

# BLOODY LUCRE: CARCERAL LABOR AND PRISON PROFIT

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The pursuit of profit is inextricably intertwined with America’s system of carceral labor and criminal punishment. Along with the institution of slavery, the harnessing of involuntary carceral labor yielded enormous proceeds through the transformation of human toil into financial gain. Profit incentives have exerted a profound influence on the shape of American carceral labor. From sixteenth-century British convict transportation to twenty-first-century private corrections companies, profitable returns from involuntary carceral servitude have been an important feature of criminal punishment.

This Article traces the coruscating power of the private profit motive within the criminal justice system, one of the first to chart the ways this focus on revenues has shaped the forced toil of those under correctional control. By thoroughly evaluating our carceral history and dissecting the financial currents that have shaped the many forms of involuntary inmate servitude, we will be better able to disentangle how money has influenced and warped our system into one of mass incarceration. A full understanding of our carceral past could help us begin to rechart the course of modern criminal justice, eliminating this kind of involuntary servitude in our system.

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INTRODUCTION: “FOLLOW THE MONEY AND SEE WHERE IT GOES”<sup>1</sup>

The profit motive is inextricably intertwined with America’s system of carceral labor and criminal punishment. Profit incentives have exerted a profound influence on the shape of American carceral labor. This dynamic has held fast through slavery, Reconstruction, the Industrial Revolution, the Great Depression, and the Great Society, continuing through today. The profit motive surfaces in all forms of detention through U.S. history, not only for the convicted but also for the disabled and those who are not citizens.

If profits are a major motivator of American mass incarceration, then carceral labor is one of the primary engines driving the entire enterprise. Along with the institution of slavery, involuntary carceral labor created huge returns by transforming human toil into monetary gain. From

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1. LIN-MANUEL MIRANDA & JEREMY MCCARTER, HAMILTON: THE REVOLUTION 200 (2016).

sixteenth-century British convict transportation to twenty-first-century private corrections companies, involuntary carceral servitude has been a feature of criminal punishment, always with an eye toward revenue. This Article traces the coruscating power effect of profits within the criminal justice system, charting the ways this focus on revenues has shaped the forced toil of those under correctional control.

From a citizen's first interaction with the justice system through their release into the community, profit-seeking is embedded in our modern carceral machine. This particularly American motivation can be tied, in part, to deep-rooted eugenic beliefs still informing our carceral system. For centuries, society has judged those who can work or produce as genetically superior to those who cannot. This belief system undergirds the criminal justice system as well. The Puritan work ethic remains a motivator of criminal process, finding its apogee in involuntary carceral labor: everyone must produce, even while under correctional control. In many ways, our modern version of eugenically driven incarceration<sup>2</sup> is transparent in that today's criminal punishment is sold to private businesses as a way of extracting profit from so-called unproductive "undesirables" through the process of obligatory work.

This Article is the first piece of scholarship to comprehensively detail and trace the role of money-making in carceral labor apart from slavery, from the early colonial period through our current time. By thoroughly evaluating our carceral history and dissecting the financial currents that have shaped the many forms of required inmate labor, we will be better able to disentangle another way lucre influences our system of mass incarceration. A full understanding of our carceral past will help us begin to rechart the course of modern criminal justice, hopefully eliminating this kind of involuntary servitude for good.

This Article proceeds in five parts. Part I details the history of early colonial and American criminal justice, explaining how beginning with the British arrival, profits were always associated with imprisonment and quickly became enmeshed with carceral labor, which was thought to improve men in both body and soul. Part I then moves to the development of early nineteenth-century industrial prisons, which were the first to make carceral labor the primary focus of incarceration, to better extract revenue from the incarcerated.

Part II carefully examines the two very different trajectories between the North and South in post-Civil War carceral labor. This Article contends that in the South, the entrapment of many Black citizens into carceral bondage was equally a function of profit-making as it was of virulent racism. Although many standard historical accounts conclude that the brutal regime of Southern carceral labor ended with convict leasing,

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2. See generally Laura I Appleman, *Deviancy, Dependency, & Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417 (2018).

the Article additionally explores how these practices simply continued under other names, including the chain gang, debt peonage, and penal farms. This Article comprehensively analyzes the entirety of such servitude through the lens of profit. In doing so, it finds that the South's postbellum utilization of deadly carceral labor practices was motivated by an unaltered focus on money-making demanded by the state, the county, the criminal justice system, and innumerable private industries.

Part II additionally scrutinizes the concomitant transformation of northern penal institutions into more modern sites of commerce, relying upon carceral labor to do so. It looks in particular at the growing emphasis on inmate "hard labor," as well as the increasing federal and state interest in extracting revenues from prisons instead of investing in them.

Part III investigates modern-day carceral labor practices in prisons, jails, and alternative correction sites, finding that most inmate work is still designed to create revenues for both government agencies and private businesses, with little thought for or focus on the incarcerated persons themselves. Part III also details how modern-day carceral labor, although less overtly racist and lethal, still exploits the incarcerated for maximum profits.

Part IV analyzes the many complicated ways that laws including federal labor laws, Social Security regulation, tax laws, OSHA, and the Clean Air Act, assist in making corrections a revenue-creating enterprise. In addition, Part IV looks at how the banking industry helps prop up many private companies profiting from inmate labor, making it possible for these businesses to thrive.

Finally, Part V focuses on potential solutions for the carceral labor situation as it currently exists, highlighting the national movement to revise the Thirteenth Amendment to eliminate slavery in all aspects, state abolition amendments, minimum wage floors, and divestment from companies using carceral labor. All of these solutions point to the necessity of eliminating involuntary carceral servitude.

The connection between money, crime, and punishment has a long and sordid history in Anglo-American legal culture.<sup>3</sup> "Moral hazards abound"<sup>4</sup> when we allow profits to dictate criminal punishment, particularly when that punishment requires forced carceral toil for the benefit of state and private industry. It is past time to break the chain of compulsory labor for incarcerated individuals and give them choice, fair wages, and dignity. Eliminating this last vestige of slavery and involuntary servitude is a crucial step toward making the world of criminal justice more just.

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3. See Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 42 (2017).

4. Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (2019).

## I. THE EARLY PRISON AS MAKER OF MONIES AND MEN

The twin motivators of making money and transforming “undesirable” British citizens into hardworking colonials fueled the settlement and development of the American colony. The colonization of North America was undergirded by a belief system rooted in rigid class and hereditary distinctions.<sup>5</sup> These strict hierarchies reflected a landowner-class belief in a permanent lower class, considered the bottom societal layer.<sup>6</sup> From the outset, the American colonies were envisioned as “a place where the surplus poor, the waste people of England, could be converted into economic assets.”<sup>7</sup>

Indeed, British elites imagined the New World, not just Australia, as an immense, uncultivated terrain perfect for resettling England’s poor, homeless, and lawbreakers—the “waste people” who were the dregs of society.<sup>8</sup> By forcibly dispatching their destitute, lawbreaking, and developmentally disabled to the North American continent,<sup>9</sup> the British expressed their vision of colonial America as “one giant workhouse.”<sup>10</sup> Not only would transporting these “undesirables” rid England of them, but America would also provide a space to, at best, transform them into productive workers.<sup>11</sup> In a colonial society that valorized hard work, good breeding, and productivity, those who could not contribute by working were doomed to a lifetime of being contained, separated, and controlled.<sup>12</sup>

## A. Transportation

The exiling of British citizens for purposes of criminal punishment and carceral labor began as early as 1606, dovetailing with the Virginia colony’s need for bodies to work the land.<sup>13</sup> Using convicts for such purposes not only allowed the American colonies to thrive and produce revenue, but also provided, in the eyes of the Crown, a tidy and convenient

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5. Appleman, *supra* note 2, at 425.

6. See NANCY ISENBERG, WHITE TRASH: THE 400-YEAR OLD UNTOLD HISTORY OF CLASS IN AMERICA 102 (2016).

7. *Id.* at 121.

8. *Id.*

9. See generally J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 470–83 (1986) (discussing British transportation prior to the 1718 Transportation Act).

10. ISENBERG, *supra* note 6, at 21.

11. *Id.*

12. Appleman, *supra* note 2, at 426.

13. See PETER WILSON COLDHAM, EMIGRANTS IN CHAINS: A SOCIAL HISTORY OF FORCED EMIGRATION TO THE AMERICAS OF FELONS, DESTITUTE CHILDREN, POLITICAL AND RELIGIOUS NON-CONFORMISTS, VAGABONDS, BEGGARS AND OTHER UNDESIRABLES 1607-1776, at 41 (1992).

way to deter future criminals.<sup>14</sup> The poor were also transported, a group that included children, the homeless, and the disorderly.<sup>15</sup> From the very beginning, hard labor, profit, and punishment were linked.

In 1718 Britain passed the Transportation Act,<sup>16</sup> formalizing the country's ability to banish convicted felons to their colonies.<sup>17</sup> In lieu of physical punishment or execution, felons were sentenced to seven or fourteen years' hard labor.<sup>18</sup> Merchant entrepreneurs charged the Crown five pounds per prisoner for transport.<sup>19</sup> This compensation, however, did not yield enough profit to induce commercial businesses into shipping the convicted in large enough numbers, so Parliament granted contractors "property and interest in the service" of the men during their sentence of hard labor.<sup>20</sup> A majority of these convicts were then "sold" to various private masters for the length of their labor, often to tobacco farmers, who preferred these workers to slaves.<sup>21</sup> Between 1718 and 1775, over 52,000 convicts were transported to the American colonies to labor on farms in Maryland and Virginia.<sup>22</sup>

Upon arrival in the American colonies, whichever convicts had survived the voyage were inspected by potential buyers, with prices ranging from £10–£14 for men, and £5–£9 for women.<sup>23</sup> Any human beings "left over" after the sale were sold in bulk at a cheap price to dealers who would travel from settlement to settlement selling them off.<sup>24</sup>

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14. See, e.g., ACTS OF THE PRIVY COUNCIL OF ENGLAND VOLUME 37, 1619-1621, at 53 (J.V. Lyle ed., London 1930), <https://www.british-history.ac.uk/acts-privy-council/vol37/pp51-75> [<https://perma.cc/E29Q-N46B>]. An act from 1619 (provided here in modern English form) noted that convicted felons with "able bodies fit for labor may be usefully employed for the great benefit and service of the commonwealth, and to that end may be constrained to toil in such heavy and painful works, as such a servitude shall be a greater terror to them than death itself, and therefore a better example since executions are so common as that wicked and irreligious sorts of people are no way thereby moved by them." *Id.* at 23.

15. See generally COLDHAM, *supra* note 13.

16. 1717: 4 George 1 c.11: *The Transportation Act*, THE STATUTES PROJECT, <https://statutes.org.uk/site/the-statutes/eighteenth-century/1717-4-george-1-c-11-the-transportation-act> [<https://perma.cc/6VUU-PASS>] (last visited Mar. 18, 2022).

17. See Shane Bauer, *5 Ways Prisoners Were Used for Profit Throughout U.S. History*, PBS (Feb. 26, 2020, 12:30 PM), <https://www.pbs.org/newshour/arts/5-ways-prisoners-were-used-for-profit-throughout-u-s-history> [<https://perma.cc/GLZ4-T8M6>].

18. 1717: 4 George 1 c.11: *The Transportation Act*, *supra* note 16.

19. Bauer, *supra* note 17.

20. *Id.*

21. *Id.*

22. R.J. Clarke, *The Land of the 'Free': Criminal Transportation to America*, THE HIST. PRESS, <https://www.thehistorypress.co.uk/articles/the-land-of-the-free-criminal-transportation-to-america> [<https://perma.cc/7JLV-8RCT>] (last visited Apr. 5, 2022).

23. *Id.*

24. *Id.*

In this way, profit intertwined with the punishment and physical hard labor of those people England deemed unworthy of remaining in society. By helping govern both the poor and the criminally convicted through hard labor and banishment, transportation helped reinforce class differences by allowing private business to derive earnings from the forced labor of the lower classes.

Profits from punishment greatly benefited the British merchants underwriting the wholesale transportation of convicts and the impoverished, as the Transportation Acts of 1718 and 1720 granted the exclusive right to transport convicts to merchants who contracted with the government.<sup>25</sup> Merchants competed with each other to bring the convicts to North America, earning substantial proceeds.<sup>26</sup> In many ways, this was the first major attempt to privatize and capitalize off of criminal justice in the Anglo-American world.<sup>27</sup>

Moreover, the use of transportation increased labor market capacity in the North American colonies, bolstering the finances of the British government.<sup>28</sup> Merchants were paid a subsidy to transport the indentured across the Atlantic and would routinely contract with local magistrates to ship the convicted.<sup>29</sup> This subsidy, combined with the money merchants made selling convicts' labor, ensured excellent returns with minimal investment.<sup>30</sup> Thus, human cargo comprised of convicted felons was an important element of the eighteenth-century Atlantic sea trade.<sup>31</sup>

Maryland and Virginia planters purchased a large number of the indentured, as did a sprinkling of tradesmen, all of whom received seven years of indentured labor from each contract purchased.<sup>32</sup> Due to the growth of slavery and, in part, convict labor, the tobacco trade tripled from 1721 to 1775, when Anglo-American transportation of convicts was at its peak.<sup>33</sup>

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25. See Farley Grubb, *The Market Evaluation of Criminality: Evidence from the Auction of British Convict Labor in America, 1767–1775*, 91 AM. ECON. REV. 295, 295 (2001); Willow Mary Meyer, *Beyond the Seas: Eighteenth-Century Convict Transportation and the Widening Net of Penal Sanctions* 46 (2011) (Ph.D. dissertation, University of California, Berkeley) (available at <https://escholarship.org/content/qt130156k1/qt130156k1.pdf> [<https://perma.cc/J9JQ-44TZ>]).

26. Grubb, *supra* note 25, at 295.

27. *Id.*

28. See Meyer, *supra* note 25, at 45.

29. *Id.* at 76.

30. *Id.* at 47.

31. See John J. McCusker & Kenneth Morgan, *Introduction*, in *THE EARLY MODERN ATLANTIC ECONOMY* 1, 1 (John J. McCusker & Kenneth Morgan eds., 2000).

32. Meyer, *supra* note 25, at 50–51.

33. See JACOB M. PRICE, *CAPITAL AND CREDIT IN BRITISH OVERSEAS TRADE: THE VIEW FROM THE CHESAPEAKE, 1700–1776*, at 18 (1980).

*B. Workhouses and Jails*

The first jails in the American colonies simply served as holding cells to contain the accused until trial and the convicted until punishment.<sup>34</sup> As early as 1555, however, the British tried to lower the expense of such incarceration by sending such prisoners to private workhouses, where prisoners worked to offset the cost of their confinement and helped supplement the jailer's salary.<sup>35</sup> As time went on, using prisoner labor became more popular, particularly when yoked with the idea that "confinement at productive labor [is] a means of checking vagrancy and other evils."<sup>36</sup> This idea culminated with the British sending numerous convicts to the American colonies to use for hard labor, simultaneously providing both profit and punishment.<sup>37</sup>

As early as the end of the seventeenth century, the northern colonies realized they could capitalize from the labor required from wrongdoers sentenced to correctional houses as both punishment and profit.<sup>38</sup> For example, Pennsylvania relied on its "Great Law" of 1682<sup>39</sup> to formalize a tradition of punishment through fines and hard labor,<sup>40</sup> both of which directly benefited the colony's government.<sup>41</sup> Although only Philadelphia truly used hard labor and fines as criminal punishment, Pennsylvania's law inspired future generations of lawmakers,<sup>42</sup> providing a blueprint for how to make punishment fiscally beneficial for the state. Colonial America's experiment with long-term confinement in prison-like institutions allowed the colonial government to profit from the labor and monies collected, even if these weren't always directly conceived as "punishment."<sup>43</sup>

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34. See Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 215 (2009).

35. *Id.* at 216.

36. MARTIN P. SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* 48 (1993).

37. Marion, *supra* note 34, at 216.

38. See generally Matthew W. Meskill, *History of Prisons in the United States from 1777–1877*, 51 STAN. L. REV. 839 (1999) (explaining how economic profitability became a new goal for prisons).

39. What we now call Pennsylvania's "Great Law" is a series of statutes enacted by Pennsylvania's first legislature that met in Upland from December 4–7, 1682. *The "Great Law" - December 7, 1682*, PA. HIST. & MUSEUM COMM'N, <http://www.phmc.state.pa.us/portal/communities/documents/1681-1776/great-law.html> [https://perma.cc/SNZ4-ZPXR] (last visited Mar. 18, 2022).

40. Several chapters of Pennsylvania's Great Law established punishment for crimes that specifically included fines or a term of imprisonment in "the house of Correction at hard Labour." *Id.*

41. See Meskill, *supra* note 38, at 839.

42. See Ashley T. Rubin, *Early US Prison History Beyond Rothman: Revisiting The Discovery of the Asylum*, 15 ANN. REV. L. & SOC. SCI. 137, 141 (2019).

43. See *id.* at 140.

By approximately 1785, a variety of newly established states began to incarcerate in local jails or houses of correction as a form of punishment.<sup>44</sup> As incarceration started to become the foundation of criminal punishment, the organization of the prisons received more attention.<sup>45</sup>

Philadelphia's Walnut Street Prison, remodeled between 1786 and 1794, offers one important example of a prison that used inmate labor as a way to profit from incarceration.<sup>46</sup> The Walnut Street Prison model, which incorporated profitable prisoner labor, along with the ideas of potential reform of criminals and potential crime reduction, proved so popular that it became a prototype for prisons all over the United States, as well as an example for those abroad.<sup>47</sup> (America exported its *entire* experiment to the world, not just representative democracy.) Profiting from inmate labor was a key aspect of this new system of punishment. Although many of these early, labor-focused proto-prisons failed due to overcrowding and inmate uprisings, this failure likely was attributable to lack of resources<sup>48</sup> and not to any dislike of monetizing punishment.

Inmate labor played a central role in the inauguration, spread, and persistence of early nineteenth-century and Jacksonian Era carceral institutions.<sup>49</sup> As one historian recently contended, "[R]eformers' ideas of social order were related more generally to solidifying particular social hierarchies and were heavily influenced by concerns about cost and profit."<sup>50</sup> With the rise of a democratic republic, there became a more pronounced need for virtuous citizens, for which inmates provided a convenient foil.<sup>51</sup> Additionally, many elites in Revolutionary society felt menaced by certain elements of an emerging egalitarian society and sought to reaffirm social distinctions while maintaining social order.<sup>52</sup> This concern combined with the need to enforce order, crush convict spirit, and make the first American penitentiaries self-sufficient.<sup>53</sup> The solution? A series of penal reforms that not only eliminated the moral reform aspect of

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44. *Id.* at 142.

45. See David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 552 (2019).

46. Rubin, *supra* note 42, at 142.

47. *Id.* at 143.

48. *Id.* at 143–44.

49. *Id.* at 146.

50. *Id.*

51. MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835, at 2, 4 (1996).

52. *Id.* at 131.

53. REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 54 (2008).

the earliest prisons, but also aimed to shrink the cost of incarceration by focusing on the prospect of inmate labor.<sup>54</sup>

### *C. The Industrial Prison*

In early to mid-nineteenth-century prisons, inmate labor rapidly became a popular means for states to recoup the imprisonment costs.<sup>55</sup> In fact, “the history of nineteenth-century American prisons is a history of contracting between the state and private interests for the use of convict labor in efforts on both sides to achieve financial gain.”<sup>56</sup> Keeping prisoners busy while simultaneously making a profit was an irresistible opportunity. As such, “contractual penal servitude” became the primary mode of punishment in all northern states and many southern states as well during this time period.<sup>57</sup>

In addition, inmate labor played a large role in driving the economy of early nineteenth-century American cities. In Philadelphia, for example, “the demand for prison labor was tied to the performance of Philadelphia’s economy,” because inmate labor was secured through contracts with the city’s private businesses.<sup>58</sup> Likewise, one way that early nineteenth-century New York dealt with the growing problem of its convict population was to institute contractual penal servitude.<sup>59</sup>

Auburn Prison in Westchester, away from New York City, was the first penitentiary to set up a contract labor system for its inmates, selling their labor to private businesses.<sup>60</sup> Auburn soon became a veritable factory, its prisoners producing thousands of items to be sold by private merchants.<sup>61</sup> After 1830, most of the northern states followed suit and instituted what became known as the “Auburn system,” which included an inmate’s labor for a private contractor by day and isolation in cells by night, overseen by strict discipline and few political rights.<sup>62</sup>

Under the Auburn system of prisoner contract labor, inmates worked inside the prison to create finished goods for private manufacturers.<sup>63</sup> The manufacturers provided the prison with raw materials to be refined by prison labor, such as footwear, carpets, furniture, and clothing.<sup>64</sup> Although

54. *Id.*

55. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–51 (2005).

56. *Id.* at 451.

57. McLENNAN, *supra* note 53, at 4.

58. MERANZE, *supra* note 51, at 226.

59. McLENNAN, *supra* note 53, at 53.

60. *Id.* at 4.

61. *Id.* at 60.

62. *Id.* at 53, 60.

63. Meskell, *supra* note 38, at 861.

64. ROBERT D. HANSER, INTRODUCTION TO CORRECTIONS 19 (3d ed. 2020).

the system was rife with corruption as company representatives often tried to defraud prisons, overwork the prisoners through bribes and threats, and steal the goods to sell on the black market, the prison contract labor setup thrived through the end of the nineteenth century.<sup>65</sup>

The concept of contract prison labor skyrocketed in political popularity, particularly during the 1830s.<sup>66</sup> Private contractors helped shape the growth of prison industries, particularly in the North, despite frequent complaints about prison labor.<sup>67</sup> Between 1825 and 1850, Maine, Maryland, New Hampshire, Vermont, Massachusetts, Connecticut, New York, the District of Columbia, Virginia, Tennessee, Louisiana, Missouri, Illinois, and Ohio all built prisons based on congregate penal labor.<sup>68</sup>

Inmate labor and desire to reap profit became dominant organizing forces of American prisons.<sup>69</sup> As one observer noted, “[T]he practice of selling the labor of convicts to private enterprise gradually became widely and deeply entrenched in penal ideology.”<sup>70</sup> By the 1840s, an individual convicted of a felony could spend their prison time working for the benefit of private labor or a state-run business.<sup>71</sup>

Contractual penal servitude, in which the state sold the labor power of inmates to private businesses, was so influential that most early to mid-nineteenth-century prisons in the United States were organized like factories.<sup>72</sup> State governments typically leased the prison facility as well as the inmates to entrepreneurs who ended up reaping the profits.<sup>73</sup> “The states’ paltry earnings did not, however, discourage their insistence on prisoner labor.”<sup>74</sup> The simple act of defraying some of the costs of punishment was enough to cement the system of inmate convict “labor as a vital source of revenue.”<sup>75</sup> In almost every Auburn-system prison in the 1840s, the revenue created by convict laborers significantly diminished the annual cost of running the prison itself.<sup>76</sup>

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65. Meskell, *supra* note 38, at 861–62; see Martin B. Miller, *At Hard Labor: Rediscovering the 19th Century Prison*, ISSUES IN CRIMINOLOGY, Spring 1974, at 91.

