

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 transformation of human toil into financial gain. Profit incentives have exerted a profound influence on the shape of American carceral labor. From 16th-century British convict transportation to 21st-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. Moreover, 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”²

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 return by transforming human toil into monetary gain. From 16th century British convict transportation to 21st century private corrections companies, involuntary carceral servitude has been a feature of criminal punishment, always with an eye towards 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 incarceration³ 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. Moreover, 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.

The 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, quickly becoming enmeshed with carceral labor, which was thought to improve men in both body and soul. Part I then moves to the development of early 19th-century

² Lin-Manuel Miranda, *Washington on Your Side*, HAMILTON: THE REVOLUTION 200 (2016).

³ See generally Laura I Appleman, *Deviancy, Dependency, & Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L. J. 417 (2018).

industrial prisons, which were the first to make carceral labor the primary focus of incarceration, to better extract revenue out of the incarcerated.

Part II carefully examines the two very different trajectories between the North and South in post-Civil War carceral labor. The Article contends that in the South, the entrapment of many Black citizens into carceral bondage was equally a function of profit-making as virulent racism. Although many standard histories conclude that the brutal regime of Southern carceral labor ended with convict leasing, the Article additionally explores how these practices simply continued under other names, including the chain gang, debt peonage, and penal farms. This 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 a 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 on 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 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 analyses the many complicated ways that the law assists in making corrections a revenue-creating enterprise, including federal labor laws, social security regulation, tax laws, OSHA, and the Clean Air Act. In addition, Part IV also 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 13th Amendment to eliminate slavery in all aspect, state abolition amendments, minimum wage floors, and divestment from companies using carceral labor. All of these solutions point to one ultimate answer: 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.⁴ "Moral hazards abound"⁵ 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, giving them choice, fair wages, and dignity. Eliminating this last vestige of slavery and involuntary servitude is a crucial step in making the world of criminal justice more just.

⁴ See Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. O. 33, 42 (2017).

⁵ Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (2019).

Part I: The Early Prison as Maker of Monies and Men

The twin motivators of making money and transforming “undesirable” British citizens into hard-working 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 heredity distinctions.⁶ These strict hierarchies reflected a landowner class belief in a permanent lower class, considered true bottom societal layer.⁷ 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.”⁸

Indeed, the New World, not just Australia, was imagined by British elites as an immense uncultivated terrain perfect for re-settling England’s poor, homeless, and lawbreakers, the “waste people” who were the dregs of society.⁹ By forcibly dispatching their destitute, lawbreaking, and developmentally disabled to the North American continent,¹⁰ the British expressed their vision of colonial America as “one giant workhouse.”¹¹ Not only would transporting these “undesirables” rid them from England, but America would also provide a space to, at best, transform them into productive workers.¹² 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.¹³

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.¹⁴ 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 way to deter future criminals.¹⁵ The poor were also transported, a group that included children, the homeless, and the disorderly.¹⁶ From the very beginning, hard labor, profit and punishment were linked.

⁶ Appleman, *Deviancy*, at 425.

⁷ See NANCY ISENBERG, *WHITE TRASH: THE 400 YEAR-OLD UNTOLD HISTORY OF CLASS IN AMERICA* 102 (2016).

⁸ *Id.* at 121.

⁹ *Id.*

¹⁰ See generally J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800* (1986) (discussing British transportation prior to 1718 Transportation Act).

¹¹ Isenberg at 21.

¹² *Id.*

¹³ Appleman, *Deviancy*, at 426.

¹⁴ 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*, 41 (1992).

¹⁵ See, e.g., *ACTS OF THE PRIVY COUNCIL OF JAMES I*, vol. 2 (London, 1925), which 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 maybe 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.

¹⁶ See Joanna Innes, *Prisons for the Poor: English Bridewells, 1555-1800*, in DOUGLAS HAY & FRANCIS SNYDER, EDS., *LABOUR, LAW AND CRIME: AN HISTORICAL PERSPECTIVE* (1987).

In 1718, Britain passed the Transportation Act,¹⁷ formalizing the country's ability to banish convicted felons to their colonies.¹⁸ In lieu of physical punishment or execution, felons were sentenced to 7 or 14 years hard labor.¹⁹ Merchant entrepreneurs charged the Crown five pounds per prisoner for transport.²⁰ 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.²¹ 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.²² Between 1718 to 1775, over 52,000 convicts were transported to the American colonies to labor on farms in Maryland and Virginia.²³

The transported convicts on board transatlantic ships were often treated as poorly as slaves; indeed, slaves were far more economically valuable to the ship captains than were the indentured felons.²⁴ Upon arrival to the American colony, whichever convicts had survived the voyage were inspected by potential buyers, with prices ranging from 10-14 pounds for men, 5-9 pounds for women.²⁵ 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.²⁶

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 both 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 Acts granted the exclusive right to transport convicts to merchants that contracted with the government.²⁷ Merchants competed with each other to bring the convicts to North America, earning substantial proceeds.²⁸ In many ways, this was the first major attempt to privatize and capitalize off of criminal justice in the Anglo-American world.²⁹

¹⁷ 1717: 4 GEORGE 1 c.11: THE TRANSPORTATION ACT, located at: <http://statutes.org.uk/site/the-statutes/eighteenth-century/1717-4-george-1-c-11-the-transportation-act/>

¹⁸ See Shane Bauer, *5 Ways Prisoners Were Used for Profit Throughout U.S. History*, PBS (February 26, 2020), <https://www.pbs.org/newshour/arts/5-ways-prisoners-were-used-for-profit-throughout-u-s-history>

¹⁹ 1717: 4 George 1 c.11: The Transportation Act.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See R.J. Clarke, *The Land of the "Free: " Criminal Transportation to America*, THE HISTORY PRESS, located at: <https://www.thehistorypress.co.uk/articles/the-land-of-the-free-criminal-transportation-to-america/>

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ 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).

²⁸ *Id.* at 295.

²⁹ *Id.*

Moreover, the use of transportation increased labor market capacity in the North American colonies, bolstering the finances of the British government.³⁰ Merchants were paid a subsidy to transport the indentured across the Atlantic, and routinely would contract with local magistrates to ship the convicted.³¹ This subsidy, combined with the money they would make selling the convicts' labor, ensured excellent returns with minimal investment.³² Thus human cargo comprised of convicted felons was an important element of the 18th century Atlantic sea trade.³³

Maryland and Virginia planters purchased a large square of the indentured, with a sprinkling of tradesmen as well, all of whom received 7 years of indentured labor from each contract purchased.³⁴ Due to the growth of slavery and, in part, convict labor the tobacco trade tripled from 1721 – 1775, when Anglo-American transportation of convicts was at its peak.³⁵

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.³⁶ As early as 1555, however, the British tried to lower the expense of such incarceration by sending such prisoners to private workhouses, where they worked to offset the cost of their confinement and helped supplement the jailer's salary.³⁷ 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.”³⁸ This idea culminated with the British sending numerous convicts to the American colonies to use as hard labor, simultaneously providing both profit and punishment.³⁹

As early as the end of the 17th century, the northern colonies realized they could capitalize from the labor required from wrongdoers sentenced to correctional houses as both punishment and profit.⁴⁰ For example, Pennsylvania relied on its “Great Law” of 1682,⁴¹ to formalize a tradition of punishment through fines and hard labor,⁴² both of which directly benefited the colony's

³⁰ See Willow Meyer, *Beyond the Seas: Eighteenth-Century Convict Transportation and the Widening Net of Penal Sanctions* 45, UC BERKELEY PHD DISS. PHIL. (2011), <https://escholarship.org/content/qt130156k1/qt130156k1.pdf>

³¹ *Id.* at 74-76.

³² *Id.* at 47.

³³ See JOHN MCCUSKER & KENNETH MORGAN, EDs., *THE EARLY MODERN ATLANTIC ECONOMY* 1 (2000).

³⁴ Meyer, *id.* at 51.

³⁵ JACOB PRICE, *CAPITAL AND CREDIT IN BRITISH OVERSEAS TRADE: THE VIEW FROM THE CHESAPEAKE, 1700-1776*, 18 (1980)

³⁶ See Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213, 216 (2009).

³⁷ *Id.* at 216.

³⁸ MARTIN SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* 48 (1993).

³⁹ Marion, *Prisoners for Sale*, at 216.

⁴⁰ See Matthew Meskell, *History of Prisons in the United States from 1777 – 1877*, 51 STAN. L. REV. 839 (1999).

⁴¹ What we now call Pennsylvania's "Great Law" is a series of statutes enacted by Pennsylvania's first legislature that met in Upland on December 4-7, 1682. The Great Law (December 7, 1682), *Our Documentary History*, PENN. HIST. & MUSEUM COMM., <http://www.phmc.state.pa.us/portal/communities/documents/1681-1776/great-law.html>

⁴² Chapters 4-6, 9-16, 19-20, 24-25, 28-30, 32, and 34 of Pennsylvania's Great Law established punishment for crimes which specifically included fines or a term of imprisonment in “the house of Correction at hard Labour to the behoof of the public.” Ch. 5, Great Law of Pennsylvania, at *id.*

government.⁴³ Although only Philadelphia truly used hard labor and fines as criminal punishment, Pennsylvania's law inspired future generations of lawmakers,⁴⁴ 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."⁴⁵

By approximately 1785, a variety of newly established states began to incarcerate as a form of punishment, in local jails or houses of correction.⁴⁶ As incarceration started to become the cornerstone of criminal punishment, the organization of the prisons themselves received more attention.⁴⁷

Philadelphia's Walnut Street Prison, remodeled between 1786 through 1794, offers one important example of a prison that used inmate labor as a way to profit from incarceration.⁴⁸ The Walnut Street Prison model, which incorporated profitable prisoner labor, along with the ideas of potential reform of criminals, 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.⁴⁹ (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 was likely attributable to lack of resources,⁵⁰ and not any dislike of the idea of monetizing punishment.

