilitative ideal’ and of welfarist policy orientations in punishment⁷—the International Labour Organisation’s (ILO’s) Forced Labour Conventions sought to eliminate more egregious forms of prison labour exploitation, while retaining the basic norm that states could direct prisoners to work, and penalise refusals.⁸ Countries which ratify the ILO conventions may compel prisoners to work, provided the work is “directed and controlled by a public authority” and prisoners are not “hired to or placed at the disposal of” non-state entities.⁹ The effect is that if prisoners work for any entity, besides the state, their labour can only be used if they have volunteered themselves for it, and if the terms and conditions (including pay) ‘approximate’ those available to free workers.¹⁰ ILO rules are thus predicated on a sharp distinction between labour done for public authorities—which can be compulsory and is implicitly part of the punishment—and work done for non-public entities—which is voluntary and closer to ‘ordinary’ work. It is not clear that this sharp distinction still holds, given the interpenetration of the private and public sectors in the years since the ILO conventions were concluded.¹¹ This blurring underpins some of the arguments which follow, since it suggests that the risk of exploitation (which applicable normative standards sought to eliminate) has evolved over time.

⁵ Anand A Yang, ‘The Prison-Handicraft Complex: Convict Labour in Colonial India’ (2023) 57 *Modern Asian Studies* 808; Clare Anderson, Kellie Moss and Shammane Joseph Jackson, ‘Coloniality and the Criminal Justice System: Empire and Its Legacies in Guyana’ (2022) 43 *Slavery & Abolition* 682; Dimpay Das and Barnali Sarma, ‘Prison Labour in Colonial India: A Case Study of Assam’ (2020) 8 *Space and Culture, India* 91; Ann Curthoys, ‘The Beginnings of Transportation in Western Australia: Banishment, Forced Labour, and Punishment at the Aboriginal Prison on Rottnest Island before 1850’ [2021] *Studies in Western Australian History* 59; Timothy J Coates, ‘The Portuguese Empire, 1100–1932’ in Clare Anderson (ed), *A global history of convicts and penal colonies* (Bloomsbury Academic 2018).

⁶ Genevieve LeBaron, ‘Prison Labour, Slavery, and the State’ in Laura Brace and Julia O’Connell Davidson (eds), *Revisiting Slavery and Antislavery: Towards a Critical Analysis* (Springer International Publishing 2018); Douglas A Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (1st Anchor Books ed, Anchor Books 2009).

⁷ Victor Bailey, *The Rise and Fall of the Rehabilitative Ideal, 1895–1970* (Routledge 2019); Francis A Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale University Press 1981); David Garland, *Punishment and Welfare: A History of Penal Strategies* (Quid Pro Books 2018).

⁸ Adelle Blackett and Alice Duquesnoy, ‘Slavery Is Not a Metaphor: US Prison Labor and Racial Subordination through the Lens of the ILO’s Abolition of Forced Labor Convention’ (2021) 67 *UCLA Law Review* 1504; *Forced Labour Convention, 1930* (No. 29); *Abolition of Forced Labour Convention, 1957* (No. 105)

⁹ The US and five other UN member states (Afghanistan, the Marshall Islands, Palau, Tonga, and Tuvalu) have not ratified the 1930 Convention, but all others have.

¹⁰ International Labour Organisation, *Combating Forced Labour - A Handbook for Employers & Business: 2 - Employers’ Frequently Asked Questions* (International Labour Organisation 2015)

<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_099624.pdf> accessed 9 May 2023.

¹¹ Faina Milman-Sivan and Yair Sagy, ‘On the International Labour Organization and Prison Labour: An Invitation to Recalibrate’ (2020) 159 *International Labour Review* 505.

Prison-specific human rights standards add extra layers to the ILO standards, further blurring the sharp distinction described above.¹² They require work not to add to the suffering of imprisonment, and set the overarching objective that it should, whenever possible, prepare prisoners for life after release. They state that prisoners should be able to choose work from what is available, and, where possible, gain vocational skills usable after release. They permit profit-making prison industries, but require prisoners' interests not to be subordinated to the profit motive. They require conformity between the working hours and health and safety protections for working prisoners and those for free workers. Finally, they stipulate that prison work must be 'equitably remunerated',¹³ albeit that prisons can make specified deductions from prisoners' wages for some specified reasons. These standards, by contrast to the ILO ones, contain the expectation that prison work *generally* should be more voluntary, more 'normalised', and more reintegrative in its aims, *whether it is directed by the state or another party*. At the same time, they also preserve the norm that it can be compelled.

The international standards create ambiguity. Although work in prison is legally separate from work in the wider economy, may be coerced, and is exempt from key workplace protections, prison-specific rights standards emphasise voluntarism, and embrace aims such as resocialisation or preparation for release. They implicitly challenge the separation, by requiring prisons both to lower, and to preserve, the boundary between 'prison work' and 'ordinary work'. This begs the question, which we address in Section 3 below: how do they balance these objectives in practice?

First, however, we briefly summarise research evidence on the effects of work in prison.

2.2 The effects of work in prison

Policymakers commonly claim that prisoners who work in prison will be less likely to reoffend after release. However, empirical evidence on this claim is inconclusive. It is hampered by several factors: by the fact that most studies were conducted in the USA (limiting the generalisability of the findings),¹⁴ by methodological risks, and by the fact that prison work takes many forms, not all of them equally skilled or rehabilitative. Allowing for these limitations, some studies using quasi-experimental or meta-analytical designs to evaluate specific prison employment and employability programmes have found modest improvements in reoffending rates among participants who are followed up after release.¹⁵

¹² European Prison Rules; The United Nations Standard Minimum Rules for the Treatment of Prisoners ('The Nelson Mandela Rules')

¹³ This term is not defined further, for example by indicating *in relation to what* prison pay should be 'equitable'.

¹⁴ Kerry M Richmond, 'The Impact of Federal Prison Industries Employment on the Recidivism Outcomes of Female Inmates' (2014) 31 Justice Quarterly 719; Susan McNeeley, 'The Effects of Vocational Education on Recidivism and Employment Among Individuals Released Before and During the COVID-19 Pandemic' (2023) 67 International Journal of Offender Therapy and Comparative Criminology 1547.

¹⁵ William G Saylor and Gerald G Gaes, 'Training Inmates through Industrial Work Participation and Vocational and Apprenticeship Instruction' (1997) 1 Corrections Management Quarterly 32; Jeffrey A Bouffard, Doris Layton Mackenzie and Laura J Hickman, 'Effectiveness of Vocational Education and

On the other hand, similar studies with similar designs are also sometimes inconclusive,¹⁶ and a few even indicate *increased* risks of reoffending.¹⁷

Regardless of these differences, there remain good reasons to promote ex-prisoners' reintegration with employment markets after release, for reasons which are independent of recidivism. Although the direction of causation is not clear, there is still a clear relationship between employment and desistance from crime. Perhaps most importantly, though, positive outcomes are not always sustained over long periods:¹⁸ the transition from prison to post-release employment is challenging. Ex-prisoners were often deeply excluded from labour markets before imprisonment, through poverty, educational shortfalls, and other factors,¹⁹ and even if they gain qualifications and skills in prison, many face continued exclusion post-release.²⁰ Job quality also influences long-term outcomes: people who have participated in work programmes in prison are more likely *to seek work* after release,²¹ but whether they *sustain work* is less certain. Low-paid, precarious, or unpredictable jobs are more associated with rearrest and return to prison, and may even produce worse outcomes than unemployment.²² This is not *simply* a question of job permanence, nor of pay—even sporadic low-waged employment can protect against recidivism—but establishing *any* form of work record amidst destitution after release can be extremely difficult.²³ It also appears that ex-prisoners are pushed into low-quality work, both by financial insecurity and parole conditions which mandate employment.²⁴

Employment Programs for Adult Offenders' (2000) 31 *Journal of Offender Rehabilitation* 1; Robynn Cox, 'The Effect of Private Sector Work Opportunities in Prison on Labor Market Outcomes of the Formerly Incarcerated' (2016) 37 *Journal of Labor Research* 412.