66. See Meskell, *supra* note 38, at 861.

67. GLEN A. GILDEMEISTER, PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840–1890, at 55 (1987).

68. MCLENNAN, *supra* note 53, at 63.

69. *Id.* at 53–54.

70. *Id.* at 54.

71. *Id.* at 66.

72. See generally DARIO MELOSSI & MASSIMO PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM (Glynis Cousin, trans., Barnes & Noble Books 1981) (1977).

73. MCLENNAN, *supra* note 53, 64–68.

74. Rubin, *supra* note 42, at 147.

75. MCLENNAN, *supra* note 53, at 67.

76. *Id.*

Economic profitability became a key motive during this era of the industrial prison. The Auburn system was “fixated on profits.”<sup>77</sup> In fact, the prisoner workplaces at Auburn bore great similarity to New York City’s industrial workshops, since they were both animated by profit motive.<sup>78</sup> The popularity of the Auburn prison system resonated with legislatures in particular, as the New York style of incarceration produced annual economic surpluses and was inexpensive to run.<sup>79</sup> As a result, most prisons constructed from the 1840s through the 1870s were predicated on the Auburn system.<sup>80</sup>

For reasons I discuss in Part II, by the late 1860s, the cracks were beginning to show in the prisons-for-profits paradigm. The focus on forced prison labor resulted in terrible physical conditions, no skills training, and a complete lack of rehabilitation.<sup>81</sup> Northern states, however, continued to utilize prisons for both punishment and profit.<sup>82</sup>

## PART II. POSTBELLUM CARCERAL LABOR

The Civil War and its aftermath resulted in a sharp division between Northern and Southern states in terms of criminal punishment, carceral labor, and profit. Following the Civil War and the end of slavery, the South instituted its own “peculiar” brand of prison profiteering, primarily based on Black bodily punishment and backbreaking carceral toil. In contrast, Northern states continued on the path of making money through inmates’ “hard labor,” which—while painful and unpleasant for prisoners—was usually not the death sentence of the South’s racist, revenue-seeking practices.

### A. The South

Prior to the Civil War, Southern prisons typically held mostly white inmates and incarcerated only a few free Black individuals.<sup>83</sup> Slaves were governed by an entirely separate code of laws, entrapped in a system that valued their labor over anything else, which also discouraged any state or local punishment aside from that inflicted by their owners.<sup>84</sup>

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77. Meskell, *supra* note 38, at 857.

78. *Id.*

79. *Id.* at 857–58.

80. *Id.* at 858.

81. *Id.* at 860.

82. McLENNAN, *supra* note 53, at 6.

83. HANSER, *supra* note 64, at 20; *see also* Christopher Muller, *Freedom and Convict Leasing in the Postbellum South*, 124 *AM. J. SOC.* 367, 368 (2018).

84. HANSER, *supra* note 64, at 20.

Post-emancipation, however, the Southern landscape of imprisonment substantially changed. The South's post-war criminal justice system underwent a dramatic transformation, shifting to focus on the subjugation of Black labor through the twin mechanisms of the Black Codes and the convict leasing system.<sup>85</sup> Roughly fifteen years post-Civil War, the imprisonment of Black individuals was twelve times higher than that of whites.<sup>86</sup> The South created a criminal justice system predicated on harnessing Black carceral labor for maximum profits, feeding the material interests of prosperous white citizens.

### 1. BLACK CODES AND CONVICT LEASING

The institution of the Black Codes forced innumerable Black citizens into involuntary carceral labor. After the Civil War, many former Confederate states passed laws severely restricting the freedom and civil liberties of the newly freed slaves.<sup>87</sup> The South passed harsh vagrancy laws that were extremely broad in scope, punishing any Black individual who “neglect[ed] their calling or employment or misspent what they earn[ed].”<sup>88</sup> Any Black citizens found to be engaging in “vagrancy” could be punished by ten days’ imprisonment and a fifty-dollar fine,<sup>89</sup> an almost unimaginable fee for newly freed slaves. In tandem with the vagrancy law was a system of special county courts, presided over by a local justice of the peace and two landowners and created to punish former slaves charged with violating any employment laws.<sup>90</sup>

Mississippi was the first to pass a set of Black Codes in the post-Civil War South.<sup>91</sup> Mississippi law was particularly draconian, imposing punishments such as “corporal chastisement” for Black citizens who were classified as vagrant.<sup>92</sup> Most strikingly, the Mississippi Black Code was

85. See “Black Codes” of Mississippi: 1865, SLAVERY AND THE MAKING OF AMERICA, <https://www.thirteen.org/wnet/slavery/experience/legal/docs6.html> [https://perma.cc/RW8K-4WBD] (last visited Mar. 18, 2022).

86. Muller, *supra* note 83, at 368.

87. David J. Childs, *Black Codes*, in 1 MULTICULTURAL AMERICA, A MULTIMEDIA ENCYCLOPEDIA 354, 354 (Carlos E. Cortés ed., 2013).

88. Act of Nov. 24, 1865, ch. 6, § 1, 1865 Miss. Laws 90; see generally *Black Codes*, ENCYCLOPEDIA.COM (May 29, 2018), <https://www.encyclopedia.com/history/united-states-and-canada/us-history/black-codes> [https://perma.cc/HZ5W-WH28].

89. Act of Nov. 24, 1865, ch. 6, § 2, 1865 Miss. Laws 90, 91.

90. Carl H. Moneyhon, *Black Codes*, TEX. STATE HIST. ASS’N HANDBOOK TEX. (Sept. 30, 2020), <https://www.tshaonline.org/handbook/entries/black-codes> [https://perma.cc/BC2T-JZ9M].

91. *The Southern “Black Codes” of 1865–1866*, CONST. RTS. FOUND., <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> [https://perma.cc/U3E7-VKG3] (last visited Mar. 18, 2022).

92. Act of Nov. 22, 1865, ch. 5, § 3, 1865 Miss. Laws 86, 87.

the first to incorporate carceral labor into vagrancy punishments.<sup>93</sup> The law held that any Black male who could not pay the costs or fees imposed for his misdemeanor within five days would be subject to being hired out for labor by any white man who would pay the fine:

[I]f any freedman, free [N]egro, or mulatto, convicted of any of the misdemeanors provided against in this act, shall fail or refuse, for the space of five days after conviction, to pay the fine and costs imposed, such person shall be hired out by the sheriff or other officer . . . to any white person who will pay said fine and all costs, and take such convict for the shortest time.<sup>94</sup>

In addition, any white citizen could seize and return any Black citizen who left their employer, earning five dollars and transportation costs for their trouble.<sup>95</sup> The return reward would be subtracted from the employee's wages.<sup>96</sup>

South Carolina was the next state to pass its own Black Code, with similarly harsh results. For example, South Carolina created a racially separate court system for all civil and criminal cases with Black plaintiffs or defendants.<sup>97</sup> Black witnesses could testify in court only in cases affecting “the person or property of a person of color.”<sup>98</sup> In addition, certain crimes—such as rebellion, arson, burglary, and assaulting a white woman—carried harsh penalties (including the death penalty), which applied only to Black citizens.<sup>99</sup> Punishments for minor offenses frequently resulted in whipping or leasing the defendant's labor—penalties rarely imposed on whites.<sup>100</sup> “Alabama, Georgia, Louisiana, Florida, Tennessee, Virginia, and North Carolina followed suit by enacting similar laws of their own.”<sup>101</sup>

Even minor crimes carried great financial penalties for Black citizens, including fines set high enough that no newly freed slave could possibly pay them.<sup>102</sup> For those who could not pay such fines, up to three months of hard labor was prescribed.<sup>103</sup> Far longer-lasting convict leasing arrangements were found in Georgia, which passed laws sanctioning

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93. See *The Southern “Black Codes” of 1865–1866*, *supra* note 91.

94. Act of Nov. 29, 1865, ch. 23, § 5, 1865 Miss. Laws 165, 166–67.

95. Act of Nov. 25, 1865, ch. 4, § 7, 1865 Miss. Laws 82, 84.

96. *Id.*

97. See *The Southern “Black Codes” of 1865–1866*, *supra* note 91.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Black Codes*, *supra* note 88.

102. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 937–38 (2019).

103. *Id.*

inmate leasing for twenty years at a time, costing the employer only approximately \$500,000.<sup>104</sup> Such laws continued long past the expiration of the original Black Codes.<sup>105</sup>

Through these openly discriminatory Black Codes, the South instituted an arrangement of forced Black labor through a system of convict leasing, creating an organized capital market for Black prisoners.<sup>106</sup> In other words, convict leasing primarily worked as a system of forced labor and was never focused on either preventing or punishing crime.<sup>107</sup> Instead, the laws worked to maximize profit for Southern whites. Indeed, Black prisoners were seen as “unfit” for incarceration, as prison was envisioned as either reformatory or rehabilitative.<sup>108</sup> Because Black citizens, assumed to be “inferior,” could not be reformed, the state decided that incarcerating them simply was not worth it.<sup>109</sup> Instead, prisoners were farmed out for profit.

The forced labor of convict leasing applied to all freed slaves but was largely used for Black men convicted of crimes.<sup>110</sup> Black women and children, however, were also subject to its cruelties.<sup>111</sup> One common section of Southern Black Codes focused on Black orphans or impoverished children, who could be “apprenticed” to any whites who wished to use them for labor, with preference given to the children’s former owners.<sup>112</sup> The “masters and mistresses” of such apprentices had the “power to inflict . . . moderate corporeal chastisement” as long as it did not rise to the level of cruel and unusual punishment.<sup>113</sup>

The institution of the Black Codes meant that Black men were arrested and convicted for petty offenses, then sentenced to the vast network of private prison camps that leased them out for profit.<sup>114</sup> Those

104. *Id.* at 939.

105. *See id.* at 941–45.

106. *See* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 64 (Anchor Books 2009) (2008).

107. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1506–07 (2019).

108. Rubin, *supra* note 42, at 150.

109. *Id.*

110. Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/2REK-UF3>].

111. *See generally* TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH* (2015) (discussing how Black women were also forced into the convict leasing system); *id.* at 98 (discussing the effects on Black children born into the convict leasing system).

112. Act of Nov. 22, 1865, ch. 5, § 1, 1865 Miss. Laws 86–87.

113. *Id.* § 3.

114. Kathy Roberts Forde & Bryan Bowman, *Exploiting Black Labor After the Abolition of Slavery*, CONVERSATION (Feb. 6, 2017, 10:39 pm),

leasing the prisoners had total custody and control.<sup>115</sup> Accordingly, the lessees focused on profits by extracting maximum labor from those convicted, “with little incentive to preserve prisoners’ welfare or lives.”<sup>116</sup>

In Georgia and other Southern states, convict leasing not only massively increased states’ coffers, but also freed states from the burden of building and maintaining prison facilities for what soon became massively engorged prison populations (due to the punitive penal codes imposed).<sup>117</sup> Multiple privately owned prison camps sprung up in lieu of state-run facilities, and Georgia’s revised penal code required that prisoners be rented out to various independent industries, creating profit both for the state and for the employers, who paid far less than the going rate for free labor.<sup>118</sup> Additionally, the arrangement freed the state from the expense of providing for the rapidly increasing prison population.<sup>119</sup>

The Civil Rights Act of 1866 outlawed these early race-based forms of convict leasing.<sup>120</sup> The Act declared freed people to be citizens of the United States who could make and enforce contracts; sue and be sued; give evidence in court; and “inherit, purchase, lease, sell, hold, and convey real estate and personal property.”<sup>121</sup> The Civil Rights Act was not enforceable, however, until the passage of the Fourteenth Amendment’s Equal Protection Clause, which fully eradicated the Black Codes.<sup>122</sup>

Moreover, the Thirteenth Amendment, which formally abolished slavery and involuntary servitude in 1865, carved out an exception for crimes “whereof the party shall have been duly convicted.”<sup>123</sup> Accordingly, following the passage of the Fourteenth and Fifteenth Amendments, Southern states simply continued the practice of convict leasing as part of their sentencing and imprisonment of prisoners.<sup>124</sup> The practice of convict leasing persisted for many more years. Every state in

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<https://theconversation.com/exploiting-black-labor-after-the-abolition-of-slavery-72482> [<https://perma.cc/7JN3-8MX2>].

115. Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolitionism Constitutionalism*, 133 HARV. L. REV. 1, 32 (2019).

116. *Id.*

117. LEFLOURIA, *supra* note 111, at 67.

118. *Id.*

119. *Id.* at 68.

120. *See* Pope, *supra* note 107, at 1484.

121. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

122. *Black Codes*, AM. BATTLEFIELD TR. (Mar. 25, 2021), <https://www.battlefields.org/learn/articles/black-codes> [<https://perma.cc/B95K-8PCW>].

123. U.S. CONST. amend. XIII, § 1.

124. In Texas, for example, convict leasing involved the entire penitentiary system, which leased all prisoners to one single employer, the Williams sugarcane plantation. Michael Hardy, *Blood and Sugar*, TEX. MONTHLY (Jan. 2017), <https://www.texasmonthly.com/articles/sugar-land-slave-convict-labor-history/> [<https://perma.cc/VBT2-KEBM>].

the South practiced convict leasing, including Tennessee, Texas, Georgia, Florida, Arkansas, Mississippi, and Louisiana.<sup>125</sup>

Convict leasing after Reconstruction helped serve a number of financial purposes. Proponents of the “New South,” focused on beginning industrialization, insisted that the South needed a newly diversified financial system, one not completely based on agriculture.<sup>126</sup> Convict labor rapidly became a key aspect in restoring the region’s devastated economy.<sup>127</sup> The South used as its blueprint the colonial version of convict labor, as discussed in Part I, in which “British convicts were auctioned off to plantation owners . . . as indentured servants” for a set period.<sup>128</sup> Georgia led the way in reinstating convict labor and the prisoner-profit ethos, creating a substantial source of prosperity for its white leaders.<sup>129</sup> This was because convicted Black prisoners could be forced to produce twice the work of free labor.<sup>130</sup> With the advent of convict leasing, Southern white elites utilized their state “punishment system to transfer wealth, confiscate land, and preserve racial hierarchy through convict leasing—that is, criminalizing people so that their bodies could be forced to work for profit.”<sup>131</sup>

The system of convict leasing meant that an extremely high number of Black Southern men were forced into servitude by local courts through the use of strict misdemeanor criminal codes applied in a racially discriminatory manner.<sup>132</sup> Once convicted, the local sheriff would sell Black inmates’ labor to “giant corporate prison mines” or lease groups of prisoners to local farmers.<sup>133</sup> “Hundreds of forced labor camps came to exist” in the South, run by local governments, farmers, corporations, and entrepreneurs.<sup>134</sup> Every Southern state used convict labor as a way to create great profit.<sup>135</sup> In addition, the leasing system was so popular that the widespread corruption and collusion were simply accepted as part of the business.<sup>136</sup>

Controlling the sale of prisoner labor was a spectacularly lucrative affair.<sup>137</sup> The sheriff made money by collecting the debts and fees from the

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125. Goodwin, *supra* note 102, at 942.

126. LEFLOURIA, *supra* note 111, at 62.

127. *Id.* at 65.

128. *Id.*

129. *Id.* at 66.

130. *Id.*

131. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 863 (2019).

132. BLACKMON, *supra* note 106, 5–6.

133. *Id.* at 6.

134. *Id.* at 7.

135. Forde & Bowman, *supra* note 114.

136. Goodwin, *supra* note 102, at 944.

137. BLACKMON, *supra* note 106, at 65.

prisoners, as well as any amount of money left over from the daily “feeding fees” paid by the state.<sup>138</sup> Due to such potential profits, local sheriffs had strong financial incentives to arrest and convict as many Black men as possible and feed them minimally.<sup>139</sup> The lessees of such prisoner labor also financially profited. Convict leasing was “one of the greatest single sources of personal wealth to some of the South’s leading businessmen and politicians.”<sup>140</sup>

Conditions were beyond squalid in Southern prison camps. Black prisoners were often packed into filthy, windowless cabins like slaves on the Middle Atlantic passage.<sup>141</sup> All convicts wore ankle shackles day and night, connected to one another.<sup>142</sup> Like slaves, inmates worked incessantly under insufferable conditions and were frequently bought and sold, sometimes repeatedly.<sup>143</sup> Convicts were harshly whipped and beaten.<sup>144</sup> Clothing and sanitary conditions were frequently defective or non-existent.<sup>145</sup> Very little care was taken to preserve the lives and well-being of the people sentenced to serve.<sup>146</sup>

Florida provides a particularly brutal example of conditions in convict leasing camps. Prisoners sentenced to Florida’s convict leasing system were subjected to heavy chains and shackles, constant searches by dogs, and punishment with whips, sweat boxes, and stringing up by the thumbs.<sup>147</sup> Living conditions were filthy, with little to no medical attention provided.<sup>148</sup> Even if prisoners were seriously injured or ill, they were forced to work.<sup>149</sup> Although the camps were primarily male, women sentenced to convict leasing also had to fend off a constant threat of sexual assault in the camps.<sup>150</sup>

Florida was unique in that it also ensnared white immigrant workers into the maw of its system, particularly with Henry Flagler’s railways and

138. *Id.*

139. *Id.*

140. Matthew J. Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 339 (1978).

141. See BLACKMON, *supra* note 106, at 70.

142. *Id.* at 70, 339.

143. Muller, *supra* note 83, at 368.

144. *Id.*

145. BLACKMON, *supra* note 106, at 135.

146. See *id.* at 288–89.

147. Bryan Bowman & Kathy Roberts Forde, *How Slave Labor Built the State of Florida—Decades After the Civil War*, WASH. POST (May 17, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/05/17/how-slave-labor-built-the-state-of-florida-decades-after-the-civil-war/> [https://perma.cc/2H2P-3LNM].

148. *Id.*

149. *Id.*

150. LEFLOURIA, *supra* note 111, at 78.

luxury hotels.<sup>151</sup> Northern labor agencies helped ensnare recently arrived immigrants down to the Florida Keys, where they were then refused transportation off the islands unless they paid back their large debts for transportation, boarding, and food.<sup>152</sup> Those who would not work under bad conditions were refused food, and sick workers were beaten and threatened with death.<sup>153</sup>

Florida's convict leasing program became so notorious that even the popular press wrote about it negatively. In 1907 *Cosmopolitan* magazine published an article describing Florida's system of modern-day slavery, "[a] revelation of appalling conditions in Florida and other states, which make possible the actual enslavement of whites and blacks under trust domination."<sup>154</sup> The article detailed how both whites and Blacks were undergoing "chattel slavery" at the hands of large corporations in the South, such as Standard Oil, the Florida East Coast Railway, and the trusts for lumber and turpentine.<sup>155</sup>

By the late nineteenth century, southern states such as Georgia, Alabama, and Tennessee had spectacular growth in the coal and iron industries, outpacing the North and creating substantial wealth for owners and the states themselves.<sup>156</sup> For example, between 1880 and 1904, ten percent of Alabama's state budget derived from profits earned by leasing state convicts.<sup>157</sup> This industrial growth was almost entirely contingent on convict leasing, as the profits gained by using low-cost convict labor made industry able to sell commodities at cheaper rates.<sup>158</sup>

The capital growth of the South post-Reconstruction became inseparable from the convict leasing system; "only in the South did the physical 'penitentiary' become virtually synonymous with the various private enterprises in which convicts labored."<sup>159</sup> In particular, the turpentine and lumber camps located in Georgia, Florida, and Louisiana commonly made the prisoners labor until they died, either from overwork or disease.<sup>160</sup> "There was simply no incentive for lessees to avoid working

151. Bowman & Forde, *supra* note 147.

152. *Id.*

153. *Id.*

154. See generally Richard Barry, *Slavery in the South To-Day*, 42 COSMOPOLITAN MAG., Mar. 1907, at 481.

155. *Id.* at 481–82.

156. LEFLOURIA, *supra* note 111, at 73.

157. Shane Bauer, *The True History of America's Private Prison Industry*, TIME (Sept. 18, 2018, 3:00 PM), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/> [<https://perma.cc/YNE9-MDCP>].

158. LEFLOURIA, *supra* note 111, at 73.

159. ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 3 (1996).

160. Steve Fraser & Joshua B. Freeman, *21st Century Chain Gangs*, SALON (Apr. 19, 2012, 3:06 PM), [https://www.salon.com/2012/04/19/21st\\_century\\_chain\\_gangs/](https://www.salon.com/2012/04/19/21st_century_chain_gangs/) [<https://perma.cc/QY4H-VEZ5>].

people to death.”<sup>161</sup> During the late nineteenth century, the death rate for Black men sentenced to convict leasing ranged from sixteen percent to twenty-five percent.<sup>162</sup> The Southern coal mines were so deadly for convict lessees that they were known as “nurseries of death.”<sup>163</sup>

The lessees of Southern convicts were interested only in productive laborers; prisoners who were sick or infirm were sent back to jail.<sup>164</sup> The capital cost of convict laborers was so fixed that it became a commodity for speculation, with several convict-leasing companies “organized to speculate in convict-labor futures.”<sup>165</sup> Thus, southern prisoners were quickly transformed from men to convicts to workers to units of fixed capital, directly responsible for industrial profit. The convict leasing system granted “absolute authority to private commercial interests.”<sup>166</sup> As a young Woodrow Wilson even remarked, “Who can defend a system which makes the punishment of criminals . . . a source of private gain?”<sup>167</sup>

Yet the practice of convict leasing was widely tolerated because the rapid industrialization of the South reaped a financial advantage for the entire national economy.<sup>168</sup> Although the federal government had numerous opportunities to put a stop to the terrible practice, it never intervened.<sup>169</sup> Convict leasing was used in the South until approximately the 1920s, but it was not formally abolished until Franklin Roosevelt took action in 1941.<sup>170</sup>

## 2. DEBT PEONAGE

Debt peonage sprung up alongside convict leasing during the post-Reconstruction era, becoming another method by which maximum revenues were ruthlessly extracted from primarily Black carceral labor. Starting concomitantly with convict leasing, debt peonage also grew out of the end of the Civil War; the white ruling class in the South decided that

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161. Bauer, *supra* note 17.