Inmate labor played a central role in the inauguration, spread, and persistence of early 19th century and Jacksonian-era carceral institutions.⁵¹ As one historian recently contended, "reformers' ideas of social order were related more generally to solidifying particular social hierarchies and were heavily influenced by concerns about cost and profit."⁵² With the rise of a democratic republic, there became a more pronounced need for virtuous citizens, for which inmates provided a convenient foil.⁵³ 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.⁵⁴ This concern, combined with the need to enforce order, crush convict spirit, and make the first American penitentiaries self-sufficient. The answer?

⁴³ See Meskell, *id.* at 839.

⁴⁴ 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).

⁴⁵ *Id.* at 140.

⁴⁶ *Id.* at 142.

⁴⁷ See David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 552 (2019).

⁴⁸ Rubin, *id.* at 142.

⁴⁹ *Id.* at 143.

⁵⁰ *Id.*

⁵¹ *Id.* at 146.

⁵² *Id.*

⁵³ MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835* (1996)

⁵⁴ *Id.* at 131.

A series of penal reforms that not only eliminated the moral reform aspect of the earliest prisons, but also aimed to shrink the cost of incarceration by focusing on the prospect of inmate labor.⁵⁵

C. The Industrial Prison

In the early to mid-19th century prisons, inmate labor rapidly became a popular means for states to recoup the imprisonment costs.⁵⁶ 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.”⁵⁷ Keeping prisoners busy while simultaneously making 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.⁵⁸

In addition, inmate labor played a large role in driving the economy of early 19th-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.⁵⁹ Likewise, one way that early 19th-century New York dealt with the growing problem of its convict population was to institute contractual penal servitude.⁶⁰

Auburn prison, built in Westchester, away from New York City, was the first penitentiary to set up a contract labor system for its inmates, selling this labor to private business.⁶¹ Auburn soon became a veritable factory, its prisoners producing thousands of items to be sold by private merchants.⁶² 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 judicial rights.⁶³

Under the Auburn system of prisoner contract labor, inmates worked inside the prison to create finished goods for private manufacturers.⁶⁴ The manufacturers provided the prison with raw materials to be refined by prison labor, such as footwear, carpets, furniture, and clothing.⁶⁵ Although the system was rife with corruption, with company representatives often trying to defraud prisons, overwork the prisoners through bribes and threats, and steal the goods to sell on the black market, this prison contract labor setup thrived through the end of the 19th century.⁶⁶

⁵⁵ REBECCA MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, 55 (2008).

⁵⁶ See Sharon Dolovich, *State Punishment and Private Prisons*, 55 *DUKE L. REV.* 437, 450-51 (2005).

⁵⁷ *Id.* at 451.

⁵⁸ MCLENNAN, *id.* at 4.

⁵⁹ Meranze, *LABORATORIES OF VIRTUE*, at 226.

⁶⁰ MCLENNAN, *id.* at 53.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 53, 60.

⁶⁴ Meskell, *History of Prisons*, at 861.

⁶⁵ See FOUNDATIONS OF CORRECTIONS 19 (2020), https://www.sagepub.com/sites/default/files/upm-binaries/97948_Chapter_1_Early_History_of_Punishment_and_the_Development_of_Prisons_in_the_United_States.pdf

⁶⁶ Meskell, *History of Prisons*, at 861.

The concept of contract prison labor skyrocketed in political popularity, particularly during the 1830s.⁶⁷ Private contractors helped shape the growth of prison industries, particularly in the north, despite frequent complaints about prison labor.⁶⁸ Between 1825 and 1850, Maine, New York, New Hampshire, Vermont, Massachusetts, Connecticut, New York, the District of Columbia, Virginia, Tennessee, Louisiana, Missouri, Illinois, and Ohio all built prisons based on congregated penal labor.⁶⁹

Inmate labor and desire to reap profit became one of the dominant organizing forces of American prisons.⁷⁰ As observed, “the practice of selling the labor of convicts to private enterprise gradually became deeply and widely entrenched in penal ideology.”⁷¹ By the 1840’s, an individual convicted of a felony would spend their prison time working for the benefit of private labor or a state-run business.⁷²

Contractual penal servitude, where the state sold the labor power of inmates to private businesses, was so influential that most early-to-mid 19th century prisons in the U.S. were organized like factories.⁷³ State governments typically leased the prison facility as well as the inmates to entrepreneurs, who ended up reaping the profits.⁷⁴ “The states’ paltry earnings did not, however, discourage their insistence on prisoner labor.”⁷⁵ Simply the 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.⁷⁶ In almost every Auburn-system prison in the 1840’s, the revenue created by convict laborers significantly diminished the annual cost of running the prison itself.⁷⁷

Economic profitability became a key motive during this era of the industrial prison. The Auburn system, instituted at the prison in Auburn, NY, was “fixated on profits.”⁷⁸ 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.⁷⁹ The popularity of the Auburn prison system resonated particularly for legislatures, as the New York style of incarceration produced annual economic surpluses and was inexpensive to run.⁸⁰ As a result, most prisons constructed from the 1840’s through the 1870’s were predicated on the Auburn system.⁸¹

⁶⁷ *Id.*

⁶⁸ See GLEN GILDEMEISTER, PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840-1890, 55 (1987).

⁶⁹ See W. DAVIS LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, 109-110 (1965).

⁷⁰ MCLENNAN, *id.* at 54.

⁷¹ *Id.*

⁷² *Id.* at 66.

⁷³ See generally DARIO MELOSSI AND MASSIMO PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM (1981).

⁷⁴ MCLENNAN, *id.* at 8, 63-64.

⁷⁵ Rubin, *id.* at 147.

⁷⁶ MCLENNAN, *id.* at 67.

⁷⁷ *Id.*

⁷⁸ Meskell, *History of Prisons*, at 857.

⁷⁹ *Id.*

⁸⁰ *Id.* at 858.

⁸¹ *Id.*

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

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 not the likely 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 Blacks.⁸³ Slaves were governed by an entirely separate code of laws, entrapped in a system which valued their labor over anything else, which also discouraged any state or local punishment aside from that of their owners.⁸⁴

Post-emancipation, however, the Southern landscape of imprisonment substantially changed. The South’s post-war criminal justice system underwent a dramatic transformation, quickly shifting to focus on the subjugation of Black labor, through the twin mechanisms of the Black Codes and the convict leasing system.⁸⁵ Roughly 15 years post-Civil War, the imprisonment of Black individuals was 12 times higher than that of whites.⁸⁶ 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 formerly Confederate states passed laws severely restricting the freedom and civil liberties of the newly-freed slaves.⁸⁷ The South passed harsh vagrancy laws which were extremely broad in scope, punishing any Black individuals who “neglected their calling or employment or misspent what they earned.”⁸⁸ Any Black citizens found to be engaging in “vagrancy” could be punished by ten days imprisonment and a fifty

⁸² *Id.* at 860.

⁸³ See Christopher Miller, *Freedom and Convict Leasing in the Postbellum South*, 124 AM. J. SOC. 367, 368 (2018).

⁸⁴ FOUNDATIONS OF CORRECTIONS, *id.* at 20.

⁸⁵ *An Act to Amend the Vagrant Laws of the State*, BLACK CODES OF MISSISSIPPI § 2 (1865), in *The Slave Experience: Legal Rights and Government*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/legal/docs6.html>

⁸⁶ Miller, *Freedom and Convict Leasing*, at 368.

⁸⁷ David Childs, *Black Codes-American Slave Laws* 1, MULTIRACIAL AMERICA, A MULTIPEDIA ENCYCLOPEDIA (2013), https://www.academia.edu/8458317/Black_Codes_American_Slave_Laws

⁸⁸ See Black Codes, <https://law.jrank.org/pages/4769/Black-Codes.html#ixzz6oBU7izoM>

dollar fine,⁸⁹ an almost unimaginable fee for newly-freed slaves. In tandem with the vagrancy law was a system of special county courts, presided over a local justice of the peace and two landowners, created to punish former slaves charged with violating any employment laws.⁹⁰

Mississippi was the first to pass a set of Black Codes in the post-Civil War South.⁹¹ Mississippi law was particularly draconian, imposing punishments such as “corporal chastisement” for Black citizens who were classified as vagrant.⁹² Most strikingly, the Mississippi Black Code was the first to incorporate carceral labor into vagrancy punishments. The law held that any Black male who could not pay the costs or fees imposed for his misdemeanor within 5 days would be subject to being hired out for labor by any white man who would pay the fine: “if any freedman, free Negro, 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. . . .”⁹³ 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.⁹⁴ The return reward would be subtracted from the employee’s wages.⁹⁵

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.⁹⁶ Black witnesses could only testify in court in cases affecting “the person or property of a person of color.”⁹⁷ In addition, certain crimes, such as rebellion, arson, burglary, and assaulting a white woman, carried harsh penalties (including the death penalty), which only applied to Black citizens.⁹⁸ Punishments for minor offenses frequently resulted in whipping or leasing the defendant’s labor, penalties rarely imposed on whites.⁹⁹ Alabama, Georgia, Louisiana, Florida, Tennessee, Virginia, and North Carolina quickly followed suit by enacting similar laws of their own.¹⁰⁰

⁸⁹ See, e.g., § 7, *An Act to Amend the Vagrant Laws of the State*, MISS. BLACK CODES (1865), <https://sharetn.gov.tnsosfiles.com/tsla/exhibits/blackhistory/pdfs2/1865%20Mississippi%27s%20Black%20Codes.pdf>

⁹⁰ See, e.g., Carl. H. Moneyhon, *Black Codes*, TEX. ST. HIST. ASSOC. HANDBOOK OF TEX., <https://www.tshaonline.org/handbook/entries/black-codes>.