¹⁶ Richmond (n 15).

¹⁷ Patricia O'Brien and Robin Bates, 'Women's Post-release Experiences in the U.S: Recidivism and Re-entry' (2005) 1 *International Journal of Prisoner Health* 207; Ramon Alós and others, 'Effects of Prison Work Programmes on the Employability of Ex-Prisoners' (2015) 12 *European Journal of Criminology* 35.

¹⁸ Cox (n 16); Alós and others (n 18).

¹⁹ Anke Ramakers and others, 'Down before They Go in: A Study on Pre-Prison Labour Market Attachment' (2015) 21 *European Journal on Criminal Policy and Research* 65.

²⁰ Reuben Jonathan Miller, *Halfway Home: Race, Punishment, and the Afterlife of Mass Incarceration* (Little, Brown and Company 2021); Naomi F Sugie, Noah D Zatz and Dallas Augustine, 'Employer Aversion to Criminal Records: An Experimental Study of Mechanisms' (2020) 58 *Criminology* 5; Simon G Kolbeck, Paul E Bellair and Steven Lopez, 'Race, Work History, and the Employment Recidivism Relationship' (2022) 60 *Criminology* 637; Bryan L Sykes and others, 'Barred: Labor Market Dynamics and Human Capital Development among People on Probation and Parole' (2022) 701 *Annals of the American Academy of Political and Social Science* 28; Beth Weaver and Cara Jardine, 'Citizenship on Probation: Understanding the Labour Market Exclusion of Criminalized People in Scotland' (2022) 69 *Probation Journal* 296.

²¹ Catriona Connell and others, 'Effectiveness of Interventions to Improve Employment for People Released from Prison: Systematic Review and Meta-Analysis' (2023) 11 *Health & Justice* 17.

²² Joe LaBriola, 'Post-Prison Employment Quality and Future Criminal Justice Contact' (2020) 6 *RSF: The Russell Sage Foundation Journal of the Social Sciences* 154.

²³ Kolbeck, Bellair and Lopez (n 21).

²⁴ Dallas Augustine, 'Coerced Work during Parole: Prevalence, Mechanisms, and Characteristics' (2023) 61 *Criminology* 546; Noah D Zatz, 'Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work' (2020) 45 *Law & Social Inquiry* 304; Noah D Zatz, 'The Carceral State at Work: Exclusion, Coercion, and Subordinated Inclusion' in Alan Bogg and others (eds), *Criminality at Work* (Oxford University Press 2020); Erin Hatton, *Coerced: Work Under Threat of Punishment* (University of California Press 2020).

As a result, the effects of prison work are nuanced. Prison authorities are not accountable for post-release outcomes and have little influence over post-release conditions, and in any case are hard-pushed to respond to individual need within the prison. Much is left to prisoners' attitudes and motivations towards the work on offer. Ethnographic research has noted that prisoners will often seek out better-paid work in prison because it alleviates the immediate difficulties of prison life, but not necessarily because they seek, or expect to derive, longer-term benefits.²⁵ Some ethnographers have even concluded that unskilled but better-paid prison labour on profit-making commercial contracts communicates to prisoners the norm that exploitation secures profit, thus reinforcing antisocial attitudes.²⁶ Generally, too, the low pay on offer can lead prisoners to conclude that even work which aims to offer skills and employability is simply punitive.²⁷

The variability evident in the literature raises two questions which guide the following sections. First, what does prison work actually look like, in the three countries we examine? What kinds of work are done, by how many people, and who directs it? Second, what incentives, rewards, and sanctions are used to secure compliance, and what does this tell us about the degree of 'voluntariness' or compulsion involved?

3 Prison work in the United Kingdom, the United States and Brazil

This section describes the legal basis, policy focus, and practical application of prison work in the three countries we examine in the project.

3.1 The United Kingdom

3.1.1 Legal basis

Prison regimes and progression

The UK²⁸ stands out from comparable European countries, both in its high imprisonment rates and its use of long, indeterminate, and extended sentences.²⁹ Although it is committed

²⁵ Michael Gibson-Light, *Orange-Collar Labor: Work and Inequality in Prison* (Oxford University Press 2023); Jenna Pandeli, 'The Nurturing of "Good" Capitalists: Prisoners and Private Prison Labour' [2018] *Academy of Management Proceedings*.

²⁶ Pandeli (n 26).

²⁷ Matthew Maycock and Daniel McGregor, "'I Do Enjoy the Work, but I Think the Wages in the Jails Are Shocking": Analysing Prisoner Wages as a Pain of Imprisonment Using Foucault's Artifice' [2023] *Incarceration*

²⁸ England & Wales account for around 90% of UK prisoners, Scotland around 8%, and Northern Ireland around 2%. Northern Ireland's imprisonment rate is far lower than the other two parts of the UK, though it is also the smallest piece of the picture.

²⁹ Catherine Appleton and Dirk van Zyl Smit, 'The Paradox of Reform: Life Imprisonment in England & Wales' in Dirk van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Hart 2016); Dirk van Zyl Smit and Katrina Morrison, 'The Paradox of Scottish Life Imprisonment' (2020) 28 *European Journal of Crime, Criminal Law and Criminal Justice* 76.

to international standards which emphasise preparation for release as the normative purpose of the sentence,³⁰ the objectives of sentencing law are somewhat contradictory,³¹ and ‘preparation for release’ is typically approached as a question for the final stages of a sentence. There is evidence that people serving long sentences deliberately focus their attention on goals within the institution, and consciously avoid looking to the post-release future.³²

Key legal provisions

Having ratified both ILO Forced Labour Conventions,³³ the UK can compel sentenced prisoners to work, provided the work is “supervised and controlled [by] a public authority” and prisoners are not “hired to or placed at the disposal of private individuals, companies, or associations”.³⁴ Domestically, prison law derives from the respective Prison Acts for each jurisdiction,³⁵ and from secondary legislation (particularly the Prison Rules) passed using powers they create. The Rules say relatively little specifically about the purposes of prison work. Those for England & Wales and Northern Ireland require only that it be “useful”;³⁶ in Scotland, work (along with other ‘purposeful activity’) should aim to improve the prisoner’s “morale, attitude, and self-respect” and “prospects for [...] successful resettlement” after release.³⁷

Pay, sanctions, and incentives

Only the Scottish Rules entitle prisoners to payment for work,³⁸ but in practice, prison work is paid throughout the UK. In England & Wales, the minimum rate set by policy is £4 per week, or £2.50 for prisoners willing to work but for whom prisons cannot find work.³⁹ In Scotland, the minimum is £5 per week according to a 2012 policy;⁴⁰ the Northern Ireland Prison Service does not publish rates. Prison work is therefore paid well below the national

³⁰ European Prison Rules (n 13).

³¹ Sentencing Act 2020 s 57(2); cf. Department of Justice, ‘Sentencing Review Northern Ireland: A Public Consultation’ <<https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/sentencing-review-northern-ireland-consultation.pdf>> accessed 24 October 2023; Scottish Sentencing Council, ‘Principles and Purposes of Sentencing: Sentencing Guideline’

<<https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf>> accessed 24 October 2023.

³² Ben Crewe, Susie Hulley and Serena Wright, *Life Imprisonment from Young Adulthood: Adaptation, Identity, Time* (Palgrave Macmillan 2020).

³³ Forced Labour Convention, 1930 (n 9); Abolition of Forced Labour Convention, 1957 (n 9).

³⁴ Forced Labour Convention, 1930 (n 9) art. 1.

³⁵ Prison Act 1952; Prisons (Scotland) Act 1989; Prison Act (Northern Ireland) 1953.

³⁶ The Prison Rules (SI 1999 No. 728) r 31; The Prison and Young Offenders Centre (Amendment) Rules (Northern Ireland) (SI 1995 No. 264) r 51.