162. *Id.*

163. *Id.*

164. MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, at 22 (1996).

165. *Id.* at 24.

166. Fraser & Freeman, *supra* note 160.

167. MANCINI, *supra* note 164, at 32.

168. Forde & Bowman, *supra* note 114.

169. *Id.*

170. See Circular No. 3591 from Att’y Gen. Francis Biddle to U.S. Att’ys (Dec. 12, 1941), [https://en.wikisource.org/wiki/File:Circular\\_No.\\_3591.pdf](https://en.wikisource.org/wiki/File:Circular_No._3591.pdf) [<https://perma.cc/6BK3-PXWC>] (directive from Attorney General Francis Biddle to all U.S. attorneys explaining procedure for handling cases relating to involuntary servitude, slavery, and peonage).

freed slaves needed a contract system post-emancipation.<sup>171</sup> The Black Codes implemented following the Civil War incorporated compulsory contract laws for newly freed Black citizens, enforced by the underlying menace of vagrancy laws.<sup>172</sup>

Debt peonage had a fairly simple premise: convicted individuals who owed any debt were held beyond the end of their prison sentences and were required to work off their debts by laboring for their “lessor-turned-employer.”<sup>173</sup> Anyone who tried to escape before paying off their debt in full was usually arrested for vagrancy and then leased out for their labor as convicts.<sup>174</sup> Thus, debt peonage and convict leasing were closely entwined in a system of extracting profits from Black individuals in the South.

The South’s compulsory contract laws obliged Black men to sign year-long agricultural contracts by January of each year.<sup>175</sup> If they did not, the men could be arrested, convicted for vagrancy, and forced to work for an employer.<sup>176</sup> Harsh penalties for vagrancy and petty theft supplied the fodder for such criminal surety laws.<sup>177</sup>

Under the criminal surety framework, a surety would pay the fines and court costs charged to impoverished defendants who were convicted of minor criminal offenses.<sup>178</sup> In exchange, the criminal defendant would contract to work off the debt for the surety.<sup>179</sup> Debt peonage used labor subordination as yet another tool in a profit-driven, racist criminal justice system.<sup>180</sup>

Violating one of these surety agreements was a criminal offense in and of itself and would inevitably lead to another surety contract to pay for the second “violation.”<sup>181</sup> In reality, the criminal surety system created an “ever-turning wheel of servitude,”<sup>182</sup> as breaching these exploitative

171. See PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969*, at 19 (Illini Books 1990) (1972).

172. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 921 (1998).

173. Bowman & Forde, *supra* note 147.

174. *Id.*

175. Klarman, *supra* note 172, at 921.

176. *Id.*

177. *Id.* at 922.

178. *Id.* at 923.

179. *Id.*

180. Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 929 (2016).

181. Klarman, *supra* note 172, at 923; see also *United States v. Reynolds*, 235 U.S. 133 (1914) (invalidating Alabama criminal surety law that enforced voluntary or involuntary labor of any persons as peons in liquidation of any debt or obligation).

182. *Reynolds*, 235 U.S. at 146–47. Despite the Supreme Court’s decision in *Reynolds*, “the rulings had little impact on the prevalence of coerced black labor in the South.” Klarman, *supra* note 172, at 926.

contracts simply led to new and even lengthier contracts.<sup>183</sup> Convicted defendants frequently were required to do hard labor for far longer a time period than the period authorized for violations of their original violation or misdemeanor.<sup>184</sup>

Debt peonage encompassed the minor crimes and trumped-up charges many Black citizens faced.<sup>185</sup> Many of the crimes involved larceny of under one dollar, and the courts usually did not consider the crimes particularly serious.<sup>186</sup> For example, during one month in a single county in Georgia, 149 individuals were convicted of crimes tantamount to “walking on the grass or spitting on the sidewalk,” leading to a total combined sentence of nineteen years.<sup>187</sup>

After individuals were arrested and convicted by local courts, they were assigned “staggering fines and court fees, [and frequently] forced to work for a local employer who would pay their fines.”<sup>188</sup> For example, individuals might be tried and convicted for the crime of using offensive language; the fine for this offense was \$10, with an additional \$25 in court costs.<sup>189</sup> A sum such as this could take eight months of labor to work off.<sup>190</sup> The debt could be paid off only by physical labor.<sup>191</sup>

In addition, local law enforcement often colluded with planters and farmers, conducting “vagrancy roundups” or arresting individuals on very minor crimes to provide enough labor during harvesting season.<sup>192</sup> Put another way, the criminal surety system systemically produced an involuntary Black workforce through fraud.<sup>193</sup>

Although Congress technically outlawed debt peonage in 1865 following the passage of the Thirteenth Amendment, in reality the practice continued until the 1940s.<sup>194</sup> Neither the passage of the Anti-Peonage Act in 1867 (in which Congress tried to prohibit coercion of labor to pay off debt) nor the existence of two Supreme Court cases invalidating debt

183. Klarman, *supra* note 172, at 923.

184. *Id.* at 925.

185. *Slavery by Another Name: Slavery v. Peonage*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/peonage/> [https://perma.cc/S3QP-ZTPF] (last visited Mar. 1, 2022).

186. DANIEL, *supra* note 171, at 26–27.

187. See Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1616 (2015).

188. *Slavery by Another Name: Slavery v. Peonage*, *supra* note 185.

189. DANIEL, *supra* note 171, at 26 n.15.

190. *See id.*

191. See Timothy Black & Lacey Caporale, *The New Debt Peonage in the Era of Mass Incarceration*, CULTURAL ENCOUNTERS, CONFLICTS, & RESOLS., 2020, at 1, 2.

192. Klarman, *supra* note 172, at 923.

193. *Id.* at 925.

194. *Slavery by Another Name: Slavery v. Peonage*, *supra* note 185.

peonage statutes<sup>195</sup> had any effect in the South.<sup>196</sup> As with convict leasing, southern states simply continued to utilize a web of criminal and penal statutes that forced indebted, convicted defendants to unwillingly work for employers.<sup>197</sup> Debt peonage continued in this fashion until after World War II.<sup>198</sup>

With minimal land or capital, many newly freed Black citizens ended up signing contracts to labor on plantations or farms in order to survive.<sup>199</sup> Some planters would not allow laborers to leave their farms if any money was owed, making debt peonage even more complex.<sup>200</sup> Debt peonage existed all over the South, but it was particularly common in the cotton belt of the Carolinas, Texas, and the Mississippi Delta, as well as on the turpentine farms of Florida, Georgia, Alabama, and Mississippi.<sup>201</sup>

The convict camps on the turpentine farms were extraordinarily punitive, even for debt peonage and convict leasing.<sup>202</sup> Living conditions, food, and work regimes were atrocious.<sup>203</sup> There was little to no state oversight.<sup>204</sup> A 1923 Florida investigation of these convict camps described them as “human slaughter pen[s].”<sup>205</sup> Technically illegal, these “wildcat” camps were almost impossible to eradicate, despite the muckraking journalism that exposed their horrors.<sup>206</sup>

Southern debt peonage often functioned as much in custom as in law with little to disturb it, particularly when combined with convict leasing. For example, police would simply arrest Black laborers who allegedly owed money, throw them in jail, and then allow their employer to punish them.<sup>207</sup> Likewise, when laborers’ debt records were either lost or contested, often the required labor contracts were simply extended,

195. *Bailey v. Alabama*, 219 U.S. 219, 245 (1911); *United States v. Reynolds*, 235 U.S. 133, 149–50 (1914).

196. Birkhead, *supra* note 187, at 1606–07.

197. *Id.* at 1606. As Birkhead notes, “Among the innovations were criminal surety statutes that allowed employers to pay the court fines for indigent misdemeanants charged with readily manufactured crimes, such as vagrancy, adultery, and use of offensive language, in exchange for a commitment to work.” *Id.*

198. *Anti-Peonage Act of 1867*, STATUTES & STORIES (June 12, 2020), [https://www.statutesandstories.com/blog\\_html/peonage-act-of-1876/](https://www.statutesandstories.com/blog_html/peonage-act-of-1876/) [<https://perma.cc/E2JZ-T53Z>].

199. DANIEL, *supra* note 171, at 19–20.

200. *Id.*

201. *Id.* at 21.

202. LICHTENSTEIN, *supra* note 159, at 171.

203. *See id.*

204. *Id.*

205. Matt Marino, *The Brutality of Florida’s Turpentine Industry*, FLOWRITER (Nov. 9, 2018, 2:46 PM), <https://flowriter.net/2018/11/09/the-brutality-of-floridas-turpentine-industry/> [<https://perma.cc/56RU-A49Q>].

206. *See* LICHTENSTEIN, *supra* note 159, at 171.

207. DANIEL, *supra* note 171, at 25.

creating further debt on the part of the laborers.<sup>208</sup> Even when the laborers' bail for minor offenses had been paid by their employer, employers often still informally required them to continue to work until they were satisfied the debt had been fully paid.<sup>209</sup>

Local sheriffs, constables, and justices of the peace enforced the Southern peonage system.<sup>210</sup> Local police colluded with planters to enforce shadowy debts that did not always exist.<sup>211</sup> Justices of the peace cooperated closely with employers, sometimes even going so far as to pocket the fine monies owed.<sup>212</sup> The fatal combination of duplicitous police and sheriffs, willfully blind court administrators, and all-white juries meant that the South simply negated any anti-peonage law or court opinions, following instead their discriminatory local custom.<sup>213</sup> Such custom meant that the post-Reconstruction South profited immensely from the monies extracted from Black carceral labor for trifling or non-existent crimes.<sup>214</sup>

### 3. CHAIN GANGS

Even after convict leasing was finally eradicated, however, there was little relief for Southern prisoners, who remained primarily Black men.<sup>215</sup> As control of carceral labor was transferred from private to public holdings, the South turned to a system of chain gangs and state farms, once again focusing on the profit to be extracted from the physical toil of convicts.<sup>216</sup>

The end of convict leasing certainly did not spell the end of carceral labor. Indeed, chain gangs were developed as a popular solution to the expensive problem of housing and feeding prisoners.<sup>217</sup> The use of the chain gang allowed Southern state governments to avoid building and

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208. Birckhead, *supra* note 187, at 1606.

209. DANIEL, *supra* note 171, at 26.

210. *Id.* at 30–31.

211. *Id.* at 31.

212. *Id.* at 31–32.

213. Birckhead, *supra* note 187, at 1623–24.

214. *Id.* at 1624.

215. See RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES & NICHOLAS TURNER, VERA INST. JUST., REIMAGINING PRISON 39 (2018), [https://www.vera.org/downloads/publications/Reimagining-Prison\\_FINAL3\\_digital.pdf](https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf) [<https://perma.cc/GHH8-SBVU>].

216. See Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 364–65 (1998).

217. See *Slavery by Another Name: Chain Gangs*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/chain-gangs/> [<https://perma.cc/T9QW-XU5K>] (last visited Mar. 7, 2022).

refurbishing prisons.<sup>218</sup> Chaining prisoners together for work purposes (particularly road construction) was quick, easy, and extremely inexpensive.<sup>219</sup> In addition, chains eliminated the need for many guards because escape was so difficult.<sup>220</sup>

The primary difference between convict leasing and chain gangs was the recipient of the labor: “Under the convict leasing system, prisoners were leased to private commercial interests; and under the chain gang system, prisoners were leased to the state to work on public projects.”<sup>221</sup>

When handed back the reins of prisoner control, Southern state penitentiaries quickly instituted a brutal form of forced labor with chain gangs.<sup>222</sup> The chain gang consisted of convicted and incarcerated individuals who would do forced labor on a state’s public works, such as building roads or clearing land.<sup>223</sup> The majority of people sentenced to work on chain gangs were Black male prisoners.<sup>224</sup>

Working on the chain gang proved just as brutal as laboring under the convict leasing system. Prisoners on a chain gang were shackled by their ankles essentially around the clock—during eating, sleeping, and laboring—in groups of five.<sup>225</sup> Chain gangs often proved deadly for prisoners, as Alex Lichtenstein detailed:

[Prisoners] labored, ate, and slept with chains riveted around their ankles. Work was done “under the gun” from sun-up to sundown, shoveling dirt at fourteen shovelfuls a minute. Food was bug-infested, rotten and unvarying; “rest” was taken in unwashed bedding, often in wheeled cages nine feet wide by twenty feet long containing eighteen beds. Medical treatment and bathing facilities were unsanitary, if available at all. And, above all, corporal punishment and outright torture . . . [were] meted out for the most insignificant transgressions.<sup>226</sup>

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218. See Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama’s Experience Raises Eighth Amendment Concerns*, 15 LAW & INEQ. 127, 130 (1997).

219. See *id.*

220. See *id.*

221. See Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 VA. J. SOC. POL’Y & L. 65, 70–71 (2019).

222. See DELANEY, SUBRAMANIAN, SHAMES & TURNER, *supra* note 215, at 34, 39.

223. *Id.* at 1, 39.

224. *Id.*

225. See WALTER WILSON, *FORCED LABOR IN THE UNITED STATES* 70 (1933); Burley, *supra* note 218, at 132.

226. LICHTENSTEIN, *supra* note 159, at 183.

Although many are aware of the existence of chain gangs due to their prevalence in popular song and film, most are not cognizant of the inhumane treatment suffered by the prisoners working in them.

Chain gangs were particularly useful for road construction in the late nineteenth-century and early twentieth-century South. Chain gang prisoners built the Tamiami Trail in Florida.<sup>227</sup> South Carolina, North Carolina, and Georgia also used chain gangs extensively to build and repair roads all over those states.<sup>228</sup> Due to the introduction of mass-produced automobiles, this focus on roads spurred public demand for decent roads throughout the South.<sup>229</sup>

Using chain gangs to repair roads saved southern state governments considerable money. For example, in South Carolina, a low-skilled cotton-mill hand was paid \$1.25 per day in 1915.<sup>230</sup> By contrast, housing, clothing, and food for chain gang members cost only \$0.20 per day; pay for guards was only another \$0.20 per day; and miscellaneous costs added a mere \$0.15 per day.<sup>231</sup> In other words, chain gang labor cost half of paid non-convict labor,<sup>232</sup> and this included the costs of maintaining the prisoners,<sup>233</sup> albeit very poorly.

Although many white Southerners wanted improved roads, they did not want to pay for them fully through taxation or to put in the paid labor to create them.<sup>234</sup> Chain gangs seemed the perfect solution, as they were a low-cost, forcibly compelled way to get the roads built and repaired at no cost to white citizens.<sup>235</sup> As the North Carolina Highway Commission noted in 1902, “[T]he value of [convict labor] is not to be underestimated,” as the state would not be able to otherwise obtain labor to fix its roads.<sup>236</sup> Even counties that previously could not afford the labor costs to build roads now found it affordable with the use of chain gangs.<sup>237</sup>

The state-run chain gang, used to build not only roads but also other infrastructure projects, became “vital to the flourishing of a mature market economy and so to the continuing process of capital accumulation.”<sup>238</sup> In

227. VIVIEN M. L. MILLER, *HARD LABOR AND HARD TIME: FLORIDA’S “SUNSHINE PRISON” AND CHAIN GANGS* 69 (John David Smith ed., 2012).

228. See Howard Bodenhorn, *Bad Men, Good Roads, Jim Crow, and the Economics of Southern Chain Gangs* 1, 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28405, 2021), <http://www.nber.org/papers/w28405> [<https://perma.cc/BQ3X-ZLUP>].

229. *Id.* at 4.

230. *Id.* at 11.

231. *Id.*

232. *Id.*

233. *Id.*

234. LICHTENSTEIN, *supra* note 159, at 163–64.

235. *Id.* at 164.

236. *Id.*

237. *Id.*

238. See Fraser & Freeman, *supra* note 160.

other words, the use of the chain gang did not function simply as a cost-saving measure. Instead, its use was key to the South's transformation from a largely agrarian community to a modern twentieth-century industrial society.

The use of prisoners in chain gangs was not formally abolished throughout the United States until the 1960s.<sup>239</sup> But thirty-five years later, chain gangs made a resurgence. Alabama brought chain gangs back to its prison experience in the mid-1990s, prompting a great outcry.<sup>240</sup> Arizona, Massachusetts, Ohio, and Washington followed suit.<sup>241</sup> Indeed, Maricopa County, Arizona, even briefly boasted of an all-female chain gang.<sup>242</sup> Most recently, Florida resurrected the chain gang in 2013, when the sheriff of Brevard County, Florida, used a small group of inmates from the local prison to labor on local roadsides.<sup>243</sup> One difference, however, is that the inmates are all volunteers, and they are not shackled to each other.<sup>244</sup> Additionally, since the prisoners who take part in the chain gang activities are already imprisoned in a correctional facility, the state does not save any money by having them do outdoor labor given the cost of incarcerating an individual on a yearly basis. As in the postbellum period, the majority of individuals who participate in the chain-gang are Black or Latinx. The spectacle is still a disturbing one.

#### 4. PENAL FARMS

Another form of forced prison labor in the form of prison farms remained prevalent in the South during the early to mid-twentieth century.<sup>245</sup> For example, in 1928, the state of Texas supervised twelve state prison farms; virtually one-hundred percent of the prisoners working there were Black.<sup>246</sup> Likewise, in Florida, convict leasing gradually morphed

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239. Burley, *supra* note 218, at 131.

240. *See id.* at 132–35.

241. Andrew Ford, *Florida Sheriff Reintroduces Chain Gang*, USA TODAY (May 2, 2013, 4:22 PM), <https://www.usatoday.com/story/news/nation/2013/05/02/brevard-county-sheriff-chain-gang/2130335/> [<https://perma.cc/FWG3-3PAF>].

242. Meg O'Connor, *'Nation's Only Female Chain Gang' Apparently Disbanded*, PHX. NEW TIMES (May 2, 2019, 7:30 AM), <https://www.phoenixnewtimes.com/news/nations-only-female-chain-gang-boasts-the-mcso-website-11279199>.

243. Ford, *supra* note 241.

244. *Id.*

245. DELANEY, SUBRAMANIAN, SHAMES & TURNER, *supra* note 215.

246. *Id.* at 39.

into prison farms.<sup>247</sup> Many of the prison farms had been former slave plantations before the state government acquired them.<sup>248</sup>

One of the most infamous Southern prison farms, Parchman Farm, was designed to function like an actual plantation.<sup>249</sup> Located in the Mississippi Delta, the Parchman lands were purchased by the Mississippi Penitentiary Board of Control in 1900 in hopes that the lands would serve up “prolific yields.”<sup>250</sup> Convicts were immediately put to work in preparing the land for farming.<sup>251</sup>

Prisoners at Parchman Farm, described as “the quintessential penal farm, the closest thing to slavery that survived the Civil War,”<sup>252</sup> labored for up to fifteen hours a day, planting, picking cotton, and plowing fields while watched by gun-toting guards.<sup>253</sup> In less than ten years after it transformed into a prison farm, Parchman became a money-making machine, reaping profits from the slave-like labor of its inmates.<sup>254</sup> Indeed, in its second year of operation, Parchman made \$185,000 in profit (or approximately \$5 million in today’s money).<sup>255</sup> Parchman Farm was essentially “the leading cash cow for the state of Mississippi. . . . [Parchman] add[ed] hundreds of thousands of dollars and then millions of dollars to the state treasury. . . . [The farm was] an enormous economic asset.”<sup>256</sup> In sum, the twin reasons for Parchman Farm’s existence were

247. See Ben Conarck, *Work Forced: A Century Later, Unpaid Prison Labor Continues to Power Florida*, FLA. TIMES-UNION (May 25, 2019, 7:37 PM), <https://www.jacksonville.com/story/special/special-sections/2019/05/25/work-forced-century-later-unpaid-prison-labor-continues-to-power-florida/5061563007/> [https://perma.cc/2Y9D-42JJ].

248. See Maurice Chammah, *Prison Plantations: One Man’s Archive of a Vanished Culture*, THE MARSHALL PROJECT (May 1, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/05/01/prison-plantations> [https://perma.cc/KNS9-33RC].

249. See Innocence Staff, *The Lasting Legacy of Parchman Farm, the Prison Modeled After a Slave Plantation*, INNOCENCE PROJECT (May 29, 2020), <https://innocenceproject.org/parchman-farm-prison-mississippi-history/> [https://perma.cc/TD4U-XTY3].

250. See Parker Yesko, *Letter from Parchman: Inside Mississippi’s Notorious Prison*, APM REPS. (May 29, 2018), <https://www.apmreports.org/story/2018/05/29/inside-parchman-mississippi-notorious-prison> [https://perma.cc/VQ8V-3LSK].

251. Innocence Staff, *supra* note 249.

252. DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 2 (Free Press Paperbacks 1997) (1996).

253. Innocence Staff, *supra* note 249.

254. OSHINSKY, *supra* note 252, at 155.

255. Yesko, *supra* note 250.

256. Lillian Cunningham, *Episode 9 of the Constitutional Podcast: ‘Fair Punishment,’* WASH. POST, at 34:06 (Oct. 23, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/10/23/episode-9-of-the-constitutional-podcast-fair-punishment/> [https://perma.cc/8PG3-EJBA].

“money-making and . . . racial control.”<sup>257</sup> Parchman Farm exploited and profited from Black bodies like they were machines.<sup>258</sup>

As with convict leasing and chain gangs, the vast majority of early twentieth-century prison farms in the South used money-making as their guiding principle.<sup>259</sup> In Arkansas, two prisons, Cummins and Tucker, were working farms, specifically premised on antebellum Southern plantations.<sup>260</sup> The men labored without pay, and the farms were run for revenue.<sup>261</sup> Patrolled by armed men on horseback, the prisoners farmed cotton, rice, soybeans, and cucumbers.<sup>262</sup> Cummins prison was a slave plantation simply converted to a prison farm.<sup>263</sup>

In the 1880s, Texas began to buy large tracts of agricultural land situated on former plantations.<sup>264</sup> The Texas prison farms were “an agricultural prison model focused on the use of inmate labor on state-owned land to benefit the state.”<sup>265</sup> The prisoners were subsequently used to extract profits from the farms.<sup>266</sup> Although these Texas prison farms were renamed prison “units” in the 1960s, virtually everything else remained the same, including the stinting of proper food, medical care, and housing for inmates, all to maximize revenues.<sup>267</sup>

Texas prison farms yielded more than any local farms worked by free laborers, as independent workers could not be whipped or starved to increase production.<sup>268</sup> Throughout the 1950s and 1960s, Texas plantation prison farms reaped an average revenue of \$1.7 million per year (\$13

257. Yesko, *supra* note 250 (quoting Parchman historian David Oshinsky).

258. See Lily Pulver, *Southern Prison Reform in the 20th Century: Mississippi's Parchman Farm*, ORG. FOR RACIAL JUST., <https://organizingforracialjusticeahistory.wordpress.com/home-3/lilys-page/> [https://perma.cc/3V7J-AFKH] (last visited Feb. 25, 2022).