⁹¹ *Act to Confer Civil Rights on Freeman*, MISSISSIPPI BLACK CODES, at § 7.

⁹² *An Act to Regulate the Relation of Master and Apprentice, as Relates to Freedmen, Free Negroes, and Mulattoes* § 3, MISSISSIPPI BLACK CODES.

⁹³ *An Act to Punish Certain Offenses Herein Named, and for Other Purposes* § 5, MISSISSIPPI BLACK CODES.

⁹⁴ *An Act to Confer Civil Rights on Freeman, and for Other Purposes*, BLACK CODES OF MISSISSIPPI § 7 (1865), *The Slave Experience: Legal Rights and Government*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/legal/docs6.html>

⁹⁵ *Act to Confer Civil Rights on Freeman*, BLACK CODES OF MISSISSIPPI, at § 7.

⁹⁶ See South Carolina Black Code § 5, *The Southern Black Codes of 1865-1866*, CONST. R. FOUNDATION, <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Black Codes of Mississippi, at *id.*

Even minor crimes carried great financial penalties for Black citizens, including fines set high enough that no newly freed slave could possibly pay.¹⁰¹ For those who could not pay such fines, three months of hard labor was prescribed.¹⁰² Far longer-lasting convict leasing arrangements were found in Georgia, which passed laws sanctioning inmate leasing for twenty years at a time, only costing the employer approximately \$500,000.¹⁰³ Such laws continued long past the expiration of the original Black Codes.¹⁰⁴

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.¹⁰⁵ In other words, convict leasing primarily worked as a system of forced labor, and was never focused on either preventing or punishing crime.¹⁰⁶ Instead, the laws worked to maximize profit for Southern whites. Indeed, Black prisoners were seen as “unfit” for incarceration, since prison was envisioned as either reformatory or rehabilitative.¹⁰⁷ Since Black citizens, assumed to be “inferior,” could not be reformed, the state decided it was simply not worth incarcerating them.¹⁰⁸ 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. Black women and children, however, were also subject to its cruelties.¹⁰⁹ 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.¹¹⁰ The “masters and mistresses” of such apprentices had “the power to inflict . . . moderate corporal chastisement,” as long as it did not rise to the level of cruel and unusual punishment.¹¹¹

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 which leased them out for profit.¹¹² Those leasing the prisoners had total custody and control.¹¹³ Accordingly, the lessees focused on profits by extracting maximum labor from those convicted, with “little incentive to preserve prisoners’ welfare or lives.”¹¹⁴

¹⁰¹ Goodwin, *Modern Slavery*, at 937-38.

¹⁰² *Id.* at 937-38

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 64 (2009).

¹⁰⁶ Pope, *Mass Incarceration and Convict Leasing*, at 40.

¹⁰⁷ See Ashley T. Rubin, *Early U.S. Prison History Beyond Rothman*, 15 ANN. REV. L. & SOC. SCI. 137, 150 (2019).

¹⁰⁸ *Id.*

¹⁰⁹ See generally TALITHA LEFLOURIA, *CHAINED IN SILENCE: BLACK LABOR AND CONVICT LABOR IN THE NEW SOUTH* (2015) (discussing how Black women were also forced into convict leasing system).

¹¹⁰ See Mississippi Apprentice Law § 2, Laws of Mississippi 85 (1865).

¹¹¹ Mississippi Apprentice Law § 2, *id.*

¹¹² See Kathy Roberts Forde, *Exploiting Black Labor After the Abolition of Slavery*, THE CONVERSATION (Feb. 6, 2017), <https://theconversation.com/exploiting-black-labor-after-the-abolition-of-slavery-72482>

¹¹³ See Dorothy Roberts, *Abolitionism Constitutionalism*, 133 HARV. L. REV. 1, 32 (2018).

¹¹⁴ *Id.*

In Georgia, as well as in other Southern states, convict leasing not only massively increased a state's coffers, but also freed them from the burden of building and maintaining prison facilities for what soon became a massively engorged prison populations (due to the punitive penal codes imposed).¹¹⁵ 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.¹¹⁶ Additionally, the arrangement freed the state from the expense of providing for the rapidly increasing prison population.¹¹⁷

The Civil Rights Act of 1866 outlawed these early race-based forms of convict leasing.¹¹⁸ 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.¹¹⁹ The Civil Rights Act was not enforceable, however, until the passage of the 14th Amendment, which fully eradicated the Black Codes, as it stated that all were subject to equal protection under the law.¹²⁰

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." Accordingly, following the passage of the 14th and 15th Amendments, Southern states simply continued the practice of convict leasing as part of their sentencing and imprisonment of prisoners.¹²¹ This continued and spread the practice of convict leasing for many more years. Every state in the South practiced convict leasing, including Tennessee, Texas, Georgia, Florida, Arkansas, Mississippi, and Louisiana.¹²²

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.¹²³ Convict labor rapidly became a key aspect in restoring the region's devastated economy.¹²⁴ The South used as its blueprint the colonial version of convict labor, as discussed in Part I, where British convicts were auctioned off to plantation landowners as indentured servants for a set period.¹²⁵ Georgia led the way in reinstating convict labor and the prisoner-profit ethos, creating a substantial source of prosperity for its white leaders.¹²⁶ This was because convicted Black

¹¹⁵ LEFLOURIA, CHAINED IN SILENCE, at 67.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 68.

¹¹⁸ See James Pope, *Mass Incarceration and Convict Leasing*, 94 N.Y.U. L. REV. 1, 1 (2019).

¹¹⁹ See CIVIL RIGHTS ACT OF 1866, 14 Stat. 27-30 (enacted April 9, 1866, but not ratified until 1870).

¹²⁰ See *Black Codes*, AM. BATTLEFIELD S. (October 20, 2020), <https://www.battlefields.org/learn/articles/black-codes>

¹²¹ In Texas, for example, convict leasing involved the entire penitentiary system, which leased all prisoners to one single employer, the Williams sugarcane plantation. See Michael Hardy, *Blood and Sugar*, TEXAS MONTHLY (January 2017), <https://www.texasmonthly.com/articles/sugar-land-slave-convict-labor-history/>

¹²² Goodwin, *Modern Slavery*, at 942.

¹²³ LeFlouria, *Chained in Silence*, at 62.

¹²⁴ *Id.* at 63.

¹²⁵ *Id.* at 65.

¹²⁶ *Id.* at 66.

prisoners could be forced to produce twice the work of free labor.¹²⁷ 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.”¹²⁸

The system of convict leasing meant that an extremely high number of Black Southern men were compelled into servitude by local courts through the use of strict misdemeanor criminal codes, applied in a racially discriminatory manner.¹²⁹ Once convicted, the local sheriff would sell Black inmates’ labor to “giant corporate prison mines” or lease groups of prisoners to local farmers.¹³⁰ Hundreds of forced labor camps came to exist in the South, run by local government, farmers, corporations, and entrepreneurs.¹³¹ Every Southern state used convict labor as a way to create great profit.¹³² In addition, the leasing system was so popular that the widespread corruption and collusion were simply accepted as part of the business.¹³³

Controlling the sale of prisoner labor was a spectacularly lucrative affair.¹³⁴ The sheriff made money by collecting the debts and fees from the prisoners, as well as any amount of money left over from the daily “feeding fees” paid by the state. Due to such potential profits, local sheriffs were strongly financially motivated to arrest and convict as many Black men as possible, and feed them quite minimally.¹³⁵ 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.”¹³⁶

Conditions were beyond squalid in Southern prison camps. Black prisoners were often packed into filthy, windowless cabins like slaves on the Middle Atlantic passage.¹³⁷ All convicts wore ankle shackles day and night, connected to one another.¹³⁸ Like slaves, inmates worked incessantly under insufferable conditions, and were frequently bought and sold, sometimes repeatedly.¹³⁹ Convicts were harshly whipped and beaten.¹⁴⁰ Clothing and sanitary conditions were frequently defective or non-existent.¹⁴¹ Very little care was taken to preserve the lives and well-being of the people sentenced to serve.¹⁴²

¹²⁷ *Id.*

¹²⁸ Alex Karakatsanis, *The Punishment Bureaucracy*, 128 *YALE L. J. F.* 848, 863 (2019)

¹²⁹ *BLACKMON, SLAVERY BY ANOTHER NAME*, at 6.

¹³⁰ *Id.* at 7.

¹³¹ *Id.*

¹³² Forde, *Exploiting Black Labor*, at *id.*

¹³³ See Michele Goodwin, *Modern Slavery, Capitalism, and Mass Incarceration*, 104 *CORNELL L. REV.* 899, 944 (2019).

¹³⁴ *BLACKMON, SLAVERY BY ANOTHER NAME*, at 65.

¹³⁵ *Id.*

¹³⁶ Matthew Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 *J. NEGRO HIST.* 339, 339 (1971).

¹³⁷ *BLACKMON, SLAVERY BY ANOTHER NAME*, at 74.

¹³⁸ *Id.*

¹³⁹ Miller, *Freedom and Convict Leasing*, at 368.

¹⁴⁰ *Id.*

¹⁴¹ *BLACKMON, SLAVERY BY ANOTHER NAME*, at 135.

¹⁴² *Id.* at 288-89.