³⁷ The Prisons and Young Offenders Institutions (Scotland) Rules (SSI 2011 No. 331) r 81(2).

³⁸ *Ibid.* r 86.

³⁹ HM Prison & Probation Service and Ministry of Justice, ‘Paying Prisoners for Work and Other Activities (PSO 4460)’ <<https://www.gov.uk/government/publications/paying-prisoners-for-work-and-other-activities-pso-4460>> accessed 22 July 2022.

⁴⁰ Maycock and McGregor (n 28) 5.

minimum wage of £11.44 per hour for workers aged 21 and over,⁴¹ with one exception: work done by prisoners on day release in England & Wales. In this case, employers pay at least the minimum wage to the Prison Service; the law provides that prison governors may deduct the net (i.e. post-tax) wage by up to 40%. Though the amount and purpose of these deductions are constrained by statute, they are discretionary and are not always made.⁴²

Wages are the only direct incentive for working: there is no earned remission of the sentence. Wage rates are responsive not only to merit, skill, or aptitude, but also compliance: behavioural incentives schemes include opportunities to earn higher pay, and the best-paid work is available preferentially to prisoners with higher earned privilege classifications.⁴³ Participation is therefore secured as much via incentives as via sanctions because work is the only way to pay for basic goods or phone credit without financial support from outside. In law, however, work remains compulsory:⁴⁴ prisoners can be penalised for not working, unless they are held pre-trial, past the statutory retirement age, or are medically certified as unfit.⁴⁵

Working conditions

Courts have repeatedly upheld the principle that prisoners are not employees and hence are not protected by employment law.⁴⁶ The Prison Rules and associated policies nevertheless mimic some basic protections for working conditions, for example by limiting working hours. Most other regulations relate to occupational health and safety, in which the Prison Service follows a policy of observing all relevant legal provisions.⁴⁷ However, this is a matter of policy: prisoners, who are not employees, do not have rights as such under the Health and Safety at Work Act 1974. This means that litigation for injuries at

⁴¹ Correct as of April 2024, see 'National Minimum Wage and National Living Wage Rates' (GOV.UK) <<https://www.gov.uk/national-minimum-wage-rates>> accessed 28 February 2024.

⁴² The Prisoners' Earnings Act 1996 specifies what purposes deductions may be made for; for further detail on implementation, see HM Prison & Probation Service and Ministry of Justice, 'Prisoners' Earnings Act 1996 (PSI 76/2011)' <<https://www.gov.uk/government/publications/deducting-money-from-prisoner-wages-psi-762011>> accessed 16 September 2022.

⁴³ Ministry of Justice and HM Prison & Probation Service, 'Incentives Policy Framework' para 5.39-5.40 <<https://www.gov.uk/government/publications/incentives-policy-framework>> accessed 18 November 2022.

⁴⁴ The Prison Rules (SI 1999 No. 728) (n 37); The Prison and Young Offenders Centre (Amendment) Rules (Northern Ireland) (SI 1995 No. 264) (n 37); The Prisons and Young Offenders Institutions (Scotland) Rules (SSI 2011 No. 331) (n 38).

⁴⁵ In which case they may opt not to work and will receive "retirement pay" of £3.25 per week.

⁴⁶ Virginia Mantouvalou, 'Captive Workers', *Structural Injustice and Workers' Rights* (Oxford University Press 2023); see also Hugh Collins, 'Prison Work and the Right to Fair Pay' in this special issue.

⁴⁷ e.g. National Offender Management Service and Ministry of Justice, 'Health and Safety Arrangements for Workplace Inspection: PSI 36/2015' <<https://webarchive.nationalarchives.gov.uk/20200701105739/http://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-36-2015-hands-workplace-inspection.pdf>> accessed 18 November 2022.

work can only be pursued on the basis that the prison owes prisoners a general duty of care, and must demonstrate the prison's negligence.⁴⁸

In some prisons, prison labour is used on contracts from public, private, and voluntary sector clients. Wages are supplemented by the customer, usually exceeding the ordinary prison wage but still falling far below the national minimum. The ILO has long criticised the UK government in relation to prison labour in contracts workshops, and all prison work in privately-operated prisons.⁴⁹ Its position is that if this work is done compulsorily and on terms and conditions not 'approximating' those available to free workers,⁵⁰ then it is illegal forced prison labour; the UK government demurs, arguing that this interpretation constrains innovation and prevents training opportunities being offered to prisoners via prison workshops,⁵¹ and that contracted-out prisons should not be treated as private contractors for the purposes of ILO convention law.

In sum, UK law on prison work is highly pragmatic, declining to set clear aims and leaving much to policy and local discretion. The result is a complex patchwork of provision, varied in relation to prison function and to local management priorities.

3.1.2 Prison work in practice

Official data publications on prison work are limited, and do not facilitate a clear overview. Published figures describing prison work in Northern Ireland and Scotland are limited to incomplete snapshots via freedom of information (FOI) requests.

Data published for England & Wales is incomplete, discontinuous, and describes only prison labour (as we define it in section 1 above). The publication of data ceased in 2020 and has not resumed.⁵² From a starting point of 10,500 in 2014/15 (12.2% of the E&W prison population in that year), the number grew to 12,500 in 2019/20 (15.5%). The average working week, calculated over this entire period, was 27 hours. Sales figures show that, between 2018 and 2021, over three quarters of contracts by value covered "general assembly and packing", "recycling", or "laundry" work.⁵³ Contracts work was unevenly distributed, concentrating mostly in men's prisons holding populations close to release,

⁴⁸ This reverses the burden of proof usually applied to claims by employees; see Jon Vagg and Ursula Smartt, 'England and Wales' in Dirk van Zyl Smit and Frieder Dünkel (eds), *Prison Labour: Salvation or Slavery? International Perspectives* (reissued ed.), (Routledge 2018), 51..

⁴⁹ Milman-Sivan and Sagy (n 12). Contracts workshops are production facilities available for production work to be done on contracts from third parties.

⁵⁰ 'Approximation' would almost certainly involve the payment of the minimum wage.

⁵¹ International Labour Organisation (ILO), 'Observation (CEACR) - Adopted 2020, Published 109th ILC Session (2021), Forced Labour Convention, 1930 (No. 29) - United Kingdom of Great Britain and Northern Ireland (Ratification: 1931), Protocol of 2014 to the Forced Labour Convention, 1930 - United Kingdom of Great Britain and Northern Ireland (Ratification: 2016)' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:4059792.> accessed 22 May 2023.

⁵² Publication ceased during the Covid-19 pandemic and has not resumed. The figures are not broken down by gender or prison type.

⁵³ New Futures Network, 'Resources' (New Futures Network, n.d.) <<https://newfuturesnetwork.gov.uk/resources/>> accessed 5 April 2023.

and being largely absent from women's and remand prisons. Contracts work varies in terms of the skill and hours involved, but a substantial part—particularly the 46% of contracts by value which are marked as “general assembly and packing”⁵⁴—is unskilled and would probably (if paid at minimum wage) be uneconomical.⁵⁵ Generally, prison labour is paid better than other prison work, though governors sometimes steeply incentivise necessary but unpopular work performed on a small scale (such as biohazard cleaning). The highest wage described by our informants for England & Wales was £35 per week, for piecework in a contracts workshop.

England & Wales also publishes data describing the work done by prisoners on day release. An average of 305 performed this form of work in 2011/12—around 0.4% of the then prison population. This proportion remained roughly consistent until around 2018/19, before growing since then, reaching 1,088 or 1.2% of the prison population in 2022/23. Work on day release receives at least the national minimum wage, which is paid to the prison and then subject to deductions as described in section 3.1.1 above.