259. See Bauer, *supra* note 17.

260. See Colin Edward Woodward, *The Arkansas Prison Scandal*, ARK. TIMES (Mar. 22, 2018, 8:00 AM), <https://arktimes.com/news/cover-stories/2018/03/22/the-arkansas-prison-scandal> [https://perma.cc/36UA-U3HV].

261. *Id.*

262. *Id.*

263. See Keri Blakinger, *Will the Reckoning over Racist Names Include These Prisons?*, THE MARSHALL PROJECT (July 29, 2020, 7:00 AM), <https://www.themarshallproject.org/2020/07/29/will-the-reckoning-over-racist-names-include-these-prisons> [https://perma.cc/S29N-Q98K].

264. See CHAD R. TRULSON & JAMES W. MARQUART, *FIRST AVAILABLE CELL: DESEGREGATION OF THE TEXAS PRISON SYSTEM* 80 (2009).

265. *Id.*

266. See *id.*

267. See *id.* at 80–81.

268. See Shane Bauer, *The Straight Line from Slavery to Private Prisons*, LITERARY HUB (Sept. 19, 2018), <https://lithub.com/the-straight-line-from-slavery-to-private-prisons/> [https://perma.cc/FEM6-MYAY].

million in 2018 dollars).<sup>269</sup> In sum, Texas prison farms were money-making ventures.<sup>270</sup>

Angola prison farm in Louisiana also followed the slave plantation blueprint in wringing the utmost labor from inmates. In 1900 Louisiana purchased 8,000 acres of a former plantation named Angola after the homeland of many of its former slaves.<sup>271</sup> A major objective was to become a self-sufficient penal system.<sup>272</sup> In approximately four years, Louisiana managed to completely construct a fully working, profitable, and self-sufficient penal system, from purchasing lands to deriving profits from crops.<sup>273</sup> Money-making became Angola's primary focus, "a profit-oriented policy of inmate plantation farming that closely mirrored slavery."<sup>274</sup> Angola's major difference from slave labor practices? There was far less incentive to keep the incarcerated laborers alive.<sup>275</sup>

Little has changed today at Angola, as prisoners only receive four to twenty cents per hour for their labor (with agricultural workers getting paid the least).<sup>276</sup> Inmates may keep only half their wages, with the rest saved for their eventual release—even though most inmates never leave Angola.<sup>277</sup> Prisoners may work seventeen-hour days and may work sixty-five-hour weeks if forced to spend the weekends working in the fields after guards file weekly disciplinary reports.<sup>278</sup> In many ways, Angola's work plan has remained the same since the times of slavery,<sup>279</sup> with profits continuing to be a main focus.<sup>280</sup> Angola raises revenue through a Louisiana company called Prison Enterprises which sells goods produced

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269. *Id.*

270. *Id.*

271. Vanessa Tolino, *Louisiana State Penitentiary at Angola*, 64 PARS. (Feb. 8, 2019), <https://64parishes.org/entry/louisiana-state-penitentiary-at-angola> [https://perma.cc/B4HJ-S4ZQ].

272. *See id.*

273. *See* MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 92–93 (1971).

274. *See* Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 905 (2012).

275. *See* Thomas Beller, *Angola Prison and the Shadow of Slavery*, NEW YORKER (Aug. 19, 2015), <https://www.newyorker.com/culture/photo-booth/angola-prison-louisiana-photos> [https://perma.cc/865Z-9AV2].

276. Maya Schenwar, *America's Plantation Prisons*, TRUTHOUT (Aug. 28, 2008), reproduced by GLOB. RSCH. (Aug. 30, 2008), <https://www.globalresearch.ca/america-s-plantation-prisons/10008> [https://perma.cc/XHX8-CHFN].

277. *See id.*

278. *See id.*

279. *Id.*

280. *See* Armstrong, *supra* note 274, at 909.

by inmates.<sup>281</sup> The company brought in almost \$29 million in 2016, much of it from Angola.<sup>282</sup>

In general, most prison farms were largely unable to compete with mechanized farming by the 1930s and were reduced to growing food crops and livestock for prison consumption.<sup>283</sup> Nonetheless, prison farms continued in their slave-plantation format until 1980 when a federal court decided *Ruiz v. Estelle*.<sup>284</sup> *Ruiz* forced Texas prisons to improve working and living conditions, addressed prison guard brutality, and no longer permitted armed inmates to guard fellow prisoners.<sup>285</sup>

Likewise, Mississippi's Parchman prison farm eventually ran into problems in the 1970s. In 1972 Mississippi Governor William Waller appointed a five-member committee to review the farming-for-profit model of Parchman Farm.<sup>286</sup> The committee recommended eradicating for-profit farming operation and reducing acreage by three-quarters, only raising food for the prison on the rest.<sup>287</sup> The committee also recommended hiring a prison superintendent who specialized in penology, not plantation farming.<sup>288</sup>

These changes followed the filing of a federal lawsuit by prison inmates, *Gates v. Collier*,<sup>289</sup> alleging a pattern of abuse, mistreatment, and segregation of prisoners by the Mississippi State Penitentiary Board.<sup>290</sup> The Mississippi district court found that the prison's practices of segregation, neglect, and abuse of prisoners violated both the Eighth and Fourteenth Amendments.<sup>291</sup> The case ultimately went up to the Fifth Circuit which dismantled a variety of abuses and corporal punishment practices inside the prison.<sup>292</sup>

281. See Richard Davies, *From Pecan Pralines to 'Dots' as Currency: How the Prison Economy Works*, GUARDIAN (Aug. 30, 2019), <https://www.theguardian.com/us-news/2019/aug/30/prison-economy-informal-markets-alternative-currencies> [<https://perma.cc/M9VN-GAYX>].

282. *Id.*

283. See William Stone, *Industry, Agriculture, and Education, in PRISONS: TODAY AND TOMORROW* 124, 128 (Joycelyn M. Pollock ed., 2d ed. 2006).

284. 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *and amended in part, vacated in part per curiam*, 688 F.2d 266 (5th Cir. 1982).

285. See *id.* at 1286–88, 1303–07, 1381–84, 1391.

286. See *Mississippi Urged to Revamp Prison*, N.Y. TIMES (Oct. 8, 1972), <https://www.nytimes.com/1972/10/08/archives/mississippi-urged-to-revamp-prison-panel-proposes-eliminating.html> [<https://perma.cc/W8FT-WETY>].

287. See *id.*

288. See *id.*

289. 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 489 F.2d 298 (5th Cir. 1973), *and aff'd*, 501 F.2d 1291 (5th Cir. 1974).

290. See *id.* at 885–86.

291. See *id.* at 893–95.

292. See *Gates v. Collier*, 501 F.2d 1291, 1299, 1322 (5th Cir. 1974).

*Gates v. Collier* was the first federal case to hold unconstitutional any conditions depriving inmates of basic hygiene and adequate medical treatment, as well as mail censorship and failure to protect inmates from violence by other inmates.<sup>293</sup> Following *Gates*, Parchman prisoners were no longer required to work in the fields, finally eliminating Parchman's prison plantation system.<sup>294</sup>

Prison farms still exist today in a modified form. Some states require farm labor programs; refusing to work can result in punishments such as solitary confinement, extra discipline, or more time behind bars.<sup>295</sup> In addition, shrinking numbers of agricultural workers have led some states to allow private companies to hire prisoners for agricultural labor.<sup>296</sup> This is unquestionably a boon to the private agriculture companies given their savings in pay and insurance costs.<sup>297</sup> Using prison labor means there are no unionization concerns or workplace complaints for private employers.<sup>298</sup>

In the era of COVID-19, working for a private farm can carry serious health risks. For example, Arizona's Perryville Prison housed 150 female inmates at a temporary Hickman's Family Farms labor camp (one of the largest egg producers in the state) to ensure that egg production stayed high.<sup>299</sup> Twenty-eight of the women were infected with COVID-19 during their stay.<sup>300</sup> The working conditions at Hickman's Family Farms over the summer were very poor, with acrid fumes, over 100-degree weather, and inconsistent air-conditioning.<sup>301</sup> Arizona's contract with Hickman's Family Farms is supposedly worth \$5 million, and the prison can deduct up to eighty percent of every dollar the women earn.<sup>302</sup>

Health and safety issues are also rife among farm prison laborers in non-pandemic times. In Alabama, many inmates are sent on work release to private poultry industries, which require dangerous work for little

293. *See id.* at 1296.

294. *See* Cunningham, *supra* note 256, at 44:07.

295. *See* Rebecca McCray, *A Disturbing Trend in Agriculture: Prisoner-Picked Vegetables*, TAKEPART (Apr. 14, 2014), <https://web.archive.org/web/20140414233702/http://www.takepart.com/article/2014/04/14/prison-ag-labor/>.

296. *See id.*

297. *See id.*

298. *Id.*

299. *See* Eliyahu Kamisher, *Prison Labor Is on the Frontlines of the COVID-19 Pandemic*, THE APPEAL (Oct. 5, 2020), <https://theappeal.org/prison-labor-is-on-the-frontlines-of-the-covid-19-pandemic/> [https://perma.cc/EBL2-AKQG].

300. *Id.*

301. *See id.*

302. *See* Cindy Wu & Prue Brady, *If Prison Workers Are Essential, We Should Treat Them Like It: Prison Labor in the U.S., Part I*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2020), <https://corpaccountabilitylab.org/calblog/2020/8/5/if-prison-workers-are-essential-we-should-treat-them-like-it-prison-labor-in-the-us-part-i> [https://perma.cc/4F72-FNJK].

personal payment.<sup>303</sup> Poultry work is one of the most hazardous industries for prison laborers, causing multiple injuries on a regular basis.<sup>304</sup>

The bulk of the money earned by inmate labor goes directly into the state coffers, which can reap millions from hired-out workers.<sup>305</sup> Alabama prisoners, for example, get only about thirteen cents out of every dollar earned.<sup>306</sup> And there is no imperative to pay prison laborers for their work.<sup>307</sup> In sum, prison farming has too many parallels to the old slave plantation system for comfort.

### B. The North

Prison labor in the northern states was far more factory-like than that in the South. At Illinois's Joliet Penitentiary in the late 1860s, for example, all 1,160 inmates were sentenced to hard labor.<sup>308</sup> Joliet inmates manufactured boots, shoes, brooms, cigars, army tents, and an array of other items all for sale on the open market.<sup>309</sup> The penitentiary was so large that running the labor aspect of the prison was seen as comparable "to running eight to ten large manufacturing establishments."<sup>310</sup> By 1872, prison officials found it simpler to have private manufacturers use inmates to create goods within prison walls, supplying machinery, foremen, and raw materials.<sup>311</sup>

Like Joliet, hard labor spread liberally in northern industrial prisons between 1820 and 1890.<sup>312</sup> This transformation of penitentiaries to inmate labor sites helped cement the country's correctional facilities as "large-scale, complex factories," all producing goods to sell at market.<sup>313</sup> Because so much commercial industry came to rely upon prison labor, there was

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303. See Kristi Graunke & Will Tucker, *Why Incarcerated People at Poultry Plants Deserve Better*, THE MARSHALL PROJECT (Aug. 13, 2018, 10:00 PM), [https://www.themarshallproject.org/2018/08/13/why-incarcerated-poultry-workers-deserve-better?utm\\_medium=email&utm\\_campaign=share-tools&utm\\_source=email&utm\\_content=post-top](https://www.themarshallproject.org/2018/08/13/why-incarcerated-poultry-workers-deserve-better?utm_medium=email&utm_campaign=share-tools&utm_source=email&utm_content=post-top) [<https://perma.cc/Y2EE-TRLP>].

304. See *id.*

305. See *Prison Labour Is a Billion-Dollar Industry, with Uncertain Returns for Inmates*, ECONOMIST (Mar. 16, 2017), <https://www.economist.com/united-states/2017/03/16/prison-labour-is-a-billion-dollar-industry-with-uncertain-returns-for-inmates> [<https://perma.cc/2HX3-G3DY>].

306. Graunke & Tucker, *supra* note 303.

307. See Wu & Brady, *supra* note 302.

308. See HENRY KAMERLING, CAPITAL AND CONVICT: RACE, REGION, AND PUNISHMENT IN POST-CIVIL WAR AMERICA 80 (2017).

309. *Id.*

310. *Id.*

311. *Id.* at 93–94.

312. MCLENNAN, *supra* note 53, at 6.

313. KAMERLING, *supra* note 308, at 83–84.

great pressure on penitentiary officials to keep inmates incarcerated for as long as possible.<sup>314</sup>

The factory-like conditions of northern penitentiaries and their immense manufacturing abilities did have one important aspect in common with southern criminal justice: devotion to profit. No matter where they were located, state correctional facilities focused on using inmates for “productive labor for large-scale, highly organized, profit-seeking enterprises.”<sup>315</sup> These industrial prisons helped feed and nurture the capitalist focus on profit,<sup>316</sup> a nationwide trend during which the “broad hegemony of market values”<sup>317</sup> flowered. Both northern and southern states did not hesitate to use a captive workforce to help boost industrial profit.<sup>318</sup> In doing so, “the penal machinery of the state did not provide punishment for crime but instead served as a clearinghouse for private individuals to hire out cheap forced labor.”<sup>319</sup>

Prison labor in the North ran into more opposition than the South, however, mostly from independent manufacturers and early union organizations. As the twentieth century neared, the financial threat of inmate labor became more pointed, and free/organized labor’s conflict with correctional industries grew.<sup>320</sup> In the 1880s and 1890s, free labor forces began campaigning directly against convict labor, particularly those inmates toiling under the hands of manufacturing enterprises.<sup>321</sup> Many businesses were so incensed by the threat of prison labor that by 1886, a group of industrialists met in Chicago to form the National Anti-Convict Contract Association.<sup>322</sup> Organized labor and industry agreed that convict labor had to be eliminated.<sup>323</sup>

Naturally, northern prisons resisted such movements, as convict labor continued to provide not only a convenient work and manufacturing source, but also a reliable source of revenue for state treasuries.<sup>324</sup> By the time that depressions hit the United States in 1870 and 1890, however, the resulting unemployment afforded further power to union demands.<sup>325</sup> The compromise was the state use system: inmates could still work, but the

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314. *Id.* at 90.

315. McLENNAN, *supra* note 53, at 88.

316. KAMERLING, *supra* note 308, at 82.

317. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, 478 (1988).

318. KAMERLING, *supra* note 308, at 83.

319. *Id.* at 98.

320. Garvey, *supra* note 216, at 359.

321. KAMERLING, *supra* note 308, at 101.

322. Garvey, *supra* note 216, at 359.

323. *Id.*

324. *Id.* at 359–60.

325. *Id.* at 362.

state would be their only market and buyer.<sup>326</sup> Thus, prison-made goods would no longer compete on the free market, and inmates would no longer compete with free workers for jobs.<sup>327</sup> This labor compromise spread throughout most of the country at the turn of the twentieth century.<sup>328</sup> Nonetheless, the mistreatment of prisoners to better extract profit was widespread enough nationwide that in 1901, W.E.B. Du Bois pointed out, “[T]he state became a dealer in crime, profited by it so as to derive a net annual income for her prisoners.”<sup>329</sup>

States’ ability to contract out prisoner labor began shrinking during the first third of the twentieth century.<sup>330</sup> By the 1920s, the movement to end inmate labor for manufacturing was widespread enough that it routinely made the papers. For example, in 1923, the *New York Times* reported on a drive by garment manufacturers to ban goods made by prison labor.<sup>331</sup> Describing how prison-made garments comprised up to forty percent of the clothing sold to wholesalers, the *Times* noted that the manufacturers promulgated the distribution of a special label to be affixed to all free-labor-made clothing, with licenses and fines to be distributed for its use.<sup>332</sup> The manufacturers also called for higher wages for prisoners so that the free-labor goods could be more competitive in the marketplace.<sup>333</sup>

This limitation on prisoner labor reached its height during the Great Depression, when thirty-three states banned the sale of convict-made goods in the free market.<sup>334</sup> This crackdown was assisted by the 1929 passage of the Hawes-Cooper Act<sup>335</sup> and the Ashurst-Sumners Act of 1935,<sup>336</sup> both of which banned interstate commerce in prisoner-made goods and limited prison labor to the creation of products to be sold to the

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326. *Id.* at 362–63.

327. *Id.* at 363.

328. See GLEN A. GILDEMEISTER, PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840–1890, at 235, 240 (1987).

329. W. E. B. DU BOIS, THE SPAWN OF SLAVERY: THE CONVICT-LEASE SYSTEM IN THE SOUTH (1901), reprinted in DU BOIS ON REFORM 87 (Brian Johnson ed., 2005).

330. See Morgan O. Reynolds, *Factories Behind Bars*, NAT’L CTR. FOR POL’Y ANALYSIS (Sept. 1, 1996), <http://www.ncpathinktank.org/pub/st206?pg=3> [<https://perma.cc/JYB7-ZCV6>].

331. See *Ban Goods Made by Prison Labor: United Drive by Garment Manufacturers Against This Kind of Competition*, N.Y. TIMES (Aug. 19, 1923), [https://timesmachine.nytimes.com/timesmachine/1923/08/19/105108076.pdf?pdf\\_redirect=true&ip=0](https://timesmachine.nytimes.com/timesmachine/1923/08/19/105108076.pdf?pdf_redirect=true&ip=0).

332. *Id.*

333. *Id.*

334. Reynolds, *supra* note 330.

335. Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084 (codified as amended at 49 U.S.C. § 11507 (1994)).

336. Act of July 24, 1935, ch. 412, 49 Stat. 494 (codified as amended at 18 U.S.C. §§ 1761–1762 (1994)).

state.<sup>337</sup> Exceptions to this legislation, however, included goods made by convicts or prisoners on parole, on supervised release or probation, or in any penal or reformatory institution.<sup>338</sup> Organized union concerns over prisoners commandeering jobs ultimately led to a federal prohibition on convict labor for federally funded public works projects.<sup>339</sup>

*C. Prison Labor for, and by, the Government*

Even the Great Depression/New Deal Era prohibitions on profit-making prison labor, however, did not eradicate the practice entirely. In 1934 the federal government created the Federal Prison Industries (“FPI,” alternately called “UNICOR”).<sup>340</sup> FPI was a federal monopoly managing prison labor programs, allowing federal prisoners to manufacture goods as long as they were for government use.<sup>341</sup> The idea was to provide work skills to inmates by allowing prison workers to farm and build highways, all while conveniently reducing the cost of their incarceration.<sup>342</sup> By the advent of World War II, FPI offered prisoner-crafted products in more than seventy categories and operated twenty-five shops and factories.<sup>343</sup>

After World War II, FPI continued to expand, focusing on construction work.<sup>344</sup> Inmate laborers helped build at least half of the thirty-one federal prisons constructed in the 1950s and 1960s.<sup>345</sup> By the 1980s, FPI, which in 1977 adopted the trade name UNICOR,<sup>346</sup> had massively expanded, based in part on the explosive growth of prisons and mass incarceration over the previous thirty years.<sup>347</sup> UNICOR spent \$50

337. Cao, *supra* note 4, at 12.

338. 18 U.S.C. §§ 1761–1762.

339. Walsh-Healey Act, 41 U.S.C. §§ 6501–6511; *see also* Cao, *supra* note 4, at 12.

340. 18 U.S.C. § 4122. Section 4122(a) holds that FPI determines “in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions or for sale to the departments or agencies of the United States, but not for sale to the public in competition with private enterprise.” *Id.*; *see* UNICOR, *FACTORIES WITH FENCES: 75 YEARS OF CHANGING LIVES* 24.

341. Cao, *supra* note 4, at 14.

342. *See* Safia Samee Ali, *Federal Prison-Owned ‘Factories with Fences’ Facing Increased Scrutiny*, NBC NEWS (Sept. 4, 2016, 1:22 PM), <https://www.nbcnews.com/news/us-news/federal-prison-owned-factories-fences-facescrutiny-n639791> [<https://perma.cc/3RUP-Z75X>].

343. *Federal Prison Industries, Inc. History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/federal-prison-industries-inc-history/> [<https://perma.cc/RAM2-FNDS>] (last visited Mar. 7, 2022).

344. *Id.*

345. *Id.*

346. *See* UNICOR, *supra* note 340, at 24.

347. *Federal Prison Industries, Inc. History*, *supra* note 343.

million to build and expand facilities assuming that inmate numbers would continue to rise.<sup>348</sup>

Some have argued that FPI has a tremendous competitive advantage in the marketplace due to its ability to bypass the competitive bidding process, reaping multi-million-dollar government contracts.<sup>349</sup> FPI has also been the subject of many Justice Department investigations.<sup>350</sup> The corporation today runs approximately eighty-three prison factories in the United States, with 12,000 inmates running call centers and making various products for very low wages, roughly \$0.23 to \$1.15 per hour.<sup>351</sup>

Many government entities are legally required to buy products only from Federal Prison Industries.<sup>352</sup> These guaranteed contracts mean that FPI routinely obtains multimillion-dollar orders and that FPI can participate in free market bidding during which it can undercut any competitors on costs.<sup>353</sup> Ultimately, FPI/UNICOR earns approximately \$500 million a year,<sup>354</sup> relying on a guaranteed market for 150 different products.<sup>355</sup>

Most of the UNICOR profit—the profit resulting from its very inexpensive labor costs and favored bidding status—is returned to it.<sup>356</sup> Prisoners are exempted from minimum wage requirements,<sup>357</sup> and those inmates who have any criminal justice debt are required to apply half of their meager paychecks to it.<sup>358</sup> Further expanding its reach, UNICOR is now permitted to sell to certain private companies courtesy of the Consolidated and Further Continuing Appropriations Act of 2012.<sup>359</sup>

UNICOR has been criticized for allowing its prisoner workers to labor in unsafe conditions, including in an electronic waste recycling facility where workers were exposed to toxic substances.<sup>360</sup> From “2003

348. *Id.*

349. Ali, *supra* note 342.

350. *Id.*

351. *Id.*

352. *See* 18 U.S.C. § 4124.

353. Ali, *supra* note 342.

354. *See* Katherine Stevenson, *Profiting Off of Prison Labor*, BUS. REV. AT BERKELEY (July 6, 2020), <https://businessreview.berkeley.edu/profitting-off-of-prison-labor/> [https://perma.cc/ZB4D-YCH5].