Florida provides a particular brutal example of conditions in convict leasing camps. Prisoners sentenced to Florida's convict leasing system were subjected to heavy chains and shackles, constant search by dogs, and punishment with whips, sweat boxes, and stringing up by the thumbs.¹⁴³ Living conditions were filthy, with little to no medical attention provided.¹⁴⁴ Even if prisoners were seriously injured or ill, they were forced to work.¹⁴⁵ 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.¹⁴⁶

Florida was also unique in that it also ensnared white immigrant workers into the maw of its system, particularly with H.M. Flagner's railways and luxury hotels.¹⁴⁷ 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.¹⁴⁸ Those who would not work under bad conditions were refused food, and sick workers were beaten and threatened with death.¹⁴⁹

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."¹⁵⁰ 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.¹⁵¹

By the late 19th century, Southern states such as Georgia, Alabama, and Tennessee had spectacular growth in the coal and iron industry, outpacing the North and creating substantial wealth for owners and for the states themselves.¹⁵² For example, between the years of 1880 and 1904, ten percent of Alabama's state budget derived from profits earned by leasing state convicts.¹⁵³ This industrial growth was almost entirely contingent on convict leasing, since the profits gained by using low-cost convict labor made the industry able to sell the commodities at a cheaper rate.¹⁵⁴

¹⁴³ See Bryan Bowman and Kathy R. 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/>

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ LEFLOURIA, CHAINED IN SILENCE, at 78.

¹⁴⁷ Bowman & Forde, *Slave Labor*, at *id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Richard Barry, *Slavery in the South To-Day*, 5 COSMOPOLITAN MAG. 481 (March 1907), https://books.google.com/books?id=Uo558QI8vSEC&pg=PA481&lpg=PA481&dq=richard+barry+cosmopolitan+slavery+in+the+south&source=bl&ots=ESqWAAE_Hg&sig=ecG4tm2nr5Qm0pegFcXc3gWkQ6g&hl=en&sa=X&ved=0ahUKewjP5ICvtfnaAhWowFkKHZHRDB4Q6AEINDAD#v=onepage&q=richard%20barry%20cosmopolitan%20slavery%20in%20the%20south&f=false

¹⁵¹ *Id.* at 481-82.

¹⁵² LEFLOURIA, CHAINED IN SILENCE, at 73.

¹⁵³ Shane Bauer, *The True History of America's Private Prison Industry*, TIME (September 18, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>

¹⁵⁴ LEFLOURIA, CHAINED IN SILENCE, at 73.

The capital growth of the South post-Reconstruction became inseparable with the convict leasing system; “only in the South did the physical ‘penitentiary’ become virtually synonymous with the various private enterprises in which convicts labored.”¹⁵⁵ In particular, the turpentine and lumber camps located in Georgia, Florida and Louisiana commonly made the prisoners labor until they literally died, either from overwork or disease.¹⁵⁶ “There was simply no incentive for lessees to avoid working people to death.”¹⁵⁷ During the late 19th century, the death rate for Black men sentencing to convict leasing ranged from 16 percent to 25 percent.¹⁵⁸ Additionally, the South’s “plantation monocultures in cotton and sugar” used convict leasing labor to harvest its crops, using both male and female Black prisoners.¹⁵⁹ Finally, the Southern coal mines were so deadly for convict lessees that they were known as “nurseries of death.”¹⁶⁰

The lessees of Southern convicts were only interested in productive laborers; prisoners who were sick or infirm were sent back to jail.¹⁶¹ 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.”¹⁶² 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.¹⁶³ As even a young Woodrow Wilson remarked, “Who can defend a system which makes the punishment of criminals . . . a source of private gain?”¹⁶⁴

Yet the practice of convict leasing was widely tolerated, because the rapid industrialization of the South reaped a financial advantage for the entire nation, benefiting the national economy.¹⁶⁵ Although the federal government had numerous opportunities to put a stop to the terrible practice, it never intervened.¹⁶⁶ Convict leasing was used in the South until approximately the 1920’s, but it was not formally abolished until Franklin Roosevelt did so in 1941.¹⁶⁷

¹⁵⁵ ALEXANDER C. LICHENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 3 (1996).

¹⁵⁶ See Steve Fraser & Joshua C. Freeman, *21st Century Chain Gangs*, SALON (April 19, 2012), https://www.salon.com/2012/04/19/21st_century_chain_gangs/

¹⁵⁷ Bauer, *True History*, at *id.*

¹⁵⁸ *Id.*

¹⁵⁹ Fraser & Freeman, *Chain Gangs*, at *id.*

¹⁶⁰ *Id.*

¹⁶¹ See MATTHEW MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866 – 1928*, 22 (1996).

¹⁶² *Id.* at 24.

¹⁶³ Fraser & Freeman, *21st Century Chain Gangs*, at *id.*

¹⁶⁴ MANCINI, *ONE DIES, GET ANOTHER*, at 32.

¹⁶⁵ Forde, *Exploiting Black Labor*, at *id.*

¹⁶⁶ *Id.*

¹⁶⁷ See Circular No. 3591 (directive from Attorney General Francis Biddle to all U.S. Attorneys, explaining procedure for handling cases relating to involuntary servitude, slavery and peonage) (December 12, 1941), <https://www.archives.gov/research/investigations/fbi/classifications/050-slavery.html>

2. Debt Peonage

Debt peonage sprung up alongside convict leasing during the Southern post-Reconstruction era, becoming another method where 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 freed slaves needed a contract system post-emancipation.¹⁶⁸ 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.¹⁶⁹

Debt peonage had a fairly simple premise: convicted individuals who owed any debt were held beyond the end of their prison sentences, required to work off their debts by laboring for their lessor-turned-employer.¹⁷⁰ 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.¹⁷¹ 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. If they did not, the men could be arrested, convicted for vagrancy, and forced to work for an employer.¹⁷² Harsh penalties for vagrancy and petty theft supplied the fodder for such criminal surety laws.¹⁷³

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.¹⁷⁴ In exchange, the criminal defendant would contract to work off the debt for the surety.¹⁷⁵ Debt peonage used labor subordination as yet another tool in a profit-driven, racist criminal justice system.¹⁷⁶

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."¹⁷⁷ In reality, the criminal surety system created an "ever-turning wheel of servitude,"¹⁷⁸ since breaching these exploitative contracts simply led to new contracts, which were even lengthier.¹⁷⁹ Convicted

¹⁶⁸ See PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901 – 1969*, 19 (1990).

¹⁶⁹ See Michael J. Klarman, *Race and Court in the Progressive Era*, 51 *VAND. L. REV.* 881, 921 (1998).

¹⁷⁰ Bowman & Forde, *Slave Labor*, at *id.*

¹⁷¹ *Id.*

¹⁷² Klarman, *Race and Court*, at 922.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See Noah Zatz, *A New Peonage? Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 *SEATTLE L. REV.* 927, 929 (2016).

¹⁷⁷ Klarman, *Race and Court*, at 922; 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).

¹⁷⁸ *Reynolds*, 235 U.S. at 146-47. Despite the Supreme Court's decision in *Reynolds*, the rulings had minimal impact on the prevalence of coerced black labor in the South. Klarman, *Race and Court*, at 926.

¹⁷⁹ Klarman, *Race and Court*, at 922.

defendants were frequently required to do hard labor for far longer a time period than what their original violation or misdemeanor authorized.¹⁸⁰

Debt peonage encompassed the minor crimes and trumped-up charges faced by many Black citizens.¹⁸¹ Many of the crimes involved larceny of under one dollar, and the courts usually did not consider the crimes particularly serious.¹⁸² For example, during one month in a single county in Georgia, 149 individuals were convicted for crimes tantamount to “walking on the grass or spitting on the sidewalk,” leading to a combined sentence total of 19 years.¹⁸³

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.¹⁸⁴ 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.¹⁸⁵ A sum such as this would usually take 8 months of labor to work off.¹⁸⁶ The debt could only be paid off by physical labor.¹⁸⁷

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.¹⁸⁸ Put another way, the criminal surety system systemically produced an involuntary Black work force through basic fraud.¹⁸⁹

Although debt peonage was technically outlawed by Congress in 1865, following the passage of the 13th Amendment, in reality the practice continued until the 1940’s.¹⁹⁰ Neither the passage of the Anti-Peonage Act in 1867 (where Congress tried to prohibit coercion of labor to pay off debt), nor the existence of two Supreme Court cases invalidating debt peon statutes,¹⁹¹ had any effect in the South.¹⁹² Like 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.¹⁹³ Debt peonage continued in this fashion until after World War II.¹⁹⁴

¹⁸⁰ *Id.*

¹⁸¹ See *Slavery v. Peonage*, SLAVERY BY ANOTHER NAME, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/peonage/>

¹⁸² DANIEL, SHADOW OF SLAVERY, at 27.

¹⁸³ See Tamar Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1616 (2015).

¹⁸⁴ *Slavery v. Peonage*, at *id.*

¹⁸⁵ DANIEL, SHADOW OF SLAVERY, at 26 n.15.

¹⁸⁶ *Id.*

¹⁸⁷ Birkhead, *id.* at 1599.

¹⁸⁸ Klarman, *Race and Court*, at 923.

¹⁸⁹ *Id.* at 925.

¹⁹⁰ DANIEL, SHADOW OF SLAVERY, at 19.

¹⁹¹ See *Bailey v. Alabama*, 219 U.S. 219, 245 (1911); *United States v. Reynolds*, 235 U.S. 133, 149–50 (1914).

¹⁹² Birkhead, *id.* at 1606.