That data is published only on prison labour (as we define it in section 1) is puzzling, since most prison work involves ‘domestic’ or ‘prison housework’ tasks relating to prison functioning (such as cleaning and catering). A government strategy in 2018 estimated that over 13,000 prisoners performed such tasks in 2016, against the 11,000 active in prison industries at the same time.⁵⁶ The government told Parliament in 2023 that it did not hold data centrally to compile equivalent figures to these, nor to describe the wages paid for different kinds of prison work.⁵⁷ Wages appear to vary widely, according to local discretion:⁵⁸ a 2018 FOI request showed (for example) that wing cleaners in eight prisons earned wages ranging between £5.40 and £13.50 per week, while kitchen workers received between £7 and £21.84 per week.⁵⁹ Recent policies have sought to make ‘prison housework’ improve prisoners’ longer-term employability by offering accredited

⁵⁴ Ibid.

⁵⁵ Based on interviews with expert informants.

⁵⁶ ‘Reform - Prisons Data - Justice Data’ (GOV.UK | Justice Data) <<https://data.justice.gov.uk/prisons/prison-reform>> accessed 6 December 2023. The basis of the first estimate was not further explained.

⁵⁷ Ministry of Justice, ‘Prisoners: Employment | Question for Ministry of Justice UIN 146987, Tabled on 17 February 2023’ (UK Parliament, 27 February 2023) <<https://questions-statements.parliament.uk/written-questions/detail/2023-02-17/146987>> accessed 23 March 2023; Ministry of Justice, ‘Prisoners: Pay | Question for Ministry of Justice UIN 146988, Tabled on 17 February 2023’ (UK Parliament, 27 February 2023) <<https://questions-statements.parliament.uk/written-questions/detail/2023-02-17/146988>> accessed 23 March 2023; Ministry of Justice, ‘Prisoners: Pay | Question for Ministry of Justice UIN 146989, Tabled on 17 February 2023’ (UK Parliament, 27 February 2023) <<https://questions-statements.parliament.uk/written-questions/detail/2023-02-17/146989>> accessed 23 March 2023.

⁵⁸ Prison governors determine wage rates from a fixed budget, according to local need; see HM Prison & Probation Service and Ministry of Justice (n 40); on incentives schemes, see Ministry of Justice and HM Prison & Probation Service (n 44).

⁵⁹ Freedom of Information response from Ministry of Justice, ‘Freedom of Information Act (FOIA) Request – 180923005’ (19 October 2018) <https://www.whatdotheyknow.com/request/prisoner_wages/response/1252372/attach/3/FOI%20180923005%20Full%20Disclosure.pdf?cookie_passthrough=1> accessed 7 February 2024.

qualifications for prisoners performing tasks of this kind, for example in prison kitchens.⁶⁰ However, these initiatives are delivered by external providers using external funding,⁶¹ and not always as core provision via prison budgets. Recent policy has also focused prominently on increasing the number of ex-prisoners in work six weeks after release. This has led to investment in employment hubs in resettlement prisons,⁶² and funding to foster links between them and local employers.⁶³

Scotland and Northern Ireland have followed similar paths, and there are prison workshops doing contracts work in both countries.⁶⁴ Some prisoners in Scotland and Northern Ireland do leave prison to work on day release, but they are not paid the minimum wage (with deductions) because relevant legislation has not been implemented.

Overall, the UK picture is patchy, locally variable, lacks detail, and it appears recently that prison overcrowding risks compromising earlier policy progress.⁶⁵ Though figures are incomplete and difficult to obtain, it appears that substantial numbers of UK prisoners—perhaps as many as half—do not work. Wages are well below those in the outside world, but appear to incentivise participation effectively, so that penalties are not generally used.⁶⁶ Prison labour is typically paid more, and concentrates in lower-security ‘resettlement prisons’. Elsewhere, prison work is used to support institutional functioning and prison order, with ‘preparation for release’ left until late in the sentence.

3.2 The United States

3.2.1 Legal basis

Prison regimes and progression

The US is known for ‘mass’ imprisonment, but state prison populations have been declining since around 2010, while remaining high by global standards. They have also followed a process of ‘bifurcation’,⁶⁷ whereby places in state prisons are increasingly reserved for

⁶⁰ Ministry of Justice, *Education and Employment Strategy* (n 1); Ministry of Justice, *Prisons Strategy White Paper* (The Stationery Office 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038765/prisons-strategy-white-paper.pdf> accessed 22 July 2022.

⁶¹ The Clink Charity, ‘The Clink Charity Announces the Launch of Clink Kitchens’ (The Clink Charity, 23 February 2021) <<https://thelinkcharity.org/news/the-clink-charity-announces-the-launch-of-clink-kitchens>> accessed 29 February 2024.

⁶² i.e. prisons which release substantial numbers of prisoners; the obverse is that links to employment are not promoted in long-term or high-security prisons.

⁶³ Ministry of Justice, *Prisons Strategy White Paper* (The Stationery Office 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038765/prisons-strategy-white-paper.pdf> accessed 22 July 2022.

⁶⁴ Based on interviews with expert informants.

⁶⁵ Based on interviews with expert informants.

⁶⁶ Based on interviews with expert informants.

⁶⁷ Christopher Seeds, ‘Bifurcation Nation: American Penal Policy in Late Mass Incarceration’ (2017) 19 *Punishment & Society* 590.

people serving long (often indeterminate) sentences for violent offences.⁶⁸ Non-violent offences are handled increasingly at the local or county level, sometimes via non-carceral alternatives.⁶⁹ In many states, the state prison population (which our work focuses on) increasingly comprises people in the first group.⁷⁰ This is important for prison work, because it means prisoners are often a) incarcerated for extremely long, and often indefinite, periods; b) released conditionally if at all, and often when elderly; and c) under parole conditions which may threaten recall to prison for those who do not find or sustain work. This holds ex-prisoners near the bottom of the employment market.⁷¹

Key legal provisions

The US has ratified only one of the ILO's Forced Labour Conventions.⁷² Thus it has committed to abolish forced or compulsory labour only if it is imposed as punishment in five specified circumstances,⁷³ not in *any* circumstances. US constitutional and domestic law carries more weight in this regard. The Thirteenth Amendment to the US Constitution abolished slavery and involuntary servitude, *except* as punishment for a crime. Because of the exception, prison administrators—barring in states which have abolished it in their state constitutions—can implement compulsory prison work at their discretion. Work is therefore mandatory in most American prisons, and the failure to work if directed to do so is a disciplinary offence which can result in sanctions, including the loss of property or earned privileges, confinement to cells, and the loss of contact with family.⁷⁴

Federal law regulating the *purposes* and *aims* of prison work is limited, so any guidance derives from the purposes of punishment itself. The Eighth Amendment to the US Constitution requires that punishment not be “cruel and unusual”, but this does not entail clear positive aims. Sentencing law is markedly retributive, and likewise does not specify aims for imprisonment or for prison work. In Arizona, the law aims only to allocate

⁶⁸ Ashley Nellis, ‘No End in Sight: America’s Enduring Reliance on Life Imprisonment’ (The Sentencing Project 2021) <<https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>> accessed 27 May 2021; Task Force on Long Sentences, ‘Long Sentences by the Numbers’ (2022) <<https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/>> accessed 22 March 2023.

⁶⁹ Carceral institutions in the US are divided into *jails*, operated by local and municipal authorities, which handle people imprisoned pending trial alongside people imprisoned for short periods following a misdemeanour conviction; and *prisons*, which are operated by states and hold only sentenced prisoners convicted of more serious felony offences.

⁷⁰ Most examples we give below of state law and policy relate to the states on which we have focused: Arizona, California, and Texas.

⁷¹ Augustine (n 25); Zatz, ‘The Carceral State at Work’ (n 25); Hatton (n 25).

⁷² The federal government has declined to proceed with ratification because to do so would bring compulsory work in privately-operated prisons into legal jeopardy. See US Council for International Business, ‘Issue Analysis: U.S. Ratification of ILO Core Labor Standards’ 8 <https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf> accessed 26 April 2023.

⁷³ Abolition of Forced Labour Convention, 1957 (No. 105) (n 9) art. 1.