355. *See* Guy Gugliotta, *From Federal Prisons to an Agency near You*, WASH. POST (July 15, 1997), <https://www.washingtonpost.com/archive/politics/1997/07/15/from-federal-prisons-to-an-agency-near-you/331319f3-8edb-4184-a119-f73afdbf03ee/> [https://perma.cc/U4PW-ADJE].

356. Ali, *supra* note 342.

357. *Federal Prison Industries, Inc. History*, *supra* note 343.

358. *See* Fed. Bureau of Prisons, *Program Details*, UNICOR, [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp) [https://perma.cc/MS2J-94QQ] (last visited Mar. 3, 2022).

359. Stevenson, *supra* note 354.

360. Ali, *supra* note 342.

to 2005, UNICOR processed over 120 million pounds of e-waste.”<sup>361</sup> Specifically, toxic dust and heavy metal contaminate from UNICOR’s electronics recycling program may have endangered hundreds of inmate laborers who broke open old computer monitors to extract various components.<sup>362</sup> No personal protective equipment was provided to protect the workers.<sup>363</sup> Airborne lead dust levels at the prison recycling facility occasionally reached fifty times higher than the federally accepted workplace level.<sup>364</sup> “Lead [contamination] can cause severe damage to nervous and reproductive systems.”<sup>365</sup> The inmate workers alleged medical complaints resulting from the contaminants, “including skin lesions, lung and heart problems, cancer, short-term memory loss, miscarriages, and general pain.”<sup>366</sup> Although the varieties of dangerous working conditions for inmate laborers have changed since the days of convict leasing and chain gangs, evidently the lack of concern still persists.

During the COVID-19 pandemic, UNICOR showed a similar disregard for safety. Instead of shutting down its factories for public health reasons, UNICOR kept them open, providing masks for its inmate workers only a few months into the pandemic.<sup>367</sup> It was almost impossible to socially distance in UNICOR’s workplaces, increasing the possibility of COVID-19 spread.<sup>368</sup> Very few of the factories that remained open were providing essential materials.<sup>369</sup> In one prison, the UNICOR workers were segregated under quarantine due to fear of further viral spread.<sup>370</sup> Again, the blatant disregard for inmate health and safety is startling.

Many more prisoners, however, are incarcerated in state prisons. State prisoners perform a much broader array of labor, much of it even less remunerative than the UNICOR prison wages. State prison labor is licensed by the Prison Industry Enhancement Certification Program

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361. Brandon Sample, *Prisoners Exposed to Toxic Dust at UNICOR Recycling Factories*, PRISON LEGAL NEWS (Jan. 15, 2009), <https://www.prisonlegalnews.org/news/2009/jan/15/prisoners-exposed-to-toxic-dust-at-unicor-recycling-factories/> [https://perma.cc/QCD8-E2HL].

362. Kristin Jones, *Prison Work Program May Have Put Hundreds of Prisoners and Workers at Risk*, ABC NEWS (July 10, 2008, 1:45 PM), <https://abcnews.go.com/Blotter/story?id=5349764&page=1> [https://perma.cc/BVB2-FEAD].

363. Sample, *supra* note 361.

364. Jones, *supra* note 362.

365. *Id.*

366. *Id.*

367. See Cary Aspinwall, Keri Blakinger & Joseph Neff, *Federal Prison Factories Kept Running as Coronavirus Spread*, THE MARSHALL PROJECT (Apr. 10, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/10/federal-prison-factories-kept-running-as-coronavirus-spread> [https://perma.cc/2HJB-ULCZ].

368. *Id.*

369. *Id.*

370. *Id.*

(PIECP), a federal program that allows incarcerated people at qualifying state and local facilities to work a selection of jobs, such as factory work and assembling and packaging products.<sup>371</sup> PIECP pays higher wages than other prison jobs, sometimes even paying “prevailing local wages.”<sup>372</sup> Other inmate laborers work for state-owned businesses, where wages range from \$0.33 to \$1.41 per hour.<sup>373</sup>

Through programs such as PIECP, state prisoners now work for a variety of private industries,<sup>374</sup> including making garments for Victoria’s Secret and JCPenney,<sup>375</sup> crafting school supplies,<sup>376</sup> building dental prostheses,<sup>377</sup> working in a variety of food processing plants,<sup>378</sup> and even making cheese and farming tilapia for grocers such as Whole Foods.<sup>379</sup> The wages for state prisoners are usually less than those of federal prisoners.<sup>380</sup> The average hourly wage of a state prisoner is eighty-six cents per hour.<sup>381</sup> State prison labor is a profitable industry for the state, with revenues in the millions of dollars.<sup>382</sup> As such, it is difficult for state prisons to give up state prison labor, despite the bad working conditions, poor treatment, and serious underpayment of inmates, as discussed below.

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371. See *Prison Industry Enhancement Certification Program (PIECP)*, BUREAU OF JUST. ASSISTANCE (Feb. 20, 2012), <https://bja.ojp.gov/program/prison-industry-enhancement-certification-program-piecp/overview> [<https://perma.cc/UW4Y-XGQC>].

372. See 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/6MLD-7HSF>].

373. *Id.*

374. See David Leonhardt, *As Prison Labor Grows, So Does the Debate*, N.Y. TIMES (Mar. 19, 2000), <https://www.nytimes.com/2000/03/19/business/as-prison-labor-grows-so-does-the-debate.html> [<https://perma.cc/7BXT-JUEM>].

375. Caroline Winter, *What Do Prisoners Make for Victoria’s Secret?*, MOTHER JONES (July/Aug. 2008), <https://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret/>.

376. *Id.*

377. *Id.*

378. *Id.*

379. Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (Dec. 9, 2015, 7:00 AM), <https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration>.

380. See Sawyer, *supra* note 372.

381. See Angela Hanks, *How to End Prison Labor Exploitation and Invest in Incarcerated People*, FORBES (Aug. 23, 2018, 10:00 AM), <https://www.forbes.com/sites/angelahanks/2018/08/23/from-exploitation-to-investment-how-to-end-low-wage-prison-labor/?sh=37d777cd5018> [<https://perma.cc/4NRP-5XD2>].

382. See, e.g., *id.*

## III. TWENTY-FIRST-CENTURY PRISON LABOR: MODERN PROFITEERING

Modern prison labor is tied closely to profit-making for both the state and private companies. Along with standard in-prison work assignments, state and federal prisoners perform a wide array of jobs, from oil cleanup to fire-fighting to making U.S. Military defense armor. The thread that ties these jobs together? The chance for revenues to be made on the backs of laboring inmates despite danger or risk of death.

A. *Cleaning Up Natural Disasters*

Prisoners have been extremely handy in remedying U.S. natural and man-made disasters. In Louisiana, for example, instead of hiring any unemployed residents following the 2010 Gulf Coast oil spill, British Petroleum (BP) instead chose to hire state prisoners to cleanse the coastline.<sup>383</sup> The inmates received only “flimsy coveralls and gloves” as protection against the crude oil, which was far less protection than that afforded to other workers.<sup>384</sup> Why prisoners? Because by hiring inmates, BP paid far less for its coastal cleanup.<sup>385</sup> In doing so, BP obtained workers who were unlikely to publicly complain, despite the danger and discomfort such work requires.<sup>386</sup> BP also earned valuable tax write-offs for its use of inmate labor.<sup>387</sup>

Louisiana has an extremely high imprisonment rate—one of the highest in the nation<sup>388</sup>—and houses many of its prisoners in “parish jails.”<sup>389</sup> Both Louisiana “[p]risons and parish jails provide free [inmate] labor to the state and private companies.<sup>390</sup> Well-behaved inmates can qualify for work-release “trustee” positions in their last three years of their sentences, which allows them to be paid near market rate for their jobs.<sup>391</sup> Hiring inmates, however, still makes economic sense for private companies because these prison “trustee” workers “are covered under the Work Opportunity Tax Credit,” which “rewards private-sector employers

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383. See Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, THE NATION (July 21, 2010), <https://www.thenation.com/article/archive/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/> [<https://perma.cc/D4GX-EEZL>].

384. J. Carlee Smith, *Inmates: Our Defenders in Disaster*, NAT. HAZARDS OBSERVER, Dec. 2016, at 10, 12.

385. Young, *supra* note 383.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

for hiring risky ‘target groups.’”<sup>392</sup> “Businesses earn a tax credit of \$2,400 for every work release inmate they hire . . . [plus] up to 40 percent of the wages they pay annually to ‘target group workers.’”<sup>393</sup>

In Louisiana, as in many other states, work-release programs in many ways are designed to benefit their operators over their participants.<sup>394</sup> The beneficiaries of state-inmate labor include parish sheriffs, private contractors, and local companies, many of which are involved in the oil and gas sector.<sup>395</sup> Louisiana inmates routinely clean up oil spills or work in the offshore drilling industry.<sup>396</sup> Indeed, as natural disasters become more frequent, prison labor is increasingly relied upon to prepare for and recover from weather-related emergencies.<sup>397</sup> Pay is often low for these oil and gas inmate workers—a little less than a dollar per hour—despite twelve- to sixteen-hour days and dangerous working conditions.<sup>398</sup> Sometimes inmates are housed in converted shipping containers for temporary clean-up jobs, much like the windowless wagons in which chain gang workers slept.<sup>399</sup>

Offshore drilling jobs, including oil spill remediators and pipeline construction, make the most money for those companies hiring work-release inmates.<sup>400</sup> Local and state facility operators, including county sheriff’s offices, can end up retaining up to sixty-four percent of a prisoner’s gross wages, which are applied to room and board.<sup>401</sup> The gross wages add up. In 2015, for example, Louisiana correctional facility operators received \$35.5 million from inmate laborers’ wages in addition to approximately \$4 million from commissary sales.<sup>402</sup>

Inmates also are assigned to clean up natural disasters without pay, benefiting both the state and private industry. In Houston, Texas, for example, prisoners were put to work assembling sand bags in preparation for 2017’s Hurricane Harvey and were not evacuated until three days after

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392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. See Carly Berlin, *How Louisiana’s Oil and Gas Industry Uses Prison Labor*, SOUTHERLY (Mar. 23, 2020), <https://southerlymag.org/2020/03/23/how-louisianas-oil-and-gas-industry-uses-prison-labor/> [<https://perma.cc/HW7Z-LS6H>].

397. *Id.*

398. *See id.*

399. Young, *supra* note 383.

400. Berlin, *supra* note 396.

401. *Id.*

402. LA. LEGIS. AUDITOR, OVERSIGHT AND BENEFITS OF THE TRANSITIONAL WORK PROGRAM 2 (2016), [https://app.la.state.la.us/PublicReports.nsf/87D9DDAEC96EFE3A86257F94007293F3/\\$FILE/0000E78F.pdf](https://app.la.state.la.us/PublicReports.nsf/87D9DDAEC96EFE3A86257F94007293F3/$FILE/0000E78F.pdf) [<https://perma.cc/8Q93-5Y5K>].

the storm made landfall.<sup>403</sup> None of the prisoners were paid for their work.<sup>404</sup> Similarly, inmates from the Louisiana State Penitentiary were used to sandbag the premises in preparation for Hurricane Katrina.<sup>405</sup>

Likewise, Florida required its prisoners to work as an unpaid labor crew in cleaning up debris from Hurricane Irma in 2017.<sup>406</sup> Hundreds of Florida inmate laborers made up both hurricane and road-debris cleanup crews after the storm.<sup>407</sup> Like Louisiana, Florida is another state that greatly profits from inmate labor, saving an estimated \$59 million per year in state costs from their work.<sup>408</sup>

More recently, scores of incarcerated Californians were sent to the front lines of massive California wildfires to battle sometimes uncontrollable blazes. California has had an inmate firefighting brigade since 1915, but the program truly expanded during World War II, when many civilian firefighters were overseas.<sup>409</sup> The inmate firefighters now live full-time in special inmate fire camps, which are located near potential fire zones.<sup>410</sup>

There are benefits to working as an inmate firefighter, such as higher hourly pay (an additional one dollar per hour when fighting fires), far looser restrictions, and reductions in sentence length.<sup>411</sup> Still, the inmates are exposed to dangerous working conditions, routinely work grueling twenty-four-hour shifts, and get only two to three weeks of formal training.<sup>412</sup> In contrast, civilian firefighters get three years of training and

403. Polly Mosendz, *When Do You Move Prisoners Out of a Storm's Path?*, BLOOMBERG (Sept. 8, 2017, 11:10 AM), <https://www.bloomberg.com/news/articles/2017-09-08/when-do-you-move-prisoners-out-of-a-hurricane-s-path>.

404. *Id.*

405. Jordan Carlee Smith, *Inmate Populations in a Disaster: A Labor Force, a Vulnerable Population, and a Hazard 2* (2016) (Master's thesis, Louisiana State University), [https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5492&context=gradschool\\_theses](https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5492&context=gradschool_theses) [<https://perma.cc/34QF-X7JQ>].

406. See Jessica Lipscomb, *Unpaid Florida Prisoners Being Used to Clean Up After Hurricane Irma*, MIA. NEW TIMES (Sept. 28, 2017, 8:00 AM), <https://www.miaminewtimes.com/news/unpaid-florida-prison-inmates-being-used-on-hurricane-irma-cleanup-labor-crews-9701867>.

407. *Id.*

408. *Id.*

409. Katrina Schwartz & Kevin Stark, *What's Next for Incarcerated Firefighters in California?*, KQED (Nov. 12, 2020), <https://www.kqed.org/news/11846622/whats-next-for-incarcerated-firefighters-in-california> [<https://perma.cc/SS4P-8AEZ>].

410. *Id.*

411. *Id.*

412. See Jared A. Brock, *As California Wildfires Raged, Incarcerated Exploited for Labor*, USA TODAY (Nov. 12, 2020, 12:15 PM), <https://www.usatoday.com/story/opinion/policing/2020/11/11/california-wildfires-raged-incarcerated-exploited-labor-column/6249201002/> [<https://perma.cc/W4S5-HDPY>]; Jaime Lowe, *The Incarcerated Women Who Fight California's Wildfires*, N.Y. TIMES

apprenticeship.<sup>413</sup> Inmate firefighters are four times more likely to be injured and eight times more likely to suffer from smoke inhalation,<sup>414</sup> and several have died doing such work.<sup>415</sup> Until recently, there was no way for ex-inmate firefighters to be hired by the state as full-time firefighters post-release, as EMT certification prohibited them from applying until ten years had passed since their release.<sup>416</sup>

Nearly a third of California firefighters are incarcerated,<sup>417</sup> and recently, inmate fire crews have comprised between fifty and eighty percent of fire personnel.<sup>418</sup> Using inmate firefighters yields a huge cost savings for the state, which saves approximately \$100 million a year from using an inmate wildfire fighting force.<sup>419</sup> Not only do inmate crews perform over three million hours of emergency response work per year, but during non-fire season, crews also clear debris from streams, pick up litter along state highways, and construct hiking trails.<sup>420</sup> Inmate firefighters are so valuable to the state that in 2014, when overcrowded California prisons were being litigated, the office of then attorney general Kamala Harris argued against reducing inmate populations because any reduction in the number of inmates “would severely impact fire camp participation.”<sup>421</sup>

Thirty states rely on prison labor to respond to emergencies and disasters, whether natural or man-made.<sup>422</sup> These jobs range from those requiring minimal instruction, such as making sandbags and clearing debris, to those requiring specialized training, such as firefighting and

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MAG., Aug. 31, 2017, <https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html> [<https://perma.cc/RN33-WPZV>].

413. Lowe, *supra* note 412.

414. Abby Vesoulis, *Inmates Fighting California Wildfires Are More Likely to Get Hurt, Records Show*, TIME (Nov. 16, 2018, 7:40 PM), <https://time.com/5457637/inmate-firefighters-injuries-death/> [<https://perma.cc/E9DR-5EZZ>].

415. At least eight inmate firefighters have died since 2012. *Firefighter Fatalities in the United States*, U.S. FIRE ADMIN., <https://apps.usfa.fema.gov/firefighter-fatalities/fatalityData/dataDownload> (last visited Mar. 11, 2022) (filtering by “Rank > Inmate”).

416. Brock, *supra* note 412; Adesuwa Agbonile, *Inmates Help Battle California’s Wildfires. But When Freed, Many Can’t Get Firefighting Jobs*, SACRAMENTO BEE (Sept. 11, 2018, 4:50 PM), <https://www.sacbee.com/news/state/california/fires/article217422815.html>.

417. Brock, *supra* note 412.

418. Lowe, *supra* note 412.

419. *Id.*

420. Vesoulis, *supra* note 414.

421. Lowe, *supra* note 412.

422. J. Carlee Purdum & Michelle A. Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, 11 RISK, HAZARDS & CRISIS IN PUB. POL’Y 296, 308 (2020).

cleaning up hazardous materials.<sup>423</sup> Inmates also are utilized in assisting with civilian evacuations, multi-transportation incidents, multi-casualty and terrorism events, and search and rescue missions despite not receiving any specific training in those areas.<sup>424</sup>

Of states that mention use of inmate labor forces in their emergency planning, thirty-seven percent were southern states, more than double the northeastern states.<sup>425</sup> Those states with higher inmate populations tended to rely more heavily on inmate labor forces for emergencies.<sup>426</sup> Thirty-one percent of states using inmate labor forces for emergencies had overcrowded prisons.<sup>427</sup>

Some states, including Alabama,<sup>428</sup> Georgia,<sup>429</sup> and Colorado,<sup>430</sup> have explicit directives relying on inmate labor during disasters or public emergencies. As a low-cost substitute for civilian workers in a time of crisis, inmate labor is doubly valuable in that it can be mandated, providing large savings for state and local governments.<sup>431</sup> Some inmate laborers are not paid at all for emergency work under state guidelines.<sup>432</sup> The Federal Emergency Management Agency (FEMA) does reimburse states “for prisoner transportation to the worksite and extraordinary costs of security guards, food, and lodging.”<sup>433</sup>

Disasters include public health emergencies as well. During the COVID-19 pandemic, inmate laborers not only helped with manufacturing protective equipment and hand sanitizer, but also completed more intimate and potentially dangerous work, such as laundering possibly contaminated

423. J. Carlee Purdum, *Disaster Work Is Often Carried Out by Prisoners – Who Get Paid as Little as 14 Cents an Hour Despite Dangers*, CONVERSATION (Sept. 15, 2020, 7:45 AM), <https://theconversation.com/disaster-work-is-often-carried-out-by-prisoners-who-get-paid-as-little-as-14-cents-an-hour-despite-dangers-145513> [<https://perma.cc/A2C3-LS67>].

424. Smith, *supra* note 405, at 14, 24–25.

425. *Id.* at 27.

426. *Id.* at 29–32.

427. *Id.* at 32–33.

428. STATE OF ALA. DEP’T OF CORR., ADMINISTRATIVE REGULATION NUMBER 010: DISASTER ASSISTANCE AND “STATE OF EMERGENCY” PLAN, 2 (2000), <http://www.doc.alabama.gov/docs/AdminRegs/AR010.pdf> (“The major support of the DOC will be manpower.”).

429. GA. COMP. R. & REGS. 125-3-5-.04 (2022).

430. COLO. REV. STAT. § 17-24-124 (“[I]nmates housed in certain prison facilities throughout the state form a labor pool that could be safely utilized to fight forest fires, help with flood relief, and assist in the prevention of or clean up after other natural or man-made disasters.”).

431. *See* Purdum, *supra* note 423.

432. *Id.*

433. FED. EMERGENCY MGMT. AGENCY, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 87 (version 4, 2020).

hospital laundry,<sup>434</sup> disinfecting cleaning supplies,<sup>435</sup> and digging mass graves for those who died of the virus.<sup>436</sup> In New York, the use of inmate workers to dig mass graves was part of a 2008 emergency pandemic plan drawn up by New York City's medical examiner.<sup>437</sup>

In 2015 inmate laborers in Indiana were tasked with killing chickens infected with avian flu, a potentially deadly threat to humans.<sup>438</sup> Given great concerns over such a highly infectious bird virus, Indiana began training some of its prisoners to safely transport the chickens before the prisoners asphyxiated the birds.<sup>439</sup>

Given the large, easily accessible, and inexpensive (or free) labor force available for disaster and emergency responses, finding that many states are incentivized to maintain or increase incarceration rates is not surprising. Specifically, "[t]he utilization of inmate labor forces in the disaster context may suggest a deeper level of entrenchment with regard[] to the extent in which states rely upon inmate labor participation in [the] local economy, and may be serving to further incentivize higher rates of incarceration."<sup>440</sup> In this way, using inmate labor for emergency and disaster response can promote harsher penal policies and more hesitance in repealing older policies.<sup>441</sup>

Private companies and individuals also are eager to take advantage of the inmate labor cost savings when responding to natural disasters. In Southern California, for example, a neighborhood community group hired state inmates to cut brush, remove debris, and spray anti-weed herbicide on any excess vegetation, as inmate labor was much cheaper than civilian labor.<sup>442</sup>

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434. See Emma Grey Ellis, *Covid-19's Toll on Prison Labor Doesn't Just Hurt Inmates*, WIRED (May 19, 2020, 2:07 PM), <https://www.wired.com/story/covid-19-prison-labor/> [https://perma.cc/GVS2-VDBB].

435. See J. Carlee Purdum, *States Are Putting Prisoners to Work Manufacturing Coronavirus Supplies*, CONVERSATION (Apr. 21, 2020, 8:46 AM), <https://theconversation.com/states-are-putting-prisoners-to-work-manufacturing-coronavirus-supplies-135290> [https://perma.cc/6D3B-DE42].

436. See Geoff Herbert, *Report: Rikers Island Inmates Offered \$6 Per Hour to Dig Mass Graves in NYC*, SYRACUSE.COM (Apr. 1, 2020, 10:42 AM), <https://www.syracuse.com/coronavirus/2020/04/report-rikers-island-inmates-offered-6-per-hour-to-dig-mass-graves-in-nyc.html> [https://perma.cc/BY99-PEVC].

437. *Id.*

438. P.J. Huffstutter, *States Enlist Prisoners, Plan Biosecurity to Combat Avian Flu Threat*, REUTERS (May 31, 2015, 6:05 AM), <https://www.reuters.com/article/us-health-birdflu-usa/states-enlist-prisoners-plan-biosecurity-to-combat-avian-flu-threat-idUSKBN0OG0FC20150531> [https://perma.cc/2RPJ-X5ST].

439. *Id.*

440. Smith, *supra* note 405, at 40.

441. See *id.* at 41.

442. *Id.* at 15.

The economic exploitation that occurs with most inmate labor is doubly troubling in times of emergency or disaster, when often prisoners' health, safety, and even lives are risked to ensure cost savings on the part of governments or private industry.