¹⁹³ *Id.* 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.*

¹⁹⁴ See *Anti-Peonage Act of 1867*, STATUTES AND STORIES, https://www.statutesandstories.com/blog_html/peonage-act-of-1876/

With minimal land or capital, many newly freed Black citizens ended up signing contracts to labor on plantations or farms, in order to survive.¹⁹⁵ Many planters would not allow laborers to leave their farms if any money was owed, making debt peonage even more complex.¹⁹⁶ Debt peonage existed all over the South, but was particularly common in the cotton belt of the Carolinas, Texas, and the Mississippi Delta, as well as the turpentine farms of Florida, Georgia, Alabama, and Mississippi.¹⁹⁷

The convict camps on the turpentine farms were extraordinarily punitive, even for debt peonage and convict leasing.¹⁹⁸ Living conditions, food, and work regimes were atrocious.¹⁹⁹ There was little to no state oversight.²⁰⁰ A 1923 Florida investigation of these convict camps described them as “human slaughter pen[s].”²⁰¹ Technically illegal, these “wildcat” camps were almost impossible to eradicate, despite the muckraking journalism that exposed their horrors.²⁰²

Southern debt peonage often functioned as much in custom as in law, with little to disturb it, particularly when it 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.²⁰³ Likewise, when laborers’ debt records were either lost or contested, often the required labor contracts were simply extended, creating further debt on the part of the laborers.²⁰⁴ 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.²⁰⁵

The Southern peonage system was enforced by local sheriffs, constables, and justices of the peace.²⁰⁶ Local police colluded with planters to enforce shadowy debts that did not always exist.²⁰⁷ Justices of the peace cooperated closely with employers, sometimes even going so far as to pocket the fine monies owed.²⁰⁸ 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.²⁰⁹ Such custom meant that the post-Reconstruction South profited immensely from the monies extracted from Black carceral labor, imposed for trifling or non-existent crimes.²¹⁰

¹⁹⁵ DANIEL, *SHADOW OF SLAVERY*, at 20.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 22.

¹⁹⁸ LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR*, at 171.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Matt Marino, *The Brutality of Florida’s Turpentine Industry*, FLOWWRITER (November 19, 2018), <https://flowriter.net/2018/11/09/the-brutality-of-floridas-turpentine-industry/>

²⁰² LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR*, at 171.

²⁰³ DANIEL, *SHADOW OF SLAVERY*, at 25.

²⁰⁴ Birkhead, *New Peonage*, at 1606.

²⁰⁵ DANIEL, *SHADOW OF SLAVERY*, at 26.

²⁰⁶ *Id.* at 30.

²⁰⁷ *Id.* at 31.

²⁰⁸ Daniel, *Shadow of Slavery*, at 32.

²⁰⁹ Birkhead, *New Peonage*, at 1624.

²¹⁰ *Id.*

3. Chain Gangs

Even after convict leasing was finally eradicated, however, there was little relief for Southern prisoners, who remained primarily Black men. 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 those who had been convicted.²¹¹

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.²¹² The use of the chain gang allowed Southern state governments to avoid building and refurbishing prisons. Chaining prisoners together for work purposes (particularly road construction) was quick, easy, and extremely inexpensive.²¹³ In addition, chains eliminated the need for many guards, since escape was so difficult.²¹⁴

The primary difference between convict leasing and chain gangs was the recipient of the labor: under convict leasing, prisoners were leased to private commercial interests; with the chain gang system prisoners were leased to the state to work on public projects.²¹⁵

When handed back the reins of prisoner control, Southern state penitentiaries quickly instituted a brutal form of forced labor with chain gangs.²¹⁶ 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.²¹⁷ The majority of people sentenced to work on chain gangs were Black male prisoners.²¹⁸

Working on the chain gang proved just as brutal as laboring under the convict lease system. Prisoners on a chain gang were shackled by their ankles essentially around the clock, during eating, sleeping, and laboring, in groups of five.²¹⁹ Chain gangs often proved deadly for prisoners, as Alex Lichtenstein has 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

²¹¹ See Stephen Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 364-65 (1998)

²¹² See Chain Gangs, *Slavery by Another Name*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/chain-gangs/>

²¹³ See Lynn Burley, *History Repeats Itself in The Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 MINN. J. L. & EQUITY 127, 130 (1997).

²¹⁴ *Id.* at 130.

²¹⁵ See Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery*, 26 VA. L.J. SOC. P. & L. 65, 70-71 (2019).

²¹⁶ See *America's History, Race and Prisons: Reimagining Prisons*, VERA INSTITUTE, <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison>

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ WALTER WILSON, *FORCED LABOR IN THE UNITED STATES* 68 (1933).

feet long containing eighteen beds. Medical treatment and bathing facilities were unsanitary, if available at all. And, above all, corporal punishment and outright torture . . . was meted out for the most insignificant transgressions.²²⁰

Although many are aware of the existence of chain gangs due to their popular prevalence in 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 19th century and early 20th century South. Chain gang prisoners built the Tamiami Trail in Florida.²²¹ South Carolina, North Carolina, and Georgia also used chain gangs extensively to build and repair roads all over the state.²²² This focus on roads was due to the introduction of mass-produced automobiles, spurring public demand for decent roads throughout the South.²²³

Using chain gangs to repair roads saved considerable money for Southern state governments. For example, in South Carolina, a low-skilled cotton mill hand was paid \$1.25 per day in 1915.²²⁴ In contrast, housing, clothing, and food for chain gang members cost only \$0.20 per day, pay for guards was only another twenty cents, per day, and then miscellaneous costs added merely \$0.15 per day.²²⁵ In other words, chain gang labor cost half of paid non-convict labor,²²⁶ and this included the costs of maintaining the prisoners, albeit very poorly.

Additionally, although many white Southerners wanted improved roads, they did not want to pay for them fully through taxation or put in the paid labor to create them.²²⁷ 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.²²⁸ As the North Carolina Highway Commission noted in 1902, “the value of [convict labor] is not to be underestimated,” as the state would not be able to otherwise obtain labor to fix its roads.²²⁹ Even counties that previously could not afford the labor costs to build roads now found it affordable with the use of chain gangs.²³⁰

Moreover, 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.”²³¹ In other words, the use of the chain gang did not

²²⁰ ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 183 (1996).

²²¹ Andrew Ford, *Florida Sheriff Reintroduces Chain Gang*, *FLORIDA TODAY* (May 2, 2013), <https://www.usatoday.com/story/news/nation/2013/05/02/brevard-county-sheriff-chain-gang/2130335/>

²²² See Howard Bodenhorn, *Bad Men, Good Roads, Jim Crow, and the Economics of Southern Chain Gangs* 1, 3, NBER Working Paper No. 28405 (January 2021), https://www.nber.org/system/files/working_papers/w28405/w28405.pdf

²²³ *Id.* at 4.

²²⁴ *Id.* at 11.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR*, at 163-64.

²²⁸ *Id.* at 164.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See Fraser & Freeman, *Chain Gangs*, at *id.*

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 20th century industrial society.

The use of prisoners in chain gangs was not formally abolished throughout the United States until the 1960s.²³² Moreover, 35 years later, chain gangs made a resurgence. Alabama brought chain gangs back to its prison experience in the mid-1990's, causing a great outcry.²³³ Arizona, Massachusetts, Ohio, and Washington followed suit.²³⁴ Indeed, Maricopa County, AZ, even briefly boasted of an all-female chain gang for approximately three years.²³⁵ Most recently, Florida resurrected the chain gang in 2013, when the sheriff of Brevard County, FL, using a small group of inmates from the local prison to labor on local roadsides.²³⁶ One difference, however, is that the inmates are all volunteers, and they are not shackled to each other.²³⁷ 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. Similar to the post-bellum period, the majority of individuals who participate in the chain-gang are Black or Latinx. The spectacle, however, is still a disturbing one.

²³² Burley, *Resurrection of Prisoner Chain Gangs*, at 131.

²³³ *Id.* at 128.

²³⁴ Ford, *Chain Gang*, at *id.*

²³⁵ Meg O'Connor, 'Nation's Only Female Chain Gang' Apparently Disbanded, PHOENIX NEW TIMES (May 2, 2019), <https://www.phoenixnewtimes.com/news/nations-only-female-chain-gang-boasts-the-mcso-website-11279199>

²³⁶ Ford, *Chain Gang*, at *id.*

²³⁷ *Id.*

4. Penal Farms

Another form of forced prison labor in the form of prison farms, began to appear in the South during the early-to mid- 20th century.²³⁸ For example, in 1928, the state of Texas supervised 12 state prison farms; virtually 100% of the prisoners working there were Black.²³⁹ In Florida, likewise, convict leasing gradually morphed into prison farms.²⁴⁰ Many of the prison farms had been former slave plantations before the state government acquired them.²⁴¹

One of the most infamous Southern prison farms, Parchman Farm, was designed to function similarly to an actual plantation.²⁴² 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.”²⁴³ Convicts were immediately put to work in preparing the land for farming.²⁴⁴

Described as “the quintessential penal farm, the closest thing to slavery that survived the Civil War,”²⁴⁵ prisoners labored for up to 15 hours a day, planting, picking cotton, and plowing fields while watched by gun-toting guards.²⁴⁶ In fewer than ten years after it transformed into a prison farm, Parchman became a money-making machine, reaping profits from the slave labor of its inmates.²⁴⁷ Indeed, in its second year of operation, Parchman made \$185,000 in profit (or approximately \$5 million dollars in today’s money).²⁴⁸ Parchman Farm was essentially “the leading cash cow for the state of Mississippi. . . .adding hundreds of thousands of dollars and then millions of dollars to the state treasury. . . . an enormous economic asset.”²⁴⁹ In sum, the twin reasons for Parchman Farm’s existence were “money-making and . . . racial control.”²⁵⁰ Parchman Farm exploited and profited from Black bodies like they were machines.²⁵¹

²³⁸ *Reimagining Prisons*, at *id.*

²³⁹ *Id.*

²⁴⁰ See Ben Conark, *Work Forced: A Century Later, Unpaid Prison Labor Continues to Power Florida*, FLORIDA TIMES UNION (May 25, 2019), <https://www.jacksonville.com/news/20190525/work-forced-century-later-unpaid-prison-labor-continues-to-power-florida>

²⁴¹ See Maurice Chammah, *Prison Plantations: One Man’s Archive of a Vanished Culture*, MARSHALL PROJECT (May 1, 2015), <https://www.themarshallproject.org/2015/05/01/prison-plantations>

²⁴² See *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/>

²⁴³ See Parker Yesko, *Letter from Parchman: Inside Mississippi’s Notorious Prison*, APM REPORTS (May 29, 2018), <https://www.apmreports.org/story/2018/05/29/inside-parchman-mississippi-notorious-prison>

²⁴⁴ *Lasting Legacy of Parchman Farm*, at *id.*

²⁴⁵ DAVID OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 2* (1997).