⁷⁴ American Civil Liberties Union, ‘Captive Labor: Exploitation of Incarcerated Workers’ (American Civil Liberties Union 2022) 49–50 <https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf> accessed 19 July 2022.

punishment proportionately to the seriousness of the offence;⁷⁵ California and Texas both list multiple aims but do not indicate how work in prison is to contribute.⁷⁶ In any case, 90% of sentences in the US are set not by courts, but via plea bargains;⁷⁷ rehabilitative aims (including for work) are left to correctional authorities to work out. State law tends to present work as an end, not a means to an end.⁷⁸

Although federal employment law does not specifically exempt prison work from its protections, federal courts have consistently declined to extend employment protections to imprisoned workers.⁷⁹ These protections include the right to a minimum wage and a 40-hour working week,⁸⁰ the right to associate and form trade unions,⁸¹ the right to decline dangerous work,⁸² the right to protection against occupational hazards,⁸³ and (in some parts of the US) to protection against discrimination in the allocation of work.⁸⁴

49 states operate state-owned prison industries corporations, which manufacture and supply goods only for consumption by public-sector customers.⁸⁵ It is also common, in many states, for prisoners to be assigned work on public works projects outside prison perimeters, including firefighting, disaster response, groundskeeping, and janitorial work for state and municipal agencies. Private companies use prison labour on a small scale, and federal law has restricted the sale of prison-made goods across state borders since the 1930s. Reforms initiated in 1979 created a certification scheme whereby companies can use prison labour if they pay the relevant minimum wage, but this scheme operates on a

⁷⁵ Arizona Revised Statutes §13-701.

⁷⁶ Texas Penal Code § 1.02; California Rules of Court: Title Four Rule 4.410.

⁷⁷ In plea bargains, prosecutors offer defendants reduced charges or a lesser penalty to incentivise a guilty plea. Some nations prohibit or limit their use, and their prominence in US criminal justice is controversial. For an overview, see Ram Subramanian and others, 'In the Shadows: A Review of the Research on Plea Bargaining' (Vera Institute of Justice 2020) <<https://safetyandjusticechallenge.org/resources/in-the-shadows-a-review-of-the-research-on-plea-bargaining/>> accessed 29 February 2024.

⁷⁸ Arizona Revised Statutes §31-251(D).

⁷⁹ For overviews, see Matthew J Lang, 'The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers' (2002) 5 University of Pennsylvania Journal of Labor and Employment Law 191; Noah D Zatz, 'Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships' (2008) 61 Vanderbilt Law Review 857; Patrice A Fulcher, 'Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates' (2015) 27 Journal of Civil Rights and Economic Development 679.

⁸⁰ U.S. Department of Labor, 'Wages and the Fair Labor Standards Act' (U.S. Department of Labor, no date) <<https://www.dol.gov/agencies/whd/flsa>> accessed 5 October 2022.

⁸¹ Tryon P Woods, 'Review of From Black Power to Prison Power: The Making of Jones v. North Carolina Prisoners' Labor Union' (2013) 47 Law & Society Review 455.

⁸² 'Workers' Right to Refuse Dangerous Work | Occupational Safety and Health Administration' <<https://www.osha.gov/workers/right-to-refuse>> accessed 12 February 2024.

⁸³ Occupational Safety and Health Administration, 'Standard Interpretation: OSHA Does Not Have Jurisdiction over State Employees or Inmates' (United States Department of Labor | Occupational Safety and Health Administration, 16 December 1992) <<https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1>> accessed 5 October 2022.

⁸⁴ Jackson Taylor Kirklin, 'Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons' (2011) 111 Columbia Law Review 1048.

⁸⁵ American Civil Liberties Union (n 75) 97-101.

tiny scale.⁸⁶ Since federal restrictions apply only to inter-state trade, some states, including Arizona, have opted instead to hire prisoner labour out to companies headquartered within the state.⁸⁷ The hiring of prison labour by state and municipal authorities is largely unrestricted, and is common in many states.⁸⁸

Pay, sanctions, and incentives

Prison work in seven states, all in the South, is almost or entirely unpaid.⁸⁹ In Texas, for instance, the only incentive for working comes via credits: reductions in sentence length which accrue for each day of work, at different rates depending on the prisoner's classification by "conduct, obedience and industry".⁹⁰

In states where prison work is paid, prison wages fall well below prevailing minimum wages. Structured incentive schemes also apply. Arizona, for instance, classifies jobs as "unskilled", "semi-skilled" and "skilled", determining wages according to a matrix which cross-references the job with the prisoner's classification in an incentive scheme.⁹¹ Similar arrangements are specified by state law across the US; credits are typically offered at a rate proportional to each day of work completed, but accrue differentially according to incentive schemes. The full range of incentives is not available to all: for example, the 32% of sentenced prisoners in California who are serving life sentences cannot earn remission credits,⁹² and exclusions based on sentence or offence type are common.

Meanwhile, the best-rewarded and most skilled work is restricted to select groups, with only some restrictions relating to aptitude or qualifications (for example, via literacy requirements). For example, Californian prisoners serving life-without-parole (LWOP) sentences and those more than five years away from an earliest release date are ineligible for state prison industries jobs.⁹³ Similarly, in Arizona, foreign nationals and people convicted of some violent or sexual offences are ineligible for better-rewarded prison work,⁹⁴ including work done outside prisons.

⁸⁶ Ray Marshall, 'Industrial Relations and Inmate Labor' (2001) Proceedings of the Industrial Relations Research Association 339.

⁸⁷ Joseph Darius Jaafari and others, 'Arizona Changed How It Sells Prisoners to Companies. The State Raked in Millions, but Workers Were Neglected' *Arizona Republic* (Phoenix, AZ, 18 July 2022) <<https://www.azcentral.com/in-depth/news/local/arizona-investigations/2022/07/18/arizona-rakes-in-millions-from-prison-labor/9724295002/>> accessed 4 October 2022.

⁸⁸ American Civil Liberties Union (n 75) 30-31.

⁸⁹ The states are: Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina, Texas.

⁹⁰ Texas Gov't Code § 498.003.

⁹¹ Arizona Department of Corrections, Rehabilitation & Reentry, 'Department Order 903: Inmate Work Activities' para 2.3 <<https://corrections.az.gov/sites/default/files/documents/policies/900/0903.pdf>> accessed 21 February 2023.

⁹² California Penal Code § 2933.

⁹³ California Department of Corrections & Rehabilitation, 'CDCR Operations Manual' para 51121.4.1 <https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2022/03/CDCR-DOM_2022.pdf> accessed 21 February 2023.

⁹⁴ Arizona Department of Corrections, Rehabilitation & Re-entry (n 92) 4.

Working conditions

Federal and state law do not consistently apply the international human rights standards requiring working hours and health and safety protections not to be worse than those in the wider economy,⁹⁵ and in practice, protections are few. Accidents and injuries are unevenly reported; research by the American Civil Liberties Union (ACLU) documents examples of serious injuries sustained by working prisoners, based on media reports and litigation.⁹⁶ Given the many barriers to litigation, cases which reach the courts will represent the tip of the iceberg, but reliable overview figures are lacking.⁹⁷ Some states offer more protections against injury than others: California is among the states which allow prisoners to claim from workplace injury compensation schemes, whereas Texas explicitly excludes prisoners from *all* protections under its Labor Code.⁹⁸

Summing up, the law in US states generally requires prisoners to work in whatever programmes, roles, and conditions they are assigned to, unless prison authorities determine that they are unfit or unsuitable;⁹⁹ those who decline can face formal sanctions. Some states (including Colorado, Nebraska and Utah) do *not* require compulsory work, having abolished the slavery exception in their state constitutions, but they are the exception.