### *B. Profit for Profit's Sake*

In the twenty-first century, “[t]he scale of private industry’s involvement within the contemporary criminal legal system is staggering.”<sup>443</sup> Private industry plays a role in almost every aspect of mass incarceration and criminal justice, from the smallest to the largest parts.<sup>444</sup> Many of these companies profit from “commercial transactions that transpire in the shadow of criminal law,”<sup>445</sup> reaping revenue out of the incarcerated toil of others.

Economic analysis of state and federal inmate labor estimated that in 2003, the fruits of prisoner industry created over \$2 billion worth of commodities, both goods and services.<sup>446</sup> More recent numbers are harder to obtain. Inmate workers usually are excluded from official state and federal employment statistics, and there is little economic research done in this area.<sup>447</sup> Because there has not been a nationwide census of prisons since 2005, there is no central source of information.<sup>448</sup> In 2005 there were approximately 1.5 million prisoners working inside and outside of correctional facilities, with roughly 600,000 people in the manufacturing sector.<sup>449</sup> At the time, that represented over four percent of all manufacturing jobs in the country.<sup>450</sup>

### *C. Food Harvest and Production*

The actual fruits of inmate labor slip into every aspect of modern life. Food and agribusiness are one highly lucrative example. For example, Leprino Foods, a \$3 billion company supplying mozzarella to three nationwide pizza chains—Papa John’s, Pizza Hut, and Domino’s—uses

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443. BRIAN HIGHSMITH, NAT’L CONSUMER L. CTR., *COMMERCIALIZED (IN)JUSTICE* 9 (2019).

444. *Id.* at 1.

445. *Id.* at 7.

446. See Asatar P. Bair, *An Economic Analysis of Prison Labor in the United States*, at vi, 2 (Sept. 2004), (Ph.D. dissertation, University of Massachusetts Amherst) (ProQuest).

447. See The Indicator from Planet Money, *The Uncounted Workforce*, NPR (June 29, 2020, 5:01 PM), <https://www.npr.org/2020/06/29/884989263/the-uncounted-workforce> [<https://perma.cc/N6GF-4PUF>].

448. *Id.*

449. *Id.*

450. *Id.*

Colorado Corrections Inc. to source its buffalo milk.<sup>451</sup> Leprino was able to purchase the buffalo milk for \$1.19 a pound, half of what it would cost on the open market, while paying prisoners only \$4.50 per day.<sup>452</sup> Very few customers are aware of the cheese sourcing, however, as Leprino and Colorado Corrections have kept their business very quiet.<sup>453</sup>

Other large nationwide food companies likewise have been quietly sourcing much of their work from inmate labor. Hickman Farms, which supplies most of the eggs in southwest Arizona, uses incarcerated workers at its poultry farms, reaping \$18.9 million from 2018 to 2020 from the collaboration.<sup>454</sup> Dairy Farmers of America, a dairy conglomerate supplying thirty percent of the nation's raw milk to companies such as Borden, T.G. Lee, Plugrá, and Breakstone's Butter, purchases much of its milk from Colorado and South Carolina correctional facilities, collecting more than \$10.5 million in revenues.<sup>455</sup> Taylor Farms, producer of salads and salad kits for Walmart, Kroger, and Ralph's, uses Arizona Correctional Industries workers and made \$5.3 million from 2019 to 2020.<sup>456</sup> Tropaquatics, Inc., a fish distributor, purchases its tilapia from Wyoming Brand Industries, a corrections-based company, and formerly used Colorado Correctional Industries as a supplier.<sup>457</sup>

Often a state's correctional facilities produce and process a wide range of food products. In Texas, inmate workers raised thirty crops that produced more than 11.7 million pounds of food in 2017, both for commercial sale and for feeding prisoners within correctional facilities.<sup>458</sup> These included harvesting 123.7 million pounds of cotton, grains, and grasses; producing 5 million eggs; processing 22.7 million pounds of meat; and canning 297,143 cases of vegetables.<sup>459</sup> Much of this is produced on the former plantation fields owned and operated by the Texas Department of Criminal Justice—some 130,000 agricultural acres.<sup>460</sup>

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451. See H. Claire Brown, *How Corporations Buy—and Sell—Food Made with Prison Labor*, COUNTER (May 18, 2021, 11:38 AM), <https://thecounter.org/how-corporations-buy-and-sell-food-made-with-prison-labor/> [<https://perma.cc/U698-TKH8>].

452. *See id.*

453. *See id.*

454. *Id.*

455. *Id.*

456. *See id.*

457. *Id.*; see also *WY Brand Industries*, WYO. DEP'T OF CORRECTIONS, <https://corrections.wyo.gov/services-and-programs/wy-brand-industries> [<https://perma.cc/L77W-EJYB>] (last visited Mar. 9, 2022).

458. LESLIE SOBLE, KATHRYN STROUD & MARIKA WEINSTEIN, IMPACT JUSTICE, *EATING BEHIND BARS* 78 (2020).

459. *Id.*

460. See Ashanté Reese & Randolph Carr, Op-Ed, *Overthrowing the Food System's Plantation Paradigm*, CIV. EATS (June 19, 2020), <https://civileats.com/2020/06/19/op-ed-overthrowing-the-food-systems-plantation-paradigm/> [<https://perma.cc/25RC-66AB>].

Forty-six states run some sort of agricultural production within their prison systems, and twenty percent of those states have large scale operations.<sup>461</sup> This means that over 30,000 inmates labor in highly profitable farming or food-related positions for little or no money.<sup>462</sup> In addition, agricultural work is frequently exempt from minimum wage requirements, so prisoners usually are paid very little for their toil.<sup>463</sup> In some prisons that produce food or process meat and dairy, such as those in Arkansas and Indiana, the inmates do not even get to eat what they grow because most of it is shipped out for sale.<sup>464</sup>

These food-production arrangements require that inmates labor on farms and in dairies for little to no money, usually lacking basic labor protections.<sup>465</sup> Moreover, most of this prison-sourced food and labor is kept very secretive—to the point that sometimes, not even the food companies know about it. In 2014, for example, *Fortune Magazine* ran a story highlighting how Whole Foods, among other companies, sold goat cheese and tilapia produced by inmate laborers in Colorado and had done so for a few years.<sup>466</sup> Both products were made by inmates working for Colorado Correctional Industries, which in 2014 employed over 1,800 prisoners.<sup>467</sup> The working inmates made between \$0.74 and \$4.00 daily and were eligible for performance bonuses.<sup>468</sup>

After customer and advocacy groups protested, Whole Foods agreed to stop selling the goods in 2016.<sup>469</sup> Whole Food defended its practice, contending that “supporting suppliers who found a way to be part of paid, rehabilitative work being done by inmates would help people get back on their feet and eventually become contributing members of society.”<sup>470</sup> Critics, however, responded that Whole Foods was making profits off the

461. SARA SNYDER, HEAL FOOD ALLIANCE, THE PRISON INDUSTRIAL COMPLEX AND AGRICULTURAL LABOR 1 (2017), [https://drive.google.com/file/d/1ZWdBH5zlKbV6K6subbGMm4nUMY3\\_ZZgJ/view](https://drive.google.com/file/d/1ZWdBH5zlKbV6K6subbGMm4nUMY3_ZZgJ/view).

462. *Id.*

463. *See id.* at 2.

464. SOBLE, STROUD & WEINSTEIN, *supra* note 458, at 11.

465. Brown, *supra* note 451.

466. *See* Jennifer Alsever, *Prison Labor’s New Frontier: Artisanal Foods*, FORTUNE (June 2, 2014, 4:00 AM), <https://fortune.com/2014/06/02/prison-labor-artisanal/> [<https://perma.cc/98GA-5HEP>].

467. *See Whole Foods to Stop Selling Products Made by Prisoners*, CHI. TRIB. (Sept. 30, 2015, 3:17 PM), <https://www.chicagotribune.com/business/ct-whole-foods-prisoners-20150930-story.html> [<https://perma.cc/8B2P-846Q>].

468. *Id.*

469. *Id.*

470. *See* Susanna Kim, *Whole Foods Suppliers Defend Using Prison Labor*, ABC NEWS (Oct. 15, 2015, 3:15 PM), <https://abcnews.go.com/Business/foods-suppliers-defend-prison-labor/story?id=34258597> [<https://perma.cc/V27S-N35M>].

backs of the poor and imprisoned,<sup>471</sup> exploiting both prisoners and existing tax law for increased revenues.<sup>472</sup>

Recent farm labor shortages over the past decade also have shunted more inmate laborers into food production. In Idaho, for example, prisoners have been tasked with picking, sorting, and packing potatoes during the potato harvest, including in open fields.<sup>473</sup> Other states with labor-intensive crops such as apples, onions, and tomatoes, such as Washington and Arizona, have followed suit.<sup>474</sup> After a nationwide crackdown on undocumented farm labor, many farmers and agribusinesses now rely on state prisoners to harvest their produce for the market.<sup>475</sup> The reliance of agribusiness and farming on cheap labor<sup>476</sup> necessitates the use of a captive labor force such as prisoners.

Many farms and farming entities keep their employment of prisoners under the radar to minimize criticism despite the prevalence of such employment.<sup>477</sup> Major farming businesses such as SunGlo of Idaho Inc., Walters Produce Inc., High Country Potato Inc., and Floyd Wilcox & Sons Inc. all have used prison labor for years, although none would confirm it.<sup>478</sup> In part, this likely is due to the high level of profit reaped from using prison labor, which pays inmate workers very minimally. In Arizona, for example, inmates doing farm work through Arizona Correctional Industries (ACI) received only \$3.00 to \$4.00 per hour in 2019, and that was before various mandatory correctional deductions.<sup>479</sup> By contrast, the 2019 minimum wage for most Arizona farm workers was \$11.00 per hour.<sup>480</sup>

In Montana, dairy conglomerate Darigold ended its thirty-year contract with the Montana State Prison due to Costco's recent decision to phase out all prison-made goods and foods.<sup>481</sup> Darigold, a marketing and

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471. *Whole Foods to Stop Selling Products Made by Prisoners*, *supra* note 467.

472. Kim, *supra* note 470.

473. See Joel Millman, *Captive Labor on the Farm*, WALL ST. J. (Oct. 18, 2011), <https://www.wsj.com/articles/SB10001424052970204774604576630972860034248>.

474. Stian Rice, *Convicts Are Returning to Farming – Anti-Immigrant Policies Are the Reason*, CONVERSATION (June 7, 2019, 7:27 AM), <https://theconversation.com/convicts-are-returning-to-farming-anti-immigrant-policies-are-the-reason-117152> [<https://perma.cc/G33Y-YDMS>].

475. Millman, *supra* note 473.

476. See Rice, *supra* note 474.

477. Millman, *supra* note 473.

478. *Id.*

479. Rice, *supra* note 474.

480. *Id.*

481. Seaborn Larson, *Montana State Prison Dairy Loses \$1.5M After Darigold Cuts Contract*, MONT. STANDARD (June 2, 2021), [https://mtstandard.com/news/state-and-regional/govt-and-politics/montana-state-prison-dairy-loses-1-5m-after-darigold-cuts-contract/article\\_d849d555-8259-5c77-a4eb-57580c86dac3.html](https://mtstandard.com/news/state-and-regional/govt-and-politics/montana-state-prison-dairy-loses-1-5m-after-darigold-cuts-contract/article_d849d555-8259-5c77-a4eb-57580c86dac3.html) [<https://perma.cc/6H6X-HGMH>].

processing subsidiary of the Northwest Dairy Association, is comprised of 350 dairy producers in Washington, Oregon, Idaho, and Montana and is a major milk supplier to Costco.<sup>482</sup> The majority of the prison's raw milk was sold directly to Darigold.<sup>483</sup> This contract cessation is poised to cost Montana's corrections industry enterprise approximately \$1.5 million, if not more.<sup>484</sup> To replace the lost revenue, Montana Correctional Enterprises is planning on raising pheasants for hunting purposes, among other ventures.<sup>485</sup>

One prominent reason for Costco's termination of its contract with Montana Correctional Enterprises was concern regarding prison wages and "the reduced transparency of prison systems in general."<sup>486</sup> Specifically, Costco's Global Policy on Prison Labor requires, among other things, that "all gross wages paid be comparable to any non-prisoners for the same type of work in the same geographic area."<sup>487</sup> Because wages are so low for most prison labor, Costco could not follow its own policy of paying the standard non-prisoner wage while still buying food products from correctional facilities at such reduced prices.

Food for children's school lunches also is often quietly processed by inmate workers. Florida's Prison Rehabilitative Industries and Diversified Enterprises (PRIDE), a privately held, nonprofit corporation operating the state's forty-one prison labor programs, manufactures a large amount of processed beef, chicken, and pork for Florida school lunch programs.<sup>488</sup> Like many other areas of prison labor, however, the prisoner-school lunch association is kept quiet.

#### *D. State-Run "Independent" Correctional Industries*

Arizona, Idaho, California, and the majority of other states source their inmate labor pools from state-run correctional industries or enterprises, which organize and parcel out teams of prisoners to work for various private businesses.<sup>489</sup> These correctional industries are self-funded, do not receive any taxpayer money, and usually run a variety of

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482. *Id.*

483. *Id.*

484. *Id.*

485. *See id.*

486. *See Statement on Prison Labor, 2020 Update*, COSTCO WHOLESALE CORP., <https://investor.costco.com/static-files/b19aaa23-709f-4606-a408-4a0f00052b83> [https://perma.cc/BRA8-4JK9] (last visited Mar. 6, 2022).

487. *Id.*

488. *See* Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION (Aug. 1, 2011), <https://www.thenation.com/article/archive/hidden-history-alec-and-prison-labor/> [https://perma.cc/WB7E-6C37].

489. *See, e.g.,* SNYDER, *supra* note 461.

programs to send inmates to work at private companies.<sup>490</sup> These industries usually operate as private-sector businesses.<sup>491</sup> Many state agencies are required to buy products from these quasi-privatized state correctional industries.<sup>492</sup> This includes public universities.<sup>493</sup> Every state but Alaska has a correctional enterprise business staffed by inmate labor to create various goods.<sup>494</sup>

As with all other prisoner labor, state correctional enterprises pay incarcerated people a tiny fraction of what they would make on the free market for their work.<sup>495</sup> Indeed, inmate wages have gone *down* in the past twenty years.<sup>496</sup> Alabama, Arkansas, Florida, Georgia, and Texas pay their prisoners nothing at all despite profiting handsomely from prisoners' labor.<sup>497</sup>

Using a captive labor force brings tremendous profit to both the prisons and the outside companies. For example, between 2015 and 2016, CALPIA, California's correctional industry, reaped over \$2 million in profit from agriculture and food.<sup>498</sup> Corcraft, New York's correctional industry, averages around \$50 million in sales annually, with all profits going to state revenue.<sup>499</sup> Despite its high revenues—approximately \$30 to \$40 million a year—Corcraft pays inmate laborers an average of only \$0.26 per hour.<sup>500</sup> By comparison, New York's minimum wage varies

490. E.g., Olivia Weitz, *With Labor Shortage, Idaho Inmates Learn Farm Work*, SPOKESMAN-REV. (Aug. 26, 2017), <https://www.spokesman.com/stories/2017/aug/26/with-labor-shortage-idaho-inmates-learn-farm-work/> [<https://perma.cc/Y6EM-FL4A>].

491. See *About Us*, OR. CORR. ENTERS., [https://oce.oregon.gov/content/OCE\\_About\\_Us.asp](https://oce.oregon.gov/content/OCE_About_Us.asp) [<https://perma.cc/3KHG-VTN5>] (last visited Mar. 7, 2022).

492. Lilah Burke, *Public Universities, Prison-Made Furniture*, INSIDE HIGHER ED (Feb. 14, 2020), <https://www.insidehighered.com/news/2020/02/14/public-universities-several-states-are-required-buy-prison-industries> [<https://perma.cc/F6WT-6MR3>].

493. *Id.*

494. *Id.*

495. See *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), [https://www.prisonpolicy.org/reports/wage\\_policies.html](https://www.prisonpolicy.org/reports/wage_policies.html) [<https://perma.cc/3WZM-AYDK>].

496. See 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/6MLD-7HSF>].

497. *Id.*; see *supra* Section III.A.

498. SNYDER, *supra* note 461.

499. See Christopher Robbins, *New York State's New Hand Sanitizer Is Made by Prisoners Paid an Average 65 Cents an Hour*, GOTHAMIST (Mar. 9, 2020), <https://gothamist.com/news/new-york-states-new-hand-sanitizer-made-prisoners-paid-average-65-cents-hour> [<https://perma.cc/S2MN-HQK8>].

500. Press Release, The Legal Aid Society, *Color of Change & Worth Rises, FOIL Disclosure: Despite Millions in Revenue from NYS Agencies – Over \$340 Million*

from \$15 per hour in New York City to \$11.80 per hour upstate.<sup>501</sup> Minnesota's correctional industry, MINNCOR, sells numerous products to private companies while paying inmate workers very low wages, thus turning a profit of approximately \$13 million in 2019.<sup>502</sup> Oregon Correctional Enterprises (OCE), Oregon's corrections industry, made \$28.5 million in 2019 while keeping inmate wages at approximately \$1.25 per hour.<sup>503</sup> Oregon also has a state law requiring inmates to work forty hours per week.<sup>504</sup>

States first legalized these types of correctional enterprises beginning in 1993 with Texas's Prison Industries Act (PIA), "which aimed to expand the PIE program."<sup>505</sup> The Prison Industry Enhancement program (PIE) was initially designed "to encourage states and units of local government to establish employment opportunities for prisoners that approximate private sector work opportunities."<sup>506</sup> A further refinement to PIE, the Prison Industry Enhancement Certification Program (PIECP), exempts certified state and local departments of corrections from normal restrictions on selling prisoner-made goods in interstate commerce.<sup>507</sup> PIECP also allows certified corrections departments to sell more than \$10,000 worth of prisoner-made goods to the federal government.<sup>508</sup> State deductions/wage capture from prisoner wages under PIECP can be up to eighty percent of hourly monies,<sup>509</sup> making inmate labor profitable for state corrections industries.

Despite all this profit companies gleefully make, many are still remarkably shy about admitting their use of prisoner labor. Numerous companies subcontract with other businesses, which are the entities that actually contract with prisons.<sup>510</sup> In Minnesota, Plastech utilized the labor

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Spanning Nine Fiscal Years – Corcraft Continues to Pay Incarcerated New Yorkers Pennies on the Dollar (Mar. 12, 2020).

501. Robbins, *supra* note 499.

502. Charity Ryerson, *Private Companies Producing with U.S. Prison Labor in 2020: Prison Labor in the U.S., Part II*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2020), <https://corpaccountabilitylab.org/calblog/2020/8/5/private-companies-producing-with-us-prison-labor-in-2020-prison-labor-in-the-us-part-ii> [<https://perma.cc/L55P-Q9FU>].

503. Mark Wilson, *Oregon Prison Industry Program Nets Record \$28.5 Million as Prisoners Earn \$1.25/Hour*, PRISON LEGAL NEWS (Apr. 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/oregon-prison-industry-program-nets-record-285-million-prisoners-earn-125hour/> [<https://perma.cc/QJ2H-T2WK>].

504. *Id.*

505. Elk & Sloan, *supra* note 488.

506. *Id.*

507. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FACT SHEET: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM (1995), <https://www.ojp.gov/pdffiles/pie.pdf> [<https://perma.cc/EM5N-S6VH>].

508. *Id.*

509. *Id.* at 2.

510. See Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should Be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010),

of thirty-two state inmates to work at its plastics company in 2020.<sup>511</sup> Plastech is a major supplier for Fujitsu,<sup>512</sup> but because the prisoners are reported as working only for Plastech, there is no link between Fujitsu's products and prison labor. Indeed, Fujitsu's own corporate responsibility guidebook for its suppliers forbids the use of forced labor, which the company defines as "[i]nhumane prison labor in harsh environments."<sup>513</sup> The Fujitsu guidebook also directs suppliers to "pay appropriate wages," defined as paying the legal minimum wage or more.<sup>514</sup> Thus, either Fujitsu is unaware that Plastech is using prison labor in violation of its corporate responsibility guidelines or Fujitsu is simply ignoring this abuse.

Inexpensive prison labor is a strong force limiting serious criminal justice reform.<sup>515</sup> This built-in, extremely inexpensive workforce benefits both the state prison industry and the companies that feed off of it, as both utilize underpaid labor to keep operating costs low and profits high.<sup>516</sup> Inexpensive prison labor is yet another way that profits continue to be squeezed out of carceral punishment—simply the latest, most palatable iteration.

#### IV. HOW THE LAW HELPS MAINTAIN PROFIT IN CARCERAL PUNISHMENT

As Noah Zatz argues, "[P]risoners' labor is located outside the economy on conventional maps of social spheres drawn by lawyers, demographers, and economists."<sup>517</sup> In large part, this is because of the way the law categorizes inmate labor—separate and distinct from normal, taxable employee labor, despite the profits it garners for both nonprofit

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<https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/> [https://perma.cc/35R5-8MWR].

511. NAT'L CORR. INDUS. ASS'N, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM, CERTIFICATION & COST ACCOUNTING CENTER LISTING: STATISTICS FOR THE QUARTER ENDING DECEMBER 31, 2020, [https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e\\_8d3b0797c98b469c831c436f5db359b4.pdf](https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_8d3b0797c98b469c831c436f5db359b4.pdf) [https://perma.cc/GGZ5-HTAJ].

512. *Fujitsu Honors 13 Companies with 2017 Fujitsu Supplier Award*, FUJITSU (May 29, 2018), <https://www.fujitsu.com/us/about/resources/news/press-releases/2018/fnc-20180529.html> [https://perma.cc/QG3E-R6VN].

513. CORP. PURCHASING UNIT, FUJITSU LTD., FUJITSU GROUP SUPPLY CHAIN CSR GUIDEBOOK 1 (2015), <https://www.fujitsu.com/us/Images/FJ%20CSR%20Guidebook%20v2.0%20En.pdf> [https://perma.cc/HZ2R-AG37].

514. *Id.* at 2.

515. Ryerson, *supra* note 502.

516. *Id.*

517. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 864 (2008).

and for-profit companies. Prison labor, like family labor, is classified as “nonmarket work,”<sup>518</sup> thus allowing all sorts of loopholes.