²⁴⁶ *Lasting Legacy of Parchman Farm*, at *id.*

²⁴⁷ OSHINSKY, *WORSE THAN SLAVERY*, at 155.

²⁴⁸ Yesko, *Letter from Parchman*, at *id.*

²⁴⁹ Lillian Cunningham, *Fair Punishment* (ep. 9, Constitutional podcast), WASH. POST (Oct. 23, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/10/23/episode-9-of-the-constitutional-podcast-fair-punishment/>

²⁵⁰ Yesko, *Letter from Parchman*, at *id.*

²⁵¹ See Lily Pulver, *Southern Prison Reform in the 20th Century: Mississippi’s Parchman Farm*, ORGANIZING FOR RACIAL JUSTICE, <https://organizingforracialjusticeahistory.wordpress.com/home-3/lilys-page/>

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.²⁵² In Arkansas, two prisons, Cummins and Tucker, were working farms, specifically premised on antebellum Southern plantations.²⁵³ The men labored without pay, and the farms were run for revenue.²⁵⁴ Patrolled by armed men on horseback, the prisoners farmed cotton, rice, soybeans and cucumbers.²⁵⁵ Cummins prison was an actual slave plantation simply converted to a prison farm, likely retaining the family name of dead slaveowners.²⁵⁶

In 1880's Texas, the state began to buy large tracts of agricultural land, situated on former plantations.²⁵⁷ The Texas prison farms were "an agricultural prison model focused on the use of inmate labor on state-owned land to benefit the state."²⁵⁸ The prisoners were subsequently used to extract profits from the farms. Although these Texas prison farms were renamed prison "units" in the 1960's, virtually everything else remained the same, including the stinting of proper food, medical care, and housing for inmates, all to maximize revenues as possible.²⁵⁹

Texas prison farms yielded more than any local farms worked by free laborers, since independent workers could not be whipped or starved to increase production.²⁶⁰ Throughout the 1950's and 60's, Texas plantation prison farms reaped an average revenue of \$1.7 million per year (\$13 million in 2018 dollars).²⁶¹ In sum, Texas prison farms were money-making ventures.²⁶²

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.²⁶³ A major objective was to be a self-sufficient penal system.²⁶⁴ In approximately 4 years, Louisiana managed to completely construct a fully working, profitable, and self-sufficient prison farm, from purchasing lands to deriving profits from crops.²⁶⁵ Money-making became Angola's primary focus, "a profit-oriented

²⁵² Shane Bauer, *The True History of America's Private Prison Industry*, TIME (September 18, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>

²⁵³ See Colin Woodward, *The Arkansas Prison Scandal*, ARKANSAS TIMES (March 22, 2018), <https://arktimes.com/news/cover-stories/2018/03/22/the-arkansas-prison-scandal>

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See Keri Blakinger, *Will the Reckoning Over Racist Names Include These Prisons*, MARSHALL PROJECT (July 29, 2020), <https://www.themarshallproject.org/2020/07/29/will-the-reckoning-over-racist-names-include-these-prisons>

²⁵⁷ See CHAD TULSON & JAMES MARQUANT, *FIRST AVAILABLE CELL: DESEGREGATION OF THE TEXAS PRISON SYSTEM 80* (2010).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 81.

²⁶⁰ See Shane Bauer, *The Straight Line from Slavery to Private Prisons*, LITHUB (September 19, 2018), <https://lithub.com/the-straight-line-from-slavery-to-private-prisons/>

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See Vanessa Tolino, *Louisiana State Penitentiary at Angola*, 64 PARISHES, <https://64parishes.org/entry/louisiana-state-penitentiary-at-angola>

²⁶⁴ *Id.*

²⁶⁵ See Mark CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM 92* (1984).

policy of inmate plantation farming that closely mirrored slavery.”²⁶⁶ Angola’s major difference from slave labor practices? There was far less incentive to keep the incarcerated laborers alive.²⁶⁷

Little has changed today at Angola, as prisoners only receive 4 to 20 cents an hour for their farm labor (with agricultural workers getting paid the least).²⁶⁸ Inmates may keep only half their wages, the rest being saved for their eventual release, even though most inmates never leave Angola.²⁶⁹ Prisoners routinely work 17-hour days and 65-hour weeks, particularly after harsh disciplinary reports are filed for the week.²⁷⁰ In many ways, Angola’s work plan has remained the same since slavery,²⁷¹ with profits continuing to be a main focus. Angola raises revenue through the company “Louisiana’s Prison Enterprises,” which sells goods produced by inmates.²⁷² brought in almost \$29 million in 2016, much of it from Angola.

In general, most prison farms were largely unable to compete with mechanized farming by the 1930’s, and were reduced to growing food crops and livestock for prison consumption.²⁷³ Nonetheless, prison farms continued in their “slave plantation” format until 1980, when a federal court decided *Ruiz v. Estelle*,²⁷⁴ which forced Texas prisons to improve working and living conditions, addressed prison guard brutality, and no longer permitted armed inmates to guard fellow prisoners.²⁷⁵

Likewise, Mississippi’s Parchman prison farm eventually ran into problems in the 1970’s. In 1972, then-Mississippi Governor William Waller appointed a 5-member committee to review the farming for profit model of Parchman Farm.²⁷⁶ The committee recommended eradicating for-profit farming operation, reducing acreage by three-quarters and only raising food for the prison on the rest.²⁷⁷ The committee also recommended hiring a prison superintendent who specialized in penology, not plantation farming.²⁷⁸

These changes followed the filing of a federal lawsuit by prison inmates, *Gates v. Collier*,²⁷⁹ alleging a pattern of abuse, mistreatment, and segregation of prisoners by the

²⁶⁶ See Bryce Covert, *Louisiana Prisoners Demand an End to Modern Day Slavery*, THE APPEAL (June 8, 2018), <https://theappeal.org/louisiana-prisoners-demand-an-end-to-modern-day-slavery/>

²⁶⁷ See Thomas Beller, *Angola and the Shadow of Slavery*, NEW YORKER (Aug. 19, 2015), <https://www.newyorker.com/culture/photo-booth/angola-prison-louisiana-photos>

²⁶⁸ See Maya Schwenar, *America’s Plantation Prisons*, GLOBAL RESEARCH (August 30, 2008), <https://www.globalresearch.ca/america-s-plantation-prisons/10008>

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² 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>

²⁷³ See JOYCELYN POLLOCK, PRISONS: TODAY AND TOMORROW 128 (2006).

²⁷⁴ *Ruiz v. Estelle*, 503 F.Supp. 1295 (S.D. Tex. 1980).

²⁷⁵ *Ruiz*, 503 F. Supp. at 1286 – 1288, 1303 – 1307, 1383 – 1384, 1391.

²⁷⁶ See *Mississippi Urged to Revamp Prison*, NYT, p.28 (October 8, 1972),

<https://www.nytimes.com/1972/10/08/archives/mississippi-urged-to-revamp-prison-panel-proposes-eliminating.html>

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972).

Mississippi State Penitentiary Board.²⁸⁰ The Mississippi district court found that the prison's practices of segregation, neglect, and abuse of prisoners violated both the 8th and 14th Amendments.²⁸¹ The case ultimately went up to the Fifth Circuit and dismantled a variety of abuses and corporal punishment practices inside the prison.²⁸²

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.²⁸³ Following *Gates*, Parchman prisoners were no longer required to work in the fields, finally eliminating the prison plantation system at this prison.²⁸⁴

Today, prison farms still exist in modified form. In some states, the farm labor program is required; refusing to work can result in punishments such as solitary confinement, extra discipline, or more time behind bars.²⁸⁵ In addition, shrinking numbers of agricultural workers has led some states to allow private companies to hire prisoners for agricultural labor.²⁸⁶ This is unquestionably a boon to the private agriculture companies, given their savings in pay and insurance costs.²⁸⁷ Additionally, using prison labor means there are no unionization concerns or workplace complaints for private employers.²⁸⁸

Additionally, in the era of COVID-19, working for a private farm employer can carry serious health risks. In Arizona, for example, 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.²⁸⁹ 28 of the women were infected with COVID-19 during their stay.²⁹⁰ The working conditions at the Hickman Family Farms over the summer were very poor, with acrid fumes, over 100 degree weather, and inconsistent air-conditioning.²⁹¹ Arizona's contract with Hickman's Farms is supposedly worth \$5 million, and the prison deducts 80% of every dollar earned by the women.²⁹²

Health and safety issues are also rife during non-pandemic prison labor at farms. In Alabama, many inmates are sent on work release to private poultry industries, which requires

²⁸⁰ *Gates*, 349 F. Supp. at 885-86.

²⁸¹ *Id.* at 893-895.

²⁸² *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974).

²⁸³ *Gates*, 501 F.2d at 1296.