3.2.2 Prison work in practice

A 2022 estimate by the ACLU, based on a nationally representative prisoner survey, put the proportion of prisoners who performed some kind of work in prison in 2016 at approximately 65%. At 2021 imprisonment rates, this would mean around 791,500 people worked in custody.¹⁰⁰ Of these, around 80% performed tasks supporting the functioning of prisons—for example, janitorial work, cleaning, catering, prison maintenance, or otherwise helping prisons to function. The ACLU estimated that a further 8% performed public works assignments outside prison walls, for example groundskeeping or janitorial work for states and municipalities. 6.5% worked in state-owned prison industries, around 2.0% in work-release programmes mandated by the sentence, 2.2% in agriculture, and just 0.6% in private-sector prison industries.¹⁰¹

The ACLU estimated that prison wages are lowest for work supporting prison functioning: a low average of \$0.13 and a high average of \$0.52 per hour across states. Wages in prison industries assignments were generally higher, averaging between \$0.30 and \$1.30 per

⁹⁵ Nelson Mandela Rules (n 13) r 101.

⁹⁶ American Civil Liberties Union (n 75) 61–64.

⁹⁷ David C Fathi, 'The Prison Litigation Reform Act: A Threat to Civil Rights' (2011) 24 Federal Sentencing Reporter 260.

⁹⁸ Texas Labor Code § 501.024.

⁹⁹ Arizona Revised Statutes § 31-251; California Penal Code § 2700; Texas Gov't Code § 497.099.

¹⁰⁰ American Civil Liberties Union (n 75) 24. This figure covers only those imprisoned in state and federal *prisons*, not those held in *jails* (which generally hold pre-trial or short-sentenced populations—see n 70), juvenile facilities, or immigration detention.

¹⁰¹ *ibid*, 24–30.

hour.¹⁰² Such wages, then, are far below the applicable federal or local minimum wages.¹⁰³ Most states also deduct them, for a range of reasons: fines, court-ordered restitution payments to victims, taxes, family support, and payments towards the cost of imprisonment. Typically, these deductions are graduated according to the original wage, with deductions at higher rates from higher wages. In most states, prison wages do not count towards unemployment or social security insurance schemes.¹⁰⁴

A recent analysis of data from earlier waves of the survey used by the ACLU, supplemented by interviews with former prisoners and prison administrators, adds important longitudinal detail to this picture, showing how work in state prisons has changed since the 1970s.¹⁰⁵ Most importantly, it suggests that, on average, prisoners now work *less* than ever before, with a greater proportion doing low-paid, low-status, and often short-hours “prison housework”.¹⁰⁶ Simultaneously, prison work has become more unequal: the best-rewarded and most skilled/demanding assignments now pay more, relatively, than in the past. The incentive structures described above offer an explanation: since more favoured assignments are scarce, and allocated based on compliance and satisfactory evaluations, then the work helps incentivise prison order. A steep incentive structure also offers a basis on which to ration more resource-intensive programmes, by allocating them preferentially based on compliance to those seen as most likely to benefit.¹⁰⁷

Two points should be noted in summary. First, prison work functions to subsidise state institutions: for example, where prisoners perform maintenance tasks and reduce operating costs, or produce goods and services (via prison industries) for public-sector consumption, or allow states and municipalities to use cheap or free labour on public works projects. Second, and simultaneously, much of it is inefficient, economically unproductive, and results in underemployment, in ways that would not be possible if prisoners were paid a market wage. Put simply, US prison work offers instances whereby prisoners’ low-waged labour is used to generate private profit. But if anything, the more representative case involves states mobilising prison work to lower the costs of imprisonment. Strong positive aims which would emphasise benefits to prisoners (e.g. that work must pay a minimum wage, or prepare them for release) are lacking.

¹⁰² *ibid* 57–58.

¹⁰³ The federal hourly minimum wage has stood at \$7.25 since 2008. It is not applicable to all forms of work but supersedes local and state minimums for those which are covered. States may set their own hourly minimums, which range between \$5.15 and \$16.28. See ‘Minimum Wage Rates by State 2024’ (minimum-wage.org) <<https://www.minimum-wage.org/wage-by-state>> accessed 9 April 2024.

¹⁰⁴ American Civil Liberties Union (n 75) 58–59.

¹⁰⁵ Adam Reich, ‘From Hard Labor to Market Discipline: The Political Economy of Prison Work, 1974 to 2022’ [2024] *American Sociological Review*.

¹⁰⁶ *Ibid.* 143.

¹⁰⁷ Michael Gibson-Light, ‘Sandpiles of Dignity: Labor Status and Boundary-Making in the Contemporary American Prison’ (2020) 6 *RSF: The Russell Sage Foundation Journal of the Social Sciences* 198; cf. Gibson-Light (n 26).

3.3 Brazil

3.3.1 Legal basis

Prison regimes and progression

Brazil's Penal Code stipulates that prison regimes be classified by security level, and structured to serve the overarching aim of resocialisation.¹⁰⁸ Prisoners can progress through three separate regimes—closed, semi-open and open. Closed regime prisoners are held in maximum or medium security facilities. Semi-open regime prisoners are required to work or attend supervised training or education during the day, either on- or off-premises, but return to the prison at night. The open regime requires prisoners to attend courses, work, or engage in other authorised activities unsupervised, and to stay in hostels (*casas do albergado*) outside working hours.

Initial regime placement is prescribed by the sentencing court and depends partly on sentence length. Sentences of more than eight years *must* begin in the closed regime. Those of between four and eight years generally begin in the semi-open regime; and those of less than four years, in the open regime. Progression is decided by a penal execution judge,¹⁰⁹ based on criteria that vary according to the offence, previous convictions, and conduct in custody.

Undermining the effectiveness of these measures is Brazil's relentless prison population growth, leading to overcrowding and a chronic shortage of prison places in all three regimes. The open regime envisioned by federal law is now largely defunct:¹¹⁰ there are very few hostels, and most prisoners are released instead into 'residential custody'—a system of conditional freedom and (often) electronic monitoring, accounting for around 20% of the sentenced population.¹¹¹ Even progression from closed to semi-open regimes is sometimes substituted by release to 'residential custody', owing to the lack of space in semi-open facilities.

Key legal provisions

Brazil has ratified the ILO's Forced Labour Convention and Abolition of Forced Labour Convention. The federal constitution of 1988 outlawed forced labour as a punishment.

The aims of imprisonment in law are various, and somewhat contradictory. The Penal Code requires sentences to be proportionate to the seriousness of the offence, and to meet the aims of deterrence and retribution. But the federal Supreme Court has held that in addition to these statutory objectives of punishment, 'its resocializing character cannot be forgotten, and the State should therefore be concerned with rehabilitation of the convict'.¹¹²

¹⁰⁸ Código Penal.

¹⁰⁹ A member of the judiciary, not of prison staff.

¹¹⁰ A Nunes, *Comentários à lei de execução penal* (Grupo Gen-Editora Forense 2016).

¹¹¹ 'Dados estatísticos do sistema penitenciário (SISDEPEN)' (Secretaria Nacional de Políticas Penais) <<https://www.gov.br/senappen/pt-br/servicos/sisdepen/sisdepen>> accessed 29 February 2024.

¹¹² *Supremo Tribunal Federal – Habeas Corpus no 107701 – Relator Ministro Gilmar Mendes, DJe 23/06/2012.*

The Penal Code structures regimes and progression, but most law on prison work derives from the federal Penal Execution Law ('LEP'),¹¹³ which requires every sentenced prisoner to work to the extent of their capacity and aptitude, and states that 'work must have an educational and productive purpose'. Allocation of work, and its remuneration, are listed as specific rights of all prisoners alongside essentials such as food and communication with the outside world. Beyond these broad criteria, there is no statutory definition of prison work.

Pay, sanctions, and incentives

Working prisoners must be paid no less than three-quarters of the national statutory minimum wage, currently 1,212 reais per month.¹¹⁴ Deductions can be made for reparation or restitution for victims; family support; and to reimburse state expenses in maintaining the prisoner. Prisoners may access what is left to meet personal expenses in prison, with any remainder transferred to them on release.