### *A. Classification of Inmate Workers*

One reason that profits are so easily manufactured from prison labor is because U.S. law permits companies to classify inmate workers as something other than “employees.” In general, “when workers are employees, the government entity that employs them must withhold and pay employment taxes and file employment tax returns.”<sup>519</sup>

Prisons, businesses, and various other actors do not want imprisoned laborers to be classified as employees because the Fair Labor Standards Act would then require the inmates to be paid minimum wage and overtime.<sup>520</sup> The exemption of inmate workers from employee status is embedded in several different areas of the law, as detailed below.

#### 1. INTERNAL REVENUE SERVICE CLASSIFICATIONS

For tax purposes, the Internal Revenue Service does not seem to classify inmate workers as employees. Revenue Rule 75-325 holds that inmate workers performing services for Federal Prison Industries, Inc. are not employees for income tax withholding purposes.<sup>521</sup> Additionally, Code section 3121(b)(7)(F) holds that services performed by state inmates are excepted from the term “employment” and thus the Social Security tax.<sup>522</sup>

The determination of whether workers are employees or not has significant consequences for tax liability and reporting.<sup>523</sup> Employment taxes for those classified as employees include federal income tax withholding; the Old-Age, Survivors and Disability Insurance tax (OASDI or Social Security); and Medicare, as well as any state or local taxes.<sup>524</sup>

Inmates can be responsible for paying taxes on any income they earn while imprisoned, however. Arizona, for example, decided that any

518. *Id.*

519. INTERNAL REVENUE SERV., FEDERAL-STATE REFERENCE GUIDE 28 (2020) [hereinafter IRS FEDERAL-STATE REFERENCE GUIDE], <https://www.irs.gov/pub/irs-pdf/p963.pdf> [<https://perma.cc/DQ97-WFC9>].

520. *Cf.* WAGE & HOUR DIV., U.S. DEP’T OF LAB., FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf> [<https://perma.cc/DX47-H2MA>].

521. Memorandum from Marie Cashmann, Senior Technician Reviewer, IRS, to Andrew E. Zuckerman, Dir. Fed., State & Loc. Gov’t, IRS (Jan. 30, 2004), <https://www.irs.gov/pub/irs-wd/0526018.pdf> [<https://perma.cc/7VFM-VDSD>].

522. *Id.* at 6.

523. IRS FEDERAL-STATE REFERENCE GUIDE, *supra* note 519, at 28.

524. *Id.*

inmates earning over \$600 should have that income reported to the IRS.<sup>525</sup> Six hundred dollars is the threshold amount for reporting to the IRS.<sup>526</sup> If an inmate does owe taxes, those taxes would come from the inmate's financial account, where their labor wages are deposited.<sup>527</sup> The rate of these taxes, usually imposed on independent contractors, is approximately 15.3% of earnings.<sup>528</sup>

Taxpaying inmates also are eligible for stimulus payments assuming they file a tax return, received Social Security or Railroad Retirement Income, or previously registered with the IRS through the non-filers portal.<sup>529</sup> This includes the recent CARES ACT stimulus payments.<sup>530</sup>

In addition, a company's use of carceral labor can result in significant federal tax credits.<sup>531</sup> Under the federal Work Opportunity Tax Credit (WOTC), private employers and companies that utilize prison labor can reduce their federal income tax liability by hiring current or ex-felons.<sup>532</sup> The tax credit is per employee and ranges from \$1,200 to \$9,600 depending on the qualifications of the hired individual.<sup>533</sup>

## 2. FAIR LABOR STANDARDS ACT CLASSIFICATIONS

The Fair Labor Standards Act (FLSA) was promulgated in 1938 to protect workers by establishing minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector, as well as in federal, state, and local

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525. Craig Harris, *Arizona Inmates Working Prison Jobs Might Owe Uncle Sam for the First Time*, AZCENTRAL (Feb. 3, 2017, 6:05 PM), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/02/03/arizona-inmates-working-prison-jobs-might-owe-uncle-sam-first-time/97414206/> [https://perma.cc/RQR3-6TNW].

526. *Id.*

527. *Id.*

528. *Id.*

529. See Michelle Singletary, *Federal Judge Rules Against Treasury and IRS Again: The Incarcerated Are Entitled to Stimulus Checks*, WASH. POST (Oct. 19, 2020), <https://www.washingtonpost.com/business/2020/10/19/federal-judge-rules-inmates-must-receive-stimulus-checks/> [https://perma.cc/6ULZ-QN7A].

530. *Id.*

531. Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 689 (2015).

532. See *Work Opportunity Tax Credit*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> [https://perma.cc/QC76-2LZT] (last visited Mar. 10, 2022).

533. *Legislative Update: Legislation Introduced to Increase Work Opportunity Tax Credit to Help Americans Get Back to Work*, SYNERGI PARTNERS (May 21, 2021), <https://www.synergipartners.com/blog/legislative-update-legislation-introduced-to-increase-work-opportunity-tax-credit-to-help-americans-get-back-to-work/> [https://perma.cc/7BTC-SX2C].

government.<sup>534</sup> The FLSA was enacted to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” and to stop “unfair method[s] of competition” created by substandard labor conditions.<sup>535</sup> The failure to apply the FLSA to the majority of carceral workers, however, completely undermines this objective.

For purposes of the FLSA, employee status is determined based on economic reality and economic dependence.<sup>536</sup> Although the FLSA does not specifically exempt prisoners from minimum wage requirements, most courts have held that carceral laborers are not covered.<sup>537</sup> These courts contend that prisoners cannot be defined as a class of “employees” to which the Act applies.<sup>538</sup> Because inmate laborers cannot be considered “employees” under the FLSA, they cannot also be subject to any of the Act’s provisions, including minimum wage requirements.<sup>539</sup>

Under the FLSA, an employee relationship exists where “the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”<sup>540</sup> Because most inmates’ labor is controlled by their individual correctional facilities, the FLSA usually does not apply. Overall, courts have generally held that the FLSA applies to prisoners only when they are part of a work release program laboring for private firms under the primary supervision of those businesses.<sup>541</sup>

Courts tend to focus on an “exclusive market” understanding of employment when determining whether prison labor is part of an economic market relationship, classifying inmate labor as

534. See Catherine Ruckelshaus, *Fair Labor Standards Act at 80: It’s More Important than Ever*, NAT’L EMP. L. PROJECT (June 26, 2018), <https://www.nelp.org/commentary/fair-labor-standards-act-at-80-its-more-important-than-ever/> [<https://perma.cc/QS7Y-U7EL>]; WAGE & HOUR DIV., U.S. DEP’T OF LAB., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2016), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1282.pdf> [<https://perma.cc/7BX6-8QER>].

535. 29 U.S.C. § 202(a).

536. See *Young v. Cutter Biological, a Div. of Script Miles Laboratories*, 694 F. Supp. 651, 655 (D. Ariz. 1988).

537. See Katherine E. Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. C.R.-C.L. L. REV. 681, 694–95 (2018); but see *Watson v. Graves*, 909 F.2d 1549, 1554, 1556 (5th Cir. 1990).

538. See Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 193 (2002).

539. See *id.*

540. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), *rev’d on other grounds, Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528 (1985).

541. Cf. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 11 (2d Cir. 1984).

noneconomic.<sup>542</sup> Following the exclusive market model, the inseparability of carceral labor from an institution such as a correctional facility makes it a “nonmarket relationship,” thus rendering it both noneconomic and not an employment relationship.<sup>543</sup>

### 3. OSHA, THE TOXIC SUBSTANCES CONTROL ACT, AND THE CLEAN AIR ACT AMENDMENTS

Under OSHA,<sup>544</sup> the Toxic Substances Control Act (TSCA),<sup>545</sup> and the Clean Air Act Amendments (CAAA),<sup>546</sup> federal prisoners are not considered employees.<sup>547</sup> This means that federal prisoners cannot report or file a complaint about working conditions in their place of carceral labor.<sup>548</sup> The Department of Justice (DOJ) has determined that “federal prisoners clearly are not parties to a contractually based employer-employee relationship as contemplated in TSCA, the CAAA, or OSHA.”<sup>549</sup> Indeed, federal prisoners are legally incapable of entering into “any contract of hire”<sup>550</sup> because the work that prisoners do can be classified as involuntary servitude. Accordingly, the DOJ has determined that employee protections provided for TSCA and clean air whistleblowers, in addition to OSHA’s definition of a federal “employee,” are not applicable to federal prisoner work.<sup>551</sup>

#### *B. Funding Private Businesses in Prisons*

Wall Street helps finance CoreCivic and GEO Group, the two primary multibillion-dollar private prison companies that routinely employ many state and federal prisoners.<sup>552</sup> In addition, private equity has enabled the growth of many private companies, both large and small, working in corrections—companies that assist in placing prisoners into carceral labor situations.<sup>553</sup> As long as finance and banking continue to

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542. Zatz, *supra* note 517, at 882.

543. *Id.*

544. 29 U.S.C. § 652.

545. 15 U.S.C. § 2622.

546. 42 U.S.C. § 7622.

547. Whether a Federal Prison Worker is an “Employee” Within the Meaning of Certain Federal Statutes, 12 Op. O.L.C. 202, 202–03 (1998).

548. *See id.*

549. *Id.* at 204.

550. *Id.* at 205.

551. *Id.*

552. *See* Laura I Appleman, *The Treatment Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.-C.L. L. REV. 1, 41–42 (2020).

553. *See id.* at 41.

support inmate labor on behalf of private companies, inmate labor will be nearly impossible to eradicate.

### 1. BANKS FLOATING PRIVATE PRISON INDUSTRIES

Several multinational banks grant loans and extend other financing agreements that help support private prison industries, which make tremendous profits off of carceral labor.<sup>554</sup> GEO Group and CoreCivic, among other private prison companies, manage their debt financing through a combination of credit, loans, and bonds.<sup>555</sup>

GEO Group and CoreCivic both have revolving lines of credit with various banks, which allow them to borrow and repay funds up to their credit limit at will.<sup>556</sup> Private corrections companies also enter into term loan agreements, which permit them to borrow a certain amount from a combination of banks, to be repaid according to a determined schedule.<sup>557</sup> Banks underwrite the corporate bonds issued by private corrections companies, which private banks then purchase and resell on the secondary market.<sup>558</sup> The banks receive millions of dollars in interest and fees in return.<sup>559</sup>

Much of this lending to private prison companies goes through company-owned Real Estate Investment Trusts (REIT), an investment vehicle created for companies traditionally investing in and obtaining revenue from real estate holdings.<sup>560</sup> Given how many private prison companies organize and profit from carceral labor through their work farms, rehabilitation centers, and halfway houses,<sup>561</sup> the funding of these companies must be carefully scrutinized and regulated. Currently there is no such oversight, financial or otherwise.

### 2. INVESTMENT AND MUTUAL FUNDS SUPPORTING PRISON LABOR

A variety of investment, mutual, and pension funds are deeply invested in private corrections companies and other businesses dependent

554. See Appleman, *supra* note 552, at 14, 18–19.

555. *Id.* at 42.

556. See SHAHRZAD HABIBI, KEVIN CONNOR & MAGGIE CORSER, IN THE PUB. INT., PUB. ACCOUNTABILITY INITIATIVE, CTR. FOR POPULAR DEMOCRACY, 2019 DATA BRIEF: THE WALL STREET BANKS STILL FINANCING PRIVATE PRISONS 1 (2019).

557. *Id.* at 1, 3.

558. *Id.*

559. *Id.* at 1.

560. See Matt Stroud, *Why Would a Prison Corporation Restructure as a Real Estate Company?*, FORBES (Jan. 31, 2013, 10:46 AM), <https://www.forbes.com/sites/mattstroud/2013/01/31/why-would-a-prison-corporation-restructure-as-a-real-estate-company> [<https://perma.cc/GBK8-TCBL>].

561. Appleman, *supra* note 552, at 18–23.

on prison labor, with millions of dollars held in these vehicles.<sup>562</sup> Specifically, Vanguard and Fidelity, the two major U.S. investment funds, own stock in various companies that use inmate labor. As of February 27, 2022, Vanguard Total Stock Market Index Fund (VTSAX) had 177.01 billion invested in 31 companies generally involved in the prison-industrial complex, amounting to 14% of the fund assets.<sup>563</sup> As of February 27, 2022, Vanguard ESG U.S. Stock ETF (ESGV) had 869.85 million invested in 22 companies involved in the prison industrial complex, amounting to 14% of the fund assets.<sup>564</sup>

Fidelity has also invested in both private prison companies and companies using inmate labor. This includes Fidelity® Total Market Index Fund (FSKAX), which has 9.95 billion invested in 31 prison companies, amounting to 14% of fund assets, as of February 27, 2022.<sup>565</sup> Fidelity Series Total Market Index Fund (FCFMX) has 6.65 billion invested in 31 companies involved in the prison-industrial complex, amounting to 14% of fund assets, as of February 27, 2022.<sup>566</sup>

Private prison companies, as well as many corrections-serving businesses, rely heavily on carceral labor in prisons, detention centers, and halfway houses, a model that is an essential part of their modus operandi.<sup>567</sup> Banks, mutual funds, and various investment vehicles help support smaller private companies that profit from prison labor. For example, Aramark, a publicly traded company, provides food services to prisons and is a heavy user of carceral labor.<sup>568</sup> Many smaller companies such as Keefe Group, iCare (a subsidiary of Aramark), and Securus

562. *Id.* at 44–45.

563. *Vanguard Total Stock Market Index Fund*, PRISON FREE FUNDS, <https://prisonfreefunds.org/fund/vanguard-total-stock-market-index-fund/VTSAX/prison-industrial-complex-investments/FSUSA002PT/FOUSA00L83> [https://perma.cc/9Y23-C3UM] (last visited Apr. 18, 2022).

564. *Vanguard ESG U.S. Stock ETF Fund*, PRISON FREE FUNDS, <https://prisonfreefunds.org/fund/vanguard-esg-us-stock-etf/ESGV/prison-industrial-complex-investments/FS0000DVU7/F000010QC6> [https://perma.cc/2S9N-UCQL] (last visited Apr. 18, 2022).

565. *Fidelity® Total Market Index Fund*, PRISON FREE FUNDS, <https://prisonfreefunds.org/fund/fidelity-total-market-index-fund/FSKAX/prison-industrial-complex-investments/FSUSA003JP/F00000MJS0> [https://perma.cc/6PH8-9UJ4] (last visited Apr. 18, 2022).

566. *Fidelity Series Total Market Index Fund*, PRISON FREE FUNDS, <https://prisonfreefunds.org/fund/fidelity-series-total-market-index-fund/FCFMX/prison-industrial-complex-investments/FS0000EA8M/F000011YJJ> [https://perma.cc/CCD8-NRTY] (last visited Apr. 18, 2022).

567. Appleman, *supra* note 552, at 18–23.

568. See Tanay Tatum-Edwards, Opinion, *It's Time for Investors to Dump Shares of Companies That Profit from Mass Incarceration and Prison Labor*, MARKETWATCH (June 30, 2020, 4:34 PM), <https://www.marketwatch.com/story/its-time-for-investors-to-divest-from-companies-that-profit-from-mass-incarceration-and-cheap-us-prison-labor-2020-06-29> [https://perma.cc/TR75-HPD8].

Technologies have profitable vending contracts with various correction facilities, charging high prices to inmates for phone calls, necessary toiletries, and even care packages.<sup>569</sup>

In addition to Vanguard and Fidelity, many passively managed index funds (frequently integrated into mutual funds or 401(k) plans) own stock in prison industries and companies using carceral labor.<sup>570</sup> The companies range from private prison companies to companies that rely on prison laborers for some of their business, including Aramark, Acadia Healthcare,<sup>571</sup> Costco,<sup>572</sup> 3M,<sup>573</sup> and Walmart.<sup>574</sup> Accordingly, many investors are unaware of their passive funding and support of companies that use carceral labor.

Higher education also supports prisons and carceral labor through its investment strategies.<sup>575</sup> Although Columbia University and the University of California system have divested from prisons and correctional facilities,<sup>576</sup> most colleges and universities have retained their investments.

In sum, many individuals are unknowingly invested in companies using carceral labor through standard mutual funds and other investment vehicles. At a minimum, there should be more transparency for those who choose not to support such involuntary servitude.

#### V. SOLUTIONS, REGULATORY AND OTHERWISE

There are various ways to attack the use of abusive carceral labor in state, federal, and industrial settings. These include the filing of lawsuits by current inmates, implementing regulatory oversight, abolishing slavery and involuntary servitude in state constitutions, and divesting from private companies using prison labor in exploitative ways, as well as divesting from private prisons themselves.

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569. *Id.*

570. Appleman, *supra* note 552, at 44–45.

571. *See Acadia Healthcare Co Inc*, INVESTIGATE (July 19, 2019), <https://investigate.afsc.org/acadia-healthcare> [<https://perma.cc/G7W8-ELLB>].

572. *See Costco Wholesale Corp*, INVESTIGATE (Sept. 9, 2020), <https://investigate.afsc.org/company/costco-wholesale> [<https://perma.cc/ERD5-9H2W>].

573. *See 3M Co*, INVESTIGATE (Aug. 9, 2018), <https://investigate.afsc.org/company/3m> [<https://perma.cc/B6FD-YSPX>].

574. *See Walmart Inc*, INVESTIGATE (Sept. 10, 2020), <https://investigate.afsc.org/company/walmart> [<https://perma.cc/G98L-PPD2>].

575. *See Sarah Brodsky, Investors Question Private Prison Holdings*, IMPACTIVATE (Apr. 11, 2019), <https://www.theimpactivate.com/investors-question-private-prison-holdings/> [<https://perma.cc/V63H-EPMM>].

576. *See James Brewer, Are You Unknowingly Investing in Private Prisons?*, FORBES (Feb. 25, 2021, 5:43 PM), <https://www.forbes.com/sites/jbrewer/2021/02/25/are-you-unknowingly-investing-in-private-prisons/?sh=66e05e0c226b>.

### A. Regulation and Lawsuits

#### 1. REGULATORY POWER

Congress has the power to regulate inmate labor in federal prisons but historically has not exercised it.<sup>577</sup> The FLSA, however, guarantees a minimum wage and overtime to all those employed in the United States and could easily be applied to inmate labor.<sup>578</sup> Although courts and legislatures have read a prisoner exemption into their interpretations of the FLSA,<sup>579</sup> this may conflict with a more general Supreme Court holding that “[s]pecificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act.”<sup>580</sup>

State and federal courts have held that prisoners are not employees because incarcerated individuals are removed from the national economy.<sup>581</sup> However, carceral labor substantially contributes to much state, federal, and business profit, as I discuss above. The FLSA should be interpreted to cover inmate labor both inside and outside correctional facilities, granting prisoners a fair wage for their many hours of hard toil.

#### 2. LAWSUITS BY PRISONERS

There are a number of pending lawsuits against correctional facilities alleging harsh inmate working conditions. Current and former inmates in Colorado have filed suit in federal district court against the state prison system, the private prison operator CoreCivic, and Governor Jared Polis.<sup>582</sup> The prisoners allege “slave labor” conditions during their incarceration by the Colorado prison system.<sup>583</sup> The suit demands that inmates be paid minimum wage, be considered state employees, and receive the same benefits as state workers, such as paid holidays and

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577. See Ruben J. Garcia, *U.S. Prisoners’ Strike Is a Reminder How Common Inmate Labor Is*, CBS NEWS (Sept. 3, 2018, 5:51 AM), <https://www.cbsnews.com/news/u-s-prisoners-strike-is-reminder-how-commonplace-inmate-labor-is/> [<https://perma.cc/VYR7-J6CM>].

578. See Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (establishing a federal minimum wage); *id.* § 207(a)(1) (establishing a time-and-a-half minimum payrate for work performed in excess of forty hours per week).

579. See *supra* Part III.

580. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950).

581. See Renee Elaine Henson, Comment, *Picking Cotton for Pennies: An Exploration into the Law’s Modern Endorsement of a Free-Prison Workforce*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 193, 201 (2018).

582. See Brian Maass, *Colorado Inmates Sue Over ‘Slave Labor,’ Demand Minimum Wage, Paid Vacations, Paid Sick Leave*, CBS DENVER (July 27, 2020, 11:59 PM), <https://denver.cbslocal.com/2020/07/27/slave-labor-prison-lawsuit-minimum-wage/> [<https://perma.cc/34QD-SR64>].

583. *Id.*

vacations, paid sick leave, and medical benefits.<sup>584</sup> Colorado's 2018 change to its state constitution, which eliminated slavery and involuntary servitude as potential punishments for crime, carved out room for the lawsuit to be filed, as the prisoners now argue they are subject to unconstitutional slave labor conditions.<sup>585</sup>

Eight prisoners in Alameda County, California, likewise have filed a federal lawsuit alleging that Aramark—the \$16.2 billion multinational food and facility services conglomerate serving the Santa Rita Jail—profited from forced labor.<sup>586</sup> The plaintiffs claimed that their unpaid work for Aramark was forced labor and violated the U.S. Constitution, the Trafficking Victims Protection Act, and a 1990 California law requiring private companies to pay prisoners fair wages.<sup>587</sup> The federal complaint argues that prisoners are entitled to wages equal to nonincarcerated workers and are eligible for overtime pay.<sup>588</sup> The class action also alleges that the jail's deputies forced prisoners to work by either threatening solitary confinement, longer sentences, or firing.<sup>589</sup> The plaintiffs have sought compensatory and punitive damages, attorney's fees, and declaratory and injunctive relief.<sup>590</sup>

Similarly, Nebraska was required to start paying its inmate workforce between \$20 and \$30 a week for their labor laundering sheets, landscaping, and cleaning bathrooms.<sup>591</sup> After a 2020 vote amending Nebraska's constitution and outlawing slavery and involuntary servitude as criminal punishment, Nebraska now must pay prisoners for labor it had historically required them to do for free.<sup>592</sup> Nebraska inmate labor is not compensated at minimum wage, however.<sup>593</sup>

These recent prisoner suits offer one way for inmate laborers to attempt to be paid a proper minimum wage for their work efforts. Individual or even class action lawsuits, however, are a slow and chancy

584. *Id.*

585. *Id.*

586. See Madison Pauly, *Jail Inmates Worked for a \$16 Billion Company Without Pay. Now They Want Their Wages.*, MOTHER JONES (Jan. 6, 2020), <https://www.motherjones.com/crime-justice/2020/01/alameda-santa-rita-jail-aramark-unpaid-wages-lawsuit/>.

587. *Id.*

588. *Id.*

589. *Id.*

590. *Complaint for Damages and Declaratory and Injunctive Relief* at 18, *Ruelas v. County of Alameda*, No. 3:19-cv-07637 (N.D. Cal. 2021).