²⁸⁴ Cunningham, *Fair Punishment*, at *id.*

²⁸⁵ See Rebecca McCray, *A Disturbing Trend in Agriculture: Prisoner-Picked Vegetables*, TAKEPART (April 14, 2014), <http://www.takepart.com/article/2014/04/14/prison-ag-labor/>

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See Eliyahu Kamisher, *Prison Labor is on the Frontlines of the COVID-19 Pandemic*, THE APPEAL (October 5, 2020), <https://theappeal.org/prison-labor-is-on-the-frontlines-of-the-covid-19-pandemic/>

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² See Charity Ryerson, Cindy Wu, and Prue Brady, *If Prison Workers Are Essential, We Should Treat Them Like It: Prison Labor in the U.S., Part I*, CORPORATE 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>

dangerous work for little personal payment.²⁹³ Poultry work is one of the most hazardous industries for prison laborers, causing multiple injuries on a regular basis.²⁹⁴

The bulk of the money earned by inmate labor goes directly into the state coffers, which can reap millions to hire out its workers.²⁹⁵ Alabama prisoners, for example, only get 13 cents out of every dollar earned.²⁹⁶ And there is no imperative to pay prison laborers for their work.²⁹⁷ In sum, prison farming has too many parallels with the old slave plantation system for comfort.

B. The North.

Prison labor in the Northern states was far more factory-like than that of the South. At Illinois' Joliet Penitentiary in the late 1860's, for example, all 1,160 inmates were sentenced to hard labor.²⁹⁸ Joliet inmates manufactured boots, shoes, brooms, cigars, army tents, and an array of other items all for sale on the open market.²⁹⁹ It was so large that running the labor aspect of the prison was seen as comparable to running "eight to ten large manufacturing establishments."³⁰⁰ By 1872, prison officials found it simpler to simply have private manufacturers use inmates to create goods within prison walls, supplying machinery, foremen, and raw materials.³⁰¹

Like Joliet, hard labor spread liberally in Northern industrial prisons between 1820-1890.³⁰² This transformation of penitentiaries to inmate labor sites helped cement the country's correctional facilities into "large-scale, complex factories," all producing goods to sell at market.³⁰³ Because so much commercial industry came to rely upon prison labor, there was great pressure on penitentiary officials to keep inmates incarcerated as long as possible.³⁰⁴

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."³⁰⁵ These industrial prisons helped feed and nurture the capitalist focus on profit,³⁰⁶ a nationwide trend

²⁹³ See Kristi Graunke and Will Tucker, *Why Incarcerated People in Poultry Plants Deserve Better*, THE MARSHALL PROJECT (August 13, 2018), 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

²⁹⁴ *Id.*

²⁹⁵ See UNSAFE AT THESE SPEEDS, SOUTHERN POVERTY LAW CENTER (March 1, 2013), <https://www.splcenter.org/20130228/unsafe-these-speeds#worker-safety>

²⁹⁶ Graunke & Tucker, *Poultry Plants*, at *id.*

²⁹⁷ Ryerson, *Prison Workers Are Essential*, at *id.*

²⁹⁸ SEE HENRY KAMERLING, CAPITAL AND CONVICT: RACE, REGION, AND PUNISHMENT IN POST-CIVIL WAR AMERICA 80 (2017).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 88.

³⁰² McLENNAN, CRISIS OF IMPRISONMENT, at 6.

³⁰³ KAMERLING, CAPITAL AND CONVICT, at 84.

³⁰⁴ *Id.* at 89.

³⁰⁵ McLENNAN, CRISIS OF IMPRISONMENT, at 6.

³⁰⁶ KAMERLING, CAPITAL AND CONVICT, at 82.

during which the “broad hegemony of market values”³⁰⁷ flowered. Both Northern and Southern states did not hesitate to use a captive workforce to help boost industrial profit.³⁰⁸ 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.”³⁰⁹

Prison labor in the North ran into more opposition than the South, however, mostly from independent manufacturers and early union organization. As the 20th century neared, the financial threat of inmate labor became more pointed, and free/organized labor's conflict with correctional industries grew.³¹⁰ In the 1880's and 1890's, free labor forces began campaigning directly against convict labor, particularly those inmates toiling under the hands of manufacturing enterprises.³¹¹ 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.³¹² Organized labor and much industry both agreed that convict labor had to be eliminated.³¹³

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.³¹⁴ By the time that depressions hit the United States in 1870 and 1890, however, the resulting unemployment gave further power to union demands.³¹⁵ The compromise was the state use system: inmates could still work, but the state would be their only market and buyer.³¹⁶ Thus prison-made goods would no longer compete on the free market, and inmates would no longer compete with free workers for jobs.³¹⁷ This labor compromise spread throughout most of the country at the turn of the 20th century.³¹⁸ Nonetheless, the mistreatment of prisoners to better extract profit was widespread enough nationwide that in 1901, W.E. Dubois pointed out: “the state became a dealer in crime, profited by it so as to derive a net annual income for her prisoners.”³¹⁹

The ability for states to contract out prisoner labor began shrinking during the first third of the 20th century.³²⁰ By the 1920's, 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.³²¹ Describing how prison-made garments comprised up to 40 percent of the clothing sold to wholesalers, the

³⁰⁷ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, 478 (1988)

³⁰⁸ KAMERLING, *CAPITAL AND CONVICT*, at 83

³⁰⁹ *Id.* at 89.

³¹⁰ Garvey, *Freeing Prisoners' Labor*, at 359.

³¹¹ KAMERLING, *CAPITAL AND CONVICT*, at 90.

³¹² Garvey, *Freeing Prisoners' Labor*, at 359.

³¹³ *Id.*

³¹⁴ *Id.* at 359-60.

³¹⁵ *Id.* at 360.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See GLEN A. GILDEMEISTER, *PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840-1890*, 235, 240 (1987)

³¹⁹ BRIAN JOHNSON, ED., *DUBOIS ON REFORM: PERIODICAL BASED LEADERSHIP FOR AFRICAN Americans* 87 (2005).

³²⁰ See Morgan O. Reynolds, *Factories Behind Bars*, NATIONAL CENTER FOR POLICY ANALYSIS (September 1, 1996), <http://www.ncpathinktank.org/pub/st206?pg=3>

³²¹ See *Ban Goods Made By Prison Labor: United Drive By Garment Manufacturers Against This Kind of Competition*, NEW YORK TIMES (August 19, 1923),

https://timesmachine.nytimes.com/timesmachine/1923/08/19/105108076.pdf?pdf_redirect=true&ip=0

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.³²² The manufacturers also called for higher wages for prisoners, in order that the free labor goods could be more competitive in the marketplace.³²³

This limitation on prisoner labor reached its height during the Great Depression, when 33 states banned the sale of convict-made goods in the free market.³²⁴ This crackdown was assisted by the 1929 passage of the Hawes-Cooper Act³²⁵ and the 1935 Ashurt-Sumners Act,³²⁶ both of which banned interstate commerce of prisoner-made goods, and limited prisoner labor to the creation and sale of products to the state.³²⁷ Exceptions to this legislation, however, still allowed goods made by convicts or prisoners on parole, supervised release or probation, or in any penal or reformatory institution.³²⁸ Organized union concerns over prisoners commandeering jobs ultimately led to a federal prohibition on convict labor for federally-funded public works projects.³²⁹

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”).³³⁰ FPI was a federal monopoly managing prison labor programs, allowing federal prisoners to manufacture goods as long as they were for government use.³³¹ The idea was to provide work skills to inmates, allowing prison workers to farm and build highways, all while conveniently reducing the cost of their incarceration.³³² By the advent of World War II, FPI offered prisoner-crafted products in over than 70 categories and operated 25 shops and factories.³³³

Post-World War II, FPI continued to expand, focusing on construction work.³³⁴ Inmate laborers helped build at least half of the 31 federal prisons constructed in the 1950’s and 60’s.³³⁵

³²² *Goods Made By Prison Labor*, at *id.*

³²³ *Id.*

³²⁴ Reynolds, *Factories Behind Bars*, at *id.*

³²⁵ Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084 (codified at 49 U.S.C. § 11507).

³²⁶ Act of July 24, 1935, ch. 412, 49 Stat. 494 (codified at 18 U.S.C. §§ 1761-1762).

³²⁷ Cao, *Made in the U.S.A.*, at 12

³²⁸ Ashurt-Sumners Act, 49 U.S.C. §§ 61-64.

³²⁹ 1936 Walsh-Healey Act, 41 U.S.C. §6501-6511. *See also* Cao, at 12.

³³⁰ 18 U.S.C. § 4122 (1994). § 4122(a) holds that tFPI 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.”

³³¹ Cao, at 14.