A further entitlement—and, given the uneven implementation of the minimum prison wage, perhaps the major incentive for working—is sentence remission. Prisoners in closed or semi-open regimes are entitled to remission of one day of their sentence for every three days worked.¹¹⁵ This operates as an incentive for overcrowded prison systems to provide work to as many prisoners as possible. Refusal to work can result in sanctions, including being held in isolation or denied progression to a less secure regime. In practice, however, the scarcity of work and competition for assignments means this rarely happens.

Working conditions

The LEP excludes working prisoners from national employment legislation, but prison working conditions must be safe and hygienic. Prisoners are required to work for between six and eight hours per day, excluding Sundays and public holidays; but those engaged in maintaining prison establishments may have to work different hours.

Prisoners who work in the closed regime must either do so inside the establishment, or on public works projects outside it (e.g. building roads or public hospitals, in which case the work can be managed by private entities on state contracts).

Federal, state and municipal governments may contract with the private sector to establish workshops, including as necessary to maintain the prison itself. The provision of labour to any private entity requires the prisoner's express consent.

As with the regime progression laws, prison population growth has rendered many of the LEP's aims and protections inoperative. When it came into force, the total prison

¹¹³ Lei de Execução Penal s 7.210.

¹¹⁴ Because of past periods of rampant inflation, salaries in Brazil are expressed not as fixed annual sums, but as multiples of the minimum wage (*salário mínimo*). Nearly two-thirds of the working population earn two minimum salaries or less. The minimum pay rules for prison work do not apply where prisoners perform tasks as a service to the community. The current minimum corresponds to around US\$245 as at March 2024.

¹¹⁵ The same applies to prisoners who engage in educational or training activities.

population stood at around 88,000. Today, it is around 840,000.¹¹⁶ Investment and staff recruitment have not kept pace with numbers. As a result, containing unrest, violence and criminality, rather than providing work, is the first priority for many prisons—especially larger, higher-security facilities.

3.3.2 Prison work in practice

Numbers working

Increasing the number of prisoners working and receiving training has been a major federal policy focus since at least 2009, with the *Começar de Novo* (New Start) programme, which also aimed to incentivise private sector involvement. In 2012, the first significant federal programme, PROCAP,¹¹⁷ funded state prison departments to establish prison production facilities in sectors including civil construction, food processing, technology, agriculture, and recycling. Further initiatives have followed: for example, the 2018 national prison work plan, which encourages states to give subsidies or tax incentives to private companies which hire prisoners or prison-leavers.¹¹⁸ In 2021 the federal government committed to increasing the number of prisoners engaged in work by 185% by 2030.¹¹⁹

All prisons are expected to record data on the numbers of prisoners working and on their remuneration; figures are aggregated by a federal body, SENAPPEN, which publishes them biannually.¹²⁰ We understand that inconsistencies may exist around whether prison maintenance jobs are counted as work—and that some states may deploy remission-for-work as a tool to control prison overcrowding.¹²¹

In June 2023, the number of prisoners in physical custody reported as working was 154,531—around 24%.¹²² Of these, around 80% worked inside prisons and 20% outside. SENAPPEN's data show considerable variation by state. Maranhão currently has top ranking with 64% of prisoners working, compared to 34% in Santa Catarina and under 20% in São Paulo. Population composition is a key factor: fewer prisoners work where (as in São Paulo) larger proportions are held pre-trial. Also significant is the type of establishment: higher rates of engagement are seen in 'colônias agrícolas' and 'colônias industriais' (agricultural or industrial colonies), facilities designed around production which are often semi-open, and do not exist in every state.

The types of work offered, and whether partnerships are formed mainly with public or private sector organisations, also varies regionally (as does pay: see 'Remuneration' below). Unlike São Paulo and Santa Catarina in the more prosperous south, Maranhão is

¹¹⁶ ICPR, 'Brazil | World Prison Brief' (World Prison Brief) <<https://www.prisonstudies.org/country/brazil>> accessed 29 February 2024.

¹¹⁷ 'Programme for Professional Training and Implementation of Permanent Workshops'.

¹¹⁸ Federal Decree No. 9.630/2018

¹¹⁹ Federal Decree No. 0.822/2021

¹²⁰ 'Dados estatísticos do sistema penitenciário (SISDEPEN)' (n 111).

¹²¹ Based on expert informant interviews.

¹²² That is, excluding people still subject to a sentence of imprisonment but who are in 'residential custody', most likely having progressed to the open regime stage.

less industrialised, with very few companies using prison labour. Most prison work there is for the public sector: for example, producing school uniforms and desks for the state education department or hexagonal blocks to pave urban pedestrian areas.¹²³ Santa Catarina, by contrast, is highly industrialised, and private companies engage substantial numbers of imprisoned workers. This affords them political clout: when the state legislated in 2021 to require its commercial partners to pay energy and water costs at prison production sites, many abruptly withdrew from these partnerships in response, causing the state to rescind the law.¹²⁴

Remuneration

Official data reveal that many working prisoners receive either no pay, or less than the statutory minimum mandated by the LEP. Over 67,000 prisoners (or 43%) received only sentence remission for working in June 2023. 26,300 were paid an amount below the legal minimum, while just over 34,000 earned above this level.¹²⁵ Again, state-level variation is significant: in Maranhão 74% of working prisoners received no remuneration, only remission; in Santa Catarina and São Paulo the proportion was 10% and 12% respectively.

4 Discussion

Comparison of the different countries described in this article reveals some striking contradictions and similarities. We now move to discussing these, in relation to three themes.

4.1 Purposes of prison work

Our first observation relates to the stated purposes of prison work in law. Brazil, alone among the countries we examine, specifically states a rehabilitative purpose for prison work. “Educative and productive purposes” are prioritised, and promoted “as a condition of social dignity”.¹²⁶ Also uniquely, national law includes the right to allocation of work among prisoners’ basic rights, and entitles working prisoners to receive a proportion of the national minimum wage, though this entitlement is not fully realised. UK law requires only that prison work be ‘useful’, and of a kind directed by the government; US state and federal law generally does not direct clear aims for prison work, leaving this instead to correctional agencies. US constitutional law offers normative cover for work imposed *as* punishment; and both the UK and the US organise some forms of work to prepare prisoners for release, tending to do so for pragmatic reasons and to offer these opportunities only to some prisoners.

¹²³ Secretaria Nacional De Informações Penais (SENAPPEN), ‘Relatório de informações penais (RELIPEN) - 1º semestre 2023’ (SENAPPEN) 2023) 47ff <<https://www.gov.br/senappen/pt-br/servicos/sisdepen/relatorios/relipen/relipen-1-semester-de-2023.pdf>> accessed 29 February 2024.

¹²⁴ Information provided during expert interviews.

¹²⁵ ‘Dados estatísticos do sistema penitenciário (SISDEPEN)’ (n 111).

¹²⁶ ‘Lei de Execução Penal’ (n 113).

4.2 Operational issues and incentives

A second comparative observation relates to operational and policy priorities, which powerfully shape the provision of work opportunities regardless of formal legal aims. In Brazil, chronic prison overcrowding has been a long-standing challenge, and managing prison space among the most pressing concerns for penal practitioners. In overcrowded, inactive closed-regime prisons, internal prison governance has been ceded to prison gangs or ‘factions’. In some states, such conditions have produced riots and massacres, for example in Maranhão in 2014. Even if wages are not paid (though prisoners are entitled to them), the entitlement to remission is both an effective incentive for prisoners, and an effective means by which to ease overcrowding by accelerating progression through the system. The development of a large-scale public-sector-led public works programme via prison workshops can best be understood in this context.