591. See Riley Johnson, *Lancaster County Jail Inmates Now Paid for Work After Nebraska Voters Passed Slavery Ban*, LINCOLN J. STAR (Dec. 12, 2020), [https://journalstar.com/news/local/crime-and-courts/lancaster-county-jail-inmates-now-paid-for-work-after-nebraska-voters-passed-slavery-ban/article\\_ced74ec6-7255-5955-a16c-106922ba10bc.html](https://journalstar.com/news/local/crime-and-courts/lancaster-county-jail-inmates-now-paid-for-work-after-nebraska-voters-passed-slavery-ban/article_ced74ec6-7255-5955-a16c-106922ba10bc.html).

592. *Id.*

593. *Id.*

way to claw back some of the profit made by the state and private companies and give relief only to a small group of individuals even if successful.

### *B. Abolishing Constitutional Slavery and Involuntary Servitude*

#### 1. FEDERAL ABOLITION AMENDMENT

The so-called “Abolition Amendment” was a bicameral effort to remove the words “except as a punishment for crime whereof the party shall have been duly convicted” from the Thirteenth Amendment.<sup>594</sup> The joint resolution would have banned slavery and involuntary servitude as legal punishments for crimes.<sup>595</sup> The original resolution did not pass in the 116th Congress.<sup>596</sup>

Senator Jeff Merkley and Georgia Representative Nikema Williams reintroduced the resolution on June 18, 2021.<sup>597</sup> The bill’s sponsors argued that eliminating this particular clause from the Thirteenth Amendment would “send a clear message: in this country, no person will be stripped of their basic humanity and forced to toil for someone else’s profit.”<sup>598</sup> As outside supporters of the bill noted, “it targets forced labor and not prison work programs, which are voluntary.”<sup>599</sup> Currently no action has been taken.

Although passing the Abolition Amendment is a noble endeavor and would help some prisoners who are currently forced to work without any pay or face punishment, its passage would not solve all the issues tied to carceral labor and profit-making. The profits extracted from inmate work are so deeply embedded in our system of mass incarceration that this potential amendment would ameliorate only part of the problem.

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594. U.S. Const. amend. XIII, § 1.

595. S.J. Res. 81, 116th Cong. (2020).

596. *All Information (Except Text) for S.J.Res.81*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/81/all-info?r=8&s=1> (last visited Mar. 3, 2022) (showing that the last action on the resolution was referred to the Committee on the Judiciary on December 2, 2020).

597. Press Release, Sen. Jeff Merkley, U.S. Senate, *Ahead of Juneteenth, Merkley, Williams Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment* (June 18, 2021), <https://www.merkley.senate.gov/news/press-releases/ahead-of-juneteenth-merkley-williams-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2021> [https://perma.cc/2QLC-T84B].

598. *Id.*

599. See Terry Tang, *Lawmakers Mark Juneteenth by Reviving ‘Abolition Amendment,’* AP NEWS (June 18, 2021), <https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0>.

## 2. AMENDING STATE CONSTITUTIONS

Approximately twenty states still have similar slavery and indentured servitude clauses in their constitutions permitting either human bondage or prison labor after conviction of a crime.<sup>600</sup> Colorado,<sup>601</sup> Utah, and Nebraska<sup>602</sup> have removed such provisions from their constitutions.<sup>603</sup> Colorado's constitution now simply states, "There shall never be in this state either slavery or involuntary servitude," eliminating language similar to that of the Thirteenth Amendment.<sup>604</sup> In 2020 Utah and Nebraska both voted to delete language from their state constitutions allowing slavery and involuntary servitude as punishment.<sup>605</sup>

Other states seem likely to follow. For example, in response to concerns arising from both the history of slavery and the continuing existence of inmate labor, the Tennessee Senate has advanced a proposal removing the clause in the Tennessee Constitution permitting slavery or involuntary servitude as punishment for a crime.<sup>606</sup> Similar to the U.S. Constitution, the Tennessee Constitution holds that "slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this state."<sup>607</sup> Article I, Section 33 would be replaced by text clearly stating that slavery and involuntary servitude are forbidden in Tennessee.<sup>608</sup> Tennessee's Department of Correction, however, has requested additional text noting that "nothing in this section shall prohibit an inmate from working when the inmate has been duly convicted of a crime."<sup>609</sup> The resolution next goes before the Tennessee House of Representatives before being voted on in the 2022 general election.<sup>610</sup>

600. *See id.*

601. *See* Bill Chappell, *Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed*, NPR (Nov. 7, 2018, 3:12 PM), <https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed> [<https://perma.cc/3PZZ-GD73>].

602. Tang, *supra* note 599.

603. *See* Elana Lyn Gross, *Alabama, Utah, Nebraska Remove Racist Language from State Constitutions*, FORBES (Nov. 4, 2020, 4:44 PM), <https://www.forbes.com/sites/elanagross/2020/11/04/alabama-utah-nebraska-remove-racist-language-from-state-constitutions/?sh=316132461301>.

604. COLO. CONST. art. II, § 26.

605. Gross, *supra* note 603.

606. Associated Press, *Tennessee Senate OKs Bid to Remove 'Slavery' As Punishment*, ABC NEWS (Mar. 15, 2021, 6:41 PM), <https://abcnews.go.com/US/wireStory/tennessee-senate-oks-bid-remove-slavery-punishment-76477338> [<https://perma.cc/KBY6-USAX>].

607. TENN. CONST. art. I, § 33.

608. Associated Press, *supra* note 606.

609. *Id.*

610. Slater Teague, *Tennessee Senate Approves Proposed Amendment to Remove Slavery from State Constitution*, WKRN (Mar. 16, 2021, 5:30 AM),

Minnesota had a similar bill up for a vote in the November 2020 election, offering Minnesotans the chance to eliminate from the state constitution slavery and involuntary servitude as possible punishments for crime.<sup>611</sup> Some constituents, however, were concerned that eliminating such language would make it difficult to continue low-wage inmate work programs in state prisons.<sup>612</sup>

Likewise, there is a bill in the Texas legislature “proposing an amendment to the state constitution that would ban [slavery and] forced labor for any reason—including as punishment.”<sup>613</sup> The bill’s supporters argue that this type of amendment not only would help stop correctional facilities from imposing mandatory work policies, but also would allow inmates forced to work to take these cases to court.<sup>614</sup> Although the bill has not yet gotten a committee hearing, if it passes the legislature, the decision to amend the Texas Constitution would be left up to voters.<sup>615</sup>

These changes to state constitutions are slowly gaining momentum. In 2020 State Assemblywoman Angela McKnight sponsored a resolution that would amend Article I of the New Jersey Constitution with a new paragraph that provides, “No person shall be held in slavery or involuntary servitude in this State, including as a penalty or a punishment for a crime.”<sup>616</sup> “It would be passed in conjunction with a question to New Jersey voters on election ballots” asking voters if they approved amending the New Jersey Constitution for those specified reasons.<sup>617</sup>

California bans slavery already, but the state may allow voters to ban involuntary servitude as a criminal punishment.<sup>618</sup> The involuntary servitude measure would remove involuntary servitude from Article I, Section 6 of the California Constitution.<sup>619</sup> The California State Assembly

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<https://www.wkrn.com/news/tennessee-news/tennessee-senate-approves-proposed-amendment-to-remove-slavery-from-state-constitution/> [https://perma.cc/96Z4-KRZ7].

611. Tim Walker, *Minnesota’s Constitution References Slavery — But Voters May Have the Chance to Hit Delete*, NORTHFIELD NEWS (May 4, 2020), [https://www.southernminn.com/northfield\\_news/news/state/article\\_ddc6524a-ac50-5c3d-85eb-34f5398e43ee.html](https://www.southernminn.com/northfield_news/news/state/article_ddc6524a-ac50-5c3d-85eb-34f5398e43ee.html) [https://perma.cc/5SY6-GKDN].

612. *Id.*

613. See Sangita Menon, *Bill Seeks to Amend Texas Constitution to Ban Slavery*, KUT 90.5 (May 8, 2021, 9:11 AM), <https://www.kut.org/crime-justice/2021-05-08/bill-seeks-to-amend-texas-constitution-to-ban-slavery> [https://perma.cc/B88R-9KYH].

614. *Id.*

615. *Id.*

616. Assemb. Con. Res. 145, 219th Leg. (N.J. 2020).

617. See David Menzies, *‘Amend the 13th’ Cypher Hopes to Galvanize Support in Fight Against Modern Slavery*, NJ.COM (Sept. 17, 2020, 11:48 AM), <https://www.nj.com/hudson/2020/09/amend-the-13th-cypher-hopes-to-galvanize-support-in-fight-against-modern-slavery.html> [https://perma.cc/7YHK-8F4Q].

618. Menon, *supra* note 613.

619. See *Asm. Kamlager Announces ACA 3: The California Abolition Act to Abolish Involuntary Servitude*, CAL. STATE ASSEMBLY DEMOCRATIC CAUCUS (Mar. 4,

Democratic Caucus notes, “The euphemistic language of ‘involuntary servitude’ masks what this nefarious practice is in plain language: forced labor.”<sup>620</sup> Because California inmates are not given the choice of working when imprisoned, much California carceral labor is truly involuntary.<sup>621</sup> Many Californians feel that requiring involuntary labor of prisoners simply continues the legacy of slavery given the demographics of those incarcerated.<sup>622</sup>

The states considering eliminating slavery and involuntary servitude from their constitutions are part of a broader abolition movement seeking to end carceral labor in their states and in the U.S. Constitution.<sup>623</sup> The Abolish Slavery National Network (ASNN) is a national coalition seeking to “abolish constitutional slavery and involuntary servitude in all forms, for all people.”<sup>624</sup> The ASNN argues that state constitutions are not symbolic but rather are important parts of state law and thus must be amended to eliminate the language of slavery and involuntary servitude.<sup>625</sup>

The movement to abolish the mention of slavery and involuntary servitude as acceptable punishments for crimes in state documents is a heartening signal and certainly should be supported. Like the federal abolition amendment, however, even a full elimination of slavery and involuntary servitude would not truly fix the persistent problem with coercive carceral labor due to the existing caselaw, regulation overseeing prison labor, and the complicated structure of mass incarceration. Abolishing slavery and involuntary servitude for criminal punishment is an important symbolic step, but it is just the beginning of what is needed to start draining the profits from punishment.

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2021), <https://asmdc.org/press-releases/asm-kamlager-announces-aca-3-california-abolition-act-abolish-involuntary-servitude> [https://perma.cc/592D-C826].

620. *Id.*

621. *Id.*

622. See Don Thompson, *Amendment Would Ban ‘Servitude’ by California Prison Inmates*, AP NEWS (Feb. 25, 2021), <https://apnews.com/article/wildfires-san-francisco-constitutions-prisons-coronavirus-pandemic-c182b569cc42d3f75450585979b763e9>.

623. See, e.g., *Home*, ABOLISH SLAVERY NAT’L NETWORK, <https://abolishslavery.us/> [https://perma.cc/D4KL-RN37] (last visited Mar. 3, 2022).

624. *About*, ABOLISH SLAVERY NAT’L NETWORK, <https://abolishslavery.us/about/> [https://perma.cc/B5FM-VPTX] (last visited Mar. 4, 2022).

625. *Frequently Asked Questions*, ABOLISH SLAVERY NAT’L NETWORK, <https://abolishslavery.us/faqs/> [https://perma.cc/6P48-LHNG] (last visited Mar. 4, 2022).

### C. Divesting from Private Prisons and Private Industry in Prisons

#### 1. GROWING BANK REFUSAL TO FUND PRIVATE PRISON COMPANIES

As discussed in Part IV, despite increasing divestment, some major banks continue to help fund private prisons' complicated real estate and tax holdings. More and more, however, lenders have begun abandoning private prison companies, cutting off funding and declining to provide financing for new facilities.<sup>626</sup> Over the past four years, several major banks have pulled their credit from the private corrections industry, including JPMorgan Chase, Wells Fargo, PNC, Barclays, U.S. Bank, SunTrust Banks/BBT, BNP Paribas, and Bank of America.<sup>627</sup> Approximately seventy-two percent of future financing to these companies, with an estimated value of over \$1.9 billion, has disappeared.<sup>628</sup>

As a result, both Geo Group and CoreCivic are currently facing significant cashflow problems, reflecting their loss of credit access from major banks.<sup>629</sup> Most recently, Regions Bank in Alabama announced the ending of its partnership with CoreCivic and will not be renewing its 2023 contract.<sup>630</sup> Following suit, Barclays Bank and KeyBank Capital Markets pulled out of a deal to help fund CoreCivic's construction of two Alabama prisons.<sup>631</sup> The pressure on banks to distance themselves from the financing of private prison companies continues to increase,<sup>632</sup> as more reports spread of private prisons' unfair forced labor policies and terrible living conditions.

As more and more banks hopefully pull their funding from major private prison companies like CoreCivic and Geo Group, such companies' ability to continue to expand across the country will cease. Public pressure

626. Appleman, *supra* note 552, at 50.

627. *Id.* at 50–51.

628. Clare Carlile, *Financing Racism in US Private Prisons*, ETHICAL CONSUMER (Sept. 11, 2020), <https://www.ethicalconsumer.org/money-finance/financing-racism-us-private-prisons> [<https://perma.cc/6UHD-WNEQ>].

629. Matthew Clarke, *Private Prison Companies Face Stock Crunch, Credit Crunch*, PRISON LEGAL NEWS (Feb. 1, 2021), <https://www.prisonlegalnews.org/news/2021/feb/1/private-prison-companies-face-stock-crash-credit-crunch/> [<https://perma.cc/QR2V-U4FK>].

630. Morgan Simon, *Regions Bank of Alabama Turns Its Back on CoreCivic, Announces Plan to End Relationship*, FORBES (Feb. 1, 2021, 10:00 AM), <https://www.forbes.com/sites/morgansimon/2021/02/01/regions-bank-of-alabama-turns-its-back-on-corecivic-announces-plan-to-end-relationship/?sh=46e1ee0d15be>.

631. Morgan Simon, *Toxic Alabama Private Prison Deal Falling Apart with Barclays Exit*, FORBES (Apr. 21, 2021, 1:53 PM), <https://www.forbes.com/sites/morgansimon/2021/04/21/toxic-alabama-private-prison-deal-falling-apart-with-barclays-exit/?sh=7939e33752f0>.

632. *Id.*

on and shaming of those remaining banks that continue to fund them may eventually stop the ability of private prisons to force scores of imprisoned carceral workers to labor in unsafe and poorly compensated jobs.

## 2. BANKS SUPPORTING THE RELEASED

In harmony with the divestment of many major banks from private prison real estate investment trusts (REITS) such as CoreCivic and Geo Group, it is also possible for banks to support prisoner education, rehabilitation, and job training. “Banks should be looking for opportunities to support organizations that provide education, training and economic opportunity to those who have been incarcerated . . . .”<sup>633</sup>

For example, Beneficial State Bank supports CROP (Creating Restorative Opportunities and Programs),<sup>634</sup> a nonprofit providing released prisoners with restorative assistance, rehabilitation, and other needed services to help them thrive in the community.<sup>635</sup> Likewise, Bank of America supports formerly imprisoned entrepreneurs who are operating mission-driven organizations.<sup>636</sup> Bank of America’s plan, called Unlocked Futures, gives former prisoners an unrestricted \$50,000 grant and a year of expert strategic support along with coaching from Bank of America senior executives.<sup>637</sup>

## 3. ELIMINATING PRIVATE PROFIT FROM THE CARCERAL WORLD

Although private prisons incarcerate only eight percent of the state and federal prison population,<sup>638</sup> there are innumerable ways private companies using carceral labor make money from public imprisonment. The general use of external, for-profit providers for health care, food, telephone, banking, and visitation services has significantly decreased the

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633. Randell Leach, *Banks Should Follow and Expand on Biden’s Lead and Divest from Mass Incarceration*, FORBES (Apr. 15, 2021, 7:00 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2021/04/15/banks-should-follow-and-expand-on-bidens-lead-and-divest-from-mass-incarceration/?sh=1379e75c4242>.

634. *Home*, CROP, <https://www.croporganization.org/experiences/HOME/pages/5e7e597e64a7236b866938dc/home> (last visited Mar. 5, 2022).

635. Leach, *supra* note 633.

636. *Workforce Development & Education*, BANK OF AM., <https://about.bankofamerica.com/en/making-an-impact/workforce-development-programs> [<https://perma.cc/6ZCM-MDX3>] (last visited Mar. 5, 2022).

637. *Id.*

638. *Private Prisons in the United States*, SENTENCING PROJECT (Mar. 3, 2021), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [<https://perma.cc/X4P4-XRAS>].

quality of life for inmates, all while steadily increasing private revenues.<sup>639</sup> The cheap pricing these service providers offer to states and counties is offset by the toll these substandard offerings have on inmates, including higher rates of illness and death, often barely edible or extremely minimal provisions, very expensive phone rates, exploitative fees for inmate banking, and pricey video visitation costs for any visitors who may wish to maintain contact with those incarcerated.<sup>640</sup>

The private contractors who operate in public prisons and jails have a vested interest in keeping the system of mass incarceration in place: the more people incarcerated, the more money these companies make.<sup>641</sup> In total, there are at least 3,100 corporations that profit from mass incarceration.<sup>642</sup>

Private businesses have benefited tremendously from the shift from public provision of carceral services to private, for-profit provision<sup>643</sup>—incarcerated individuals less so. “The corrections industry operates for the primary purpose of maximizing profits for its owners—creating strong incentives to achieve *new* forms of monetary extraction in addition to shifting the burden of *existing* costs.”<sup>644</sup> To truly free prisoners from the burden of being used as a profit source, states cannot skimp on services by using private purveyors to save money. Monetizing the criminal justice system through the use of private service providers injures everyone but the profit-makers.

#### CONCLUSION

“Comprised of institutions that include courts, police and sheriffs’ offices, and prisons and jails that warehouse predominately poor people, the criminal justice system and many of its stakeholders derive profit in various ways from those caught within its grip.”<sup>645</sup> Roughly half of American inmates worked in some form as of 2018, many unwillingly and even more under very harsh conditions.<sup>646</sup> These carceral workers,

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639. See Victoria Law, *Public Prisons, Private Profits*, TRUTHOUT (Nov. 1, 2014), <https://truthout.org/articles/public-prisons-private-profits/> [<https://perma.cc/5BKS-GLRA>].

640. Laura I Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 596–607 (2018).

641. Karakatsanis, *supra* note 131, at 860–61.

642. CORR. ACCOUNTABILITY PROJECT AT THE URB. JUST. CTR., *THE PRISON INDUSTRIAL COMPLEX: MAPPING PRIVATE SECTOR PLAYERS 1* (2018).

643. Appleman, *supra* note 640, at 607.

644. HIGHSMITH, *supra* note 443, at 1.

645. Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in the Carceral State*, 57 U. LOUISVILLE L. REV. 61, 69 (2018).

646. See Daniel Moritz-Rabson, ‘Prison Slavery’: Inmates Are Paid Cents While Manufacturing Products Sold to Government, NEWSWEEK (Aug. 28, 2018, 5:12 PM),

however, largely have been ignored and forgotten. “[T]oiling at the margins of the American economy,”<sup>647</sup> these incarcerated individuals generate profit for private industry and cut costs for state and local governments but get little payment or benefit for themselves. Carceral labor essentially still functions as modern penal servitude, itself a quintessentially American invention.<sup>648</sup>

As Amna Akbar has argued, our system of mass incarceration demonstrates a passionate “commitment to extracting capital from Black labor.”<sup>649</sup> And yet there has been little focus until very recently<sup>650</sup> on the role of profit and capitalism in our criminal justice system. This Article has sought to lay out the historical path of profiteering in punishment, looking particularly at how carceral labor—and often the literal body, blood, and bones of inmate workers—has shaped the system of mass incarceration today. Although many aspects of such carceral labor have changed, the ineradicable extraction of revenues from the corpus of the imprisoned remains.

Where to go from here is the difficult question. Answers have ranged from outright abolition of prisons<sup>651</sup> to requiring minimum wage or a living wage for prison labor<sup>652</sup> to eradicating all involuntary carceral labor.<sup>653</sup> What is clear, however, is that removing the cash from carceral labor will be no easy task given the deep enmeshing of profitability with mass incarceration. The economic forces underlying and benefiting from carceral labor range from investment funds to major corporations and are thus difficult to dislodge from the prison-industrial complex. Indeed,

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<https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729>  
[<https://perma.cc/8D89-3JVC>].

647. Benjamin R. Syroka, *Unshackling the Chain Gang: Circumventing Partisan Arguments to Reduce Recidivism Rates Through Prison Labor*, 50 U. TOL. L. REV. 395, 396 (2019).

648. See Rebecca McLennan, *When Felons Were Human*, NAT’L HUMANITIES CTR. (Aug. 16, 2011), <https://nationalhumanitiescenter.org/on-the-human/2011/08/when-felons-were-human/> [<https://perma.cc/S2JX-ESBA>].

649. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 449–50 (2018).

650. See, e.g., *id.*; Roberts, *supra* note 115, at 4.

651. See Symposium, *Prison Abolition*, 132 HARV. L. REV. (2019) (containing articles centered on prison abolition).

652. See Noah Smith, *Paying Minimum Wage to Inmates Helps the Working Class*, CHI. TRIB. (June 7, 2017, 8:47 AM), <https://www.chicagotribune.com/opinion/commentary/ct-prison-inmates-minimum-wage-20170607-story.html>; Ronnie K. Stephens, *Nevada to Weigh Paying Prisoners Minimum Wage*, INTERROGATING JUST. (Apr. 13, 2021), <https://interrogatingjustice.org/prisons/nevada-to-weigh-paying-prisoners-minimum-wage/>.

653. See Eric Foner, *We Are Not Done with Abolition*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/opinion/abolition-prison-labor-amendment.html> [<https://perma.cc/7HFH-UP23>].

“today’s prison entrepreneurs view inmates not only as exploitable workers, but also as captive consumers and tenants, as well as tickets to government money.”<sup>654</sup> Loosening the commercial grasp will be a long and complex process.

If the history of the prison is the history of brutal prison labor,<sup>655</sup> then at minimum we must try to envision a different kind of criminal incarceration, one that allows inmates the dignity of meaningful work with appropriate compensation along with the right to choose what type of work they undertake. Otherwise, a criminal sentence will continue to be what it has always been: a “pernicious form[] of servitude”<sup>656</sup> in which inmates are trapped in the service of endlessly increasing profit, the literal revenues of physical toil, suffering, and exploitation. The twenty-first century can and must do better.

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654. See Pope, *supra* note 107, at 1530.

655. See Garvey, *supra* note 216, at 342.

656. Goodwin, *supra* note 102, at 907.