Some US states remain committed to large-scale prison labour schemes organised ‘in-house’. Texas, for instance, operates large-scale agribusinesses and state prison industries which produce food, clothes, and other goods for consumption within prisons and the wider public sector.¹²⁷ These occupy prisoners and defray costs, but some lose money and have been criticised for their expense compared to procurement via the open market,¹²⁸ and would certainly cease to be viable if prisoners working in were paid. Revenue-boosting, meanwhile, was a major factor driving Arizona’s reorientation of its prison industries programmes towards hiring prisoners’ labour to external parties, rather than operating production efforts ‘in-house’.¹²⁹

Other US states—and the UK—operate a more ‘mixed economy’, in which engaging prisoners in activity is a relatively high priority, but ensuring that this activity is economically productive work is less so. Low-risk prisoners are permitted to leave prison daily to work and to earn a ‘normal’ wage with deductions, and private-sector contracts are taken on to raise revenue where this is practical and investment can be made, but many prisoners appear not to work, and inactivity, not exploitation, is the norm. It is telling that (for example in both California and England & Wales) policymakers vaunt the vocational training and qualifications offered by programmes available to a select few, but publish less data on the large and indistinct mass of inactivity and ‘prison housework’ which is the reality for rather more prisoners.

¹²⁷ Texas Department of Criminal Justice, ‘Manufacturing, Agribusiness and Logistics Division | Facilities and Operations’ (Texas Department of Criminal Justice, -?) <https://www.tdcj.texas.gov/divisions/mal/fac_oper.html#tci> accessed 30 January 2023.

¹²⁸ Lisa R Collier, ‘An Audit Report on Agribusiness at the Department of Criminal Justice’ (Texas State Auditor’s Office 2021) Audit report 21-016 <<https://sao.texas.gov/Reports/Main/21-016.pdf>> accessed 20 February 2023; Keri Blakinger, ‘Some Prison Labor Programs Lose Money — Even When Prisoners Work for Pennies’ <<https://www.themarshallproject.org/2021/09/02/some-prison-labor-programs-lose-money-even-when-prisoners-work-for-pennies>> accessed 4 October 2022.

¹²⁹ Jaafari and others (n 88).

What is notable throughout is an inherent tension: between prioritising activities which *occupy prisoners in prison*, and those which *prepare them for work after release*; or put differently, a tension between in-prison and post-prison outcomes.

4.3 The role of outside organisations and markets

This leads to a third observation: much depends on local political economy, and particularly the role of market logics in prison work provision. In the US, where statistics permit the longest view on the issue, work opportunities as currently offered discipline prisoners into conformity with an unequal and highly exclusionary employment market: the behaviours incentivised relate to competitiveness, compliance with expectations, and rewards for taking whatever employment is on offer,¹³⁰ and these market logics pervade both work provision within the public sector, and work provision involving partnerships with outside organisations. Ethnographic research offers glimpses of the subcultural hierarchies which prisoners construct under these conditions, showing that they are based on the virtues of working hard within such a system.¹³¹

The shortage of available data means we cannot trace the issue over the same periods of time in the other countries we examine. But while the current US position is not inconsistent with parts of the UK and Brazil, it differs from others. In England & Wales and (to a lesser extent) Scotland, prison labour partnerships with outside organisations are mobilised to steepen the incentives—training, qualifications or pay—which can be offered to those who have ‘earned’ these opportunities through compliance; but these partnerships are offered mainly in lower-security facilities and are patchily available by region. Similarly, private sector partnerships are evident in the highly industrialised, market-oriented Brazilian state of Santa Catarina. But they are largely absent in Maranhão, where the public sector is more economically important, and where large-scale and ostensibly more inclusionary state-building public works projects are prioritised. Thus political economy powerfully shapes the kinds of work opportunity available.

5 Conclusions

History suggests that it is difficult to organise economically productive work in prisons while also sustaining parallel commitments to labour that is not forced, and to meaningfully prepare for release.¹³² There are inherent security and administrative challenges, and anything more than low-skilled work presupposes the political will to invest in addressing prisoners’ typically low educational attainment, and histories of social exclusion. Capital and human investment are prerequisites, and ideally also sources of revenue. Their scarcity, in a context of high imprisonment rates and often overcrowded, dilapidated prisons, means that preparation for release is most often a privilege, ‘earned’

¹³⁰ Reich (n 106).

¹³¹ Gibson-Light (n 26); Gibson-Light (n 108).

¹³² Vagg and Smartt (n 49); Andrew Coyle, ‘The Myth of Prison Work’; Matthew Pehl, ‘Between the Market and the State: The Problem of Prison Labor in the New Deal’ (2019) 16 Labor 77.

by prisoners held in less restrictive forms of custody, where the aforementioned administrative and security challenges are less pronounced.

The involvement of external providers is a necessary if not a sufficient condition for meaningful preparation for release to be offered to more prisoners. However, their involvement is patchy, and many barriers exist. Serendipitous wider market conditions can provide incentives: in the UK, labour shortages relating to Brexit and the pandemic, and in Brazil, labour shortages in highly industrialised regions, have each produced this effect. But where these opportunities are absent or fleeting, incentives such as low wages or tax breaks (as in Brazil's policy framework) may be necessary to secure outside involvement, at least by the private sector.

For most prisoners in all three countries, wages for prison work are far below the minimum wage, regardless of who they work for. This appears exploitative, most strikingly where (as in some US states, or some parts of Brazil) no wage is paid. Sentence remission is often framed—including by human rights courts¹³³—as an acceptable alternative incentive, and may be seen as such by prisoners. But it is not available to all, and in the UK, is not available at all.

ILO protections against exploitation are unsatisfactory,¹³⁴ because their protections against exploitation are premised on a false binary between state and private use; the ILO's requirement that wages for private prison labour must 'approximate' a market wage is openly ignored by some states. International prison standards, which stipulate that work should prepare prisoners for release, require individualised provision and are difficult to operationalise given the scale at which prison systems currently operate. They set norms which are also hard to realise for those whose release is far distant. All of this is consistent with the picture described above, in which only a select few prisoners benefit from more 'normalised' or 'market-like' work opportunities, and then often not through the payment of a 'real' minimum wage.

Reform via major legislative change—for instance, a blanket restoration of the right to a minimum wage for all prison work—is not a straightforward remedy. Given the current scale of prison systems, if all prison labour were paid at the prevailing minimum wage, the resulting monetary cost would likely force prisons to reduce the numbers of prisoners in work, by finding ways to increase productivity among those who remained. This would harm prisoners' short-term interests (and their longer-term ones), and would likely further increase the allocation of the 'best' prison jobs to those already most qualified to do them. Similarly, if all prisoners working in 'prison housework' jobs had to receive 'fair pay', even if below the country's minimum wage, prisons at their current scale would not operate without billions in state support.

¹³³ Dirk van Zyl Smit and Frieder Dünkel, 'Conclusion: Prison Labour - Salvation or Slavery?' in Dirk van Zyl Smit and Frieder Dünkel (eds), *Prison Labour: Salvation or Slavery? International Perspectives* (1st (reissued), Routledge 2018), 340–341.

¹³⁴ Milman-Sivan and Sagy (n 12).

Our analysis suggests that several questions on appropriate legal reforms must be tackled, with attention paid to custodial realities, *as well as* to the nationally and locally specific forms taken by exploitation through low pay. A principled debate—based on an understanding of the ‘adjacent possible’¹³⁵—should focus on several questions. How can current levels of involvement by external parties in providing work opportunities for prisoners can be maintained or expanded? Connectedly, how can these opportunities be better tailored to meet the needs of more prisoner groups—not only those close to release, but also those held in longer-term custody? A third key question, given that human rights standards on imprisonment require ‘equitable remuneration’ without defining this, is how work by prisoners should be rewarded. Is sentence remission alone, and not also a wage, an acceptable reward for work? Should prisoners serving longer sentences be offered remission in lieu of wages, and higher quality or more skills-focused jobs, given that these are currently in short supply and usually offered to those nearer to release? Finally, given that prisoners face fewer living expenses than free workers, what link, if any, ought to exist between prisoners’ wages and rates of pay for similar work outside prison; and what (if anything) can justifiably be deducted?

¹³⁵ Lennart Björneborn, ‘Adjacent Possible’, *The Palgrave Encyclopedia of the Possible* (Springer International Publishing 2020)