³³² *See* Safia Samee Ali, *Federal Prison-Owned 'Factories with Fences' Facing Increased Scrutiny*, NBC NEWS (Sept. 4, 2016), <https://www.nbcnews.com/news/us-news/federal-prison-owned-factories-fences-face-scrutiny-n639791>

³³³ *See Federal Prison Industries, Inc., History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/federal-prison-industries-inc-history/>

³³⁴ *FPI History*, at *id.*

³³⁵ *Id.*

By the 1980's, FPI, which in 1977 adopted on the trade name UNICOR,³³⁶ had massively expanded, based in part on the explosive growth of prisons and mass incarceration over the past 30 years.³³⁷ UNICOR spent \$50 million dollars to build and expand facilities, assuming that inmate numbers would continue to rise.³³⁸

Some have argued that FPI has a tremendous competitive advantage in the marketplace, due to its ability to bypass the competitive bid process, reaping multi-million dollar government contracts.³³⁹ FPI has also been the subject of many Justice Department investigations.³⁴⁰ The corporation today runs approximately 83 prison factories in the U.S., with 12,000 inmates running call centers and making various products for very low wages, roughly 23 cents to \$1.15 per hour.³⁴¹

Many government entities are legally required to buy products only from Federal Prison Industries.³⁴² These guaranteed contracts mean that FPI routinely obtains multi-million dollar orders, as well as being able to participate in free market bidding where they can undercut any competitors on costs.³⁴³ Ultimately, FPI/UNICOR earns approximately \$500 million a year,³⁴⁴ relying on a guaranteed market for 150 different products.³⁴⁵

Most of the UNICOR profit, resulting from its very inexpensive labor costs and favored bidding status, is returned to it.³⁴⁶ Prisoners are exempted from minimum wage requirements,³⁴⁷ and those inmates who have any criminal justice debt are required to ascribe half of their meager paycheck to it.³⁴⁸ Further expanding its reach, UNICOR is now permitted to sell to certain private companies, courtesy of the Consolidated and Further Continuing Appropriations Act of 2012.³⁴⁹

UNICOR has been criticized for allowing its prisoner workers to labor in unsafe conditions, including exposure to toxic substances in an electronic waste recycling facility.³⁵⁰ From 2003 –

³³⁶ See *Factories with Fences: 75 Years of Changing Lives* 24, UNICOR, https://unicor.gov/publications/corporate/CATMC1101_C.pdf

³³⁷ *FPI History*, at *id.*

³³⁸ *Id.*

³³⁹ Ali, *Factories with Fences*, at *id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ See Katherine Stevenson, *Profiting Off of Prison Labor*, BUS. R. BERKELEY (July 6, 2020), <https://businessreview.berkeley.edu/profitting-off-of-prison-labor/>

³⁴⁵ 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/>

³⁴⁶ Ali, *Factories with Fences*, at *id.*

³⁴⁷ *FPI History*, at *id.*

³⁴⁸ See *Program Details*, UNICOR, FED. BUR. OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp

³⁴⁹ Stevenson, *Profiting Off of Prison Labor*, at *id.*

³⁵⁰ Ali, *Factories with Fences*, at *id.*

2005, UNICOR processed over 120 million pounds of e-waste.³⁵¹ 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.³⁵² No personal protective equipment was provided to protect the workers.³⁵³ Airborne lead dust level at the prison recycling facility occasionally reached 50 times higher than the federally accepted workplace level.³⁵⁴ Lead contamination can cause serious damage to nervous and reproductive systems.³⁵⁵ The inmate workers alleged medical complaints resulting from the contaminants that included skin lesions, lung and heart problems, cancer, short-term memory loss, miscarriages and general pain.³⁵⁶ Although the type of dangerous working conditions for inmate laborers has 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 reasons of public health, UNICOR kept them open, only providing masks for its inmate workers a few months into the epidemic.³⁵⁷ It was almost impossible to socially distance in UNICOR's workplaces, increasing the possibility of COVID-19 spread.³⁵⁸ Very few of the factories that remained open were providing essential materials.³⁵⁹ In one prison, the UNICOR workers were segregated under quarantine due to fear of further virus spread.³⁶⁰ 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 (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.³⁶¹ PIECP pays more highly than other prison jobs, sometimes even making "prevailing local wages."³⁶² Other inmate laborers work for state-owned businesses, where wages range from 33 cents to \$1.41 per hour.³⁶³

³⁵¹ See 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/>

³⁵² See Kristin Jones, *Prison Work Program May Have Put Hundreds of Prisoners and Workers at Risk*, ABC NEWS (July 10, 2008), <https://abcnews.go.com/Blotter/story?id=5349764&page=1>

³⁵³ Sample, *Toxic Dust*, at *id.*

³⁵⁴ Jones, *Prison Work Program*, at *id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ See Cary Aspinwall, Keri Blakinger, & Joseph Neff, *Federal Prison Factories Kept Running as Coronavirus Spread*, MARSHALL PROJECT (April 10, 2020), <https://www.themarshallproject.org/2020/04/10/federal-prison-factories-kept-running-as-coronavirus-spread>

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ See *Overview, Prison Industry Enhancement Certification Program (PIECP)*, Bureau of Justice Assistance, <https://bja.ojp.gov/program/prison-industry-enhancement-certification-program-piecp/overview>

³⁶² See Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State*, PRISON POLICY INSTITUTE (April 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>

³⁶³ *Id.*

Through programs such as PIECP, state prisoners now work for a variety of private industries, including making garments for Victoria's Secret and JCPenney,³⁶⁴ crafting school supplies, building dental prostheses, working in a variety of food processing plants,³⁶⁵ and even making cheese and farming tilapia for grocers such as Whole Foods.³⁶⁶ The wages for state prisoners is usually less than that of federal prisoners.³⁶⁷ The average hourly wage of a state prisoner is 86 cents per hour.³⁶⁸ State prison labor is a profitable industry for the state, with revenues in the millions of dollars.³⁶⁹ As such it is something very difficult for state prisons to give up, despite the bad working conditions, poor treatment, and serious underpayment of inmates, as discussed below.

Part III: 21st 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 do an enormous array of jobs, ranging 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 inmate labor, despite danger or risk of death.

A. Cleaning Up Natural Disasters

Prisoners have come in extremely handy for 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.³⁷⁰ The inmates only received "flimsy coveralls and gloves" as protectant against the crude oil, which was far less protection than civilian workers obtained.³⁷¹ Why prisoners? Because, by hiring inmates, BP paid far less for their coastal cleanup.³⁷² In addition, BP also obtained workers who were unlikely to publicly complain, despite the danger and discomfort such work requires.³⁷³ Finally, BP earned valuable tax write-offs for their use of inmate labor.³⁷⁴

³⁶⁴ See David Leonhardt, *As Prison Labor Grows, So Does the Debate*, NEW YORK TIMES (March 19, 2000), <https://www.nytimes.com/2000/03/19/business/as-prison-labor-grows-so-does-the-debate.html>

³⁶⁵ See Caroline Winter, *What Do Prisoners Make for Victoria's Secret*, MOTHER JONES (July 2008), <https://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret/>

³⁶⁶ See Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (December 9, 2015), <https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration>

³⁶⁷ See Transcript, *The Uncounted Workplace, The Indicator from Planet Money*, OPB (June 29, 2020), <https://www.npr.org/transcripts/884989263>

³⁶⁸ See Angela Hanks, *How to End Prison Labor Exploitation and Invest in Incarcerated People*, FORBES (Aug. 18, 2018), <https://www.forbes.com/sites/angelahanks/2018/08/23/from-exploitation-to-investment-how-to-end-low-wage-prison-labor/?sh=37d777cd5018>

³⁶⁹ *Uncounted Workplace*, at *id.*

³⁷⁰ See Abe Louise Young, *British Petroleum Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), <https://www.thenation.com/article/archive/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/>

³⁷¹ Smith, *Inmates: Our Defenders*, at *id.*

³⁷² Young, *Prison Labor to Clear Up Spill*, at *id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

Louisiana has an extremely high imprisonment rate—one of the highest in the nation—and houses many of its prisoners in “parish jails.”³⁷⁵ Both Louisiana prisons and parish jails provide free inmate labor to both the state and private companies.³⁷⁶ Well-behaved inmates can qualify for work-release “trustee” positions in their last 3 years of their sentences, which allows them to be paid near market rate for their jobs. However, hiring inmates 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 for hiring risky target groups. Businesses earn a tax credit of \$2,400 for every work release inmate hired, plus up to 40 percent of the wages they pay annually to “target group workers.”³⁷⁷

Louisiana inmates routinely clean up oil spills or work in the offshore drilling industry.³⁷⁸ Indeed, as natural disasters become more frequent, prison labor is increasingly relied upon to help preparation and recovery for weather-related emergencies. ³⁷⁹ In Louisiana, however, as in many other states, its work-release programs are primarily designed to benefit its operators over its participants.³⁸⁰ The beneficiaries of state inmate labor include parish sheriffs, private contractors, and local companies, many of whom are involved in the oil and gas sector.³⁸¹ Pay is often low for these oil and gas inmate workers—a little less than a dollar an hour—despite 12-16 hour days and dangerous working conditions.³⁸² Sometimes inmates are housed in converted shipping containers for temporary clean-up jobs, similar to the windowless wagons in which chain gang workers slept.³⁸³

Offshore drilling jobs, including oil spill remediators and pipeline construction, make the most money for those companies hiring work-release inmates.³⁸⁴ Local and state facility operators, including the county sheriff’s office, can end up retaining up to 64% of a prisoner’s gross wages, applied to room and board.³⁸⁵ The gross wages can really add up. In 2015, for example, Louisiana correctional facilities operators received \$35.5 million from inmate laborer’s wages, in addition to approximately \$4 million from commissary sales.³⁸⁶

Inmates are also assigned to clean up natural disasters without pay, benefiting both the state and private industry. In Houston, TX, for example, prisoners were put to work assembling sand bags in preparation for 2017’s Hurricane Harvey, and were not evacuated until 3 days after the

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ See Carly Berlin, *How Louisiana’s Oil and Gas Industry Uses Prison Labor*, SOUTHERLY MAG. (March 23, 2020), <https://southerlymag-how-louisianas-oil-and-gas-industry-uses-prison-labor%2F+&cd=15&hl=en&ct=clnk&gl=us&client=firefox-b-1-d>

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Young, *Prison Labor to Clear Up Spill*, at *id.*

³⁸⁴ Berlin, *Louisiana’s Oil and Gas Industry*, at *id.*

³⁸⁵ *Id.*

³⁸⁶ See *Oversight and Benefits of the Transitional Work Program 2*, Dep’t Pub. Safety & Corrections, LOUISIANA LEGISLATIVE AUDITOR (April 13, 2016), [https://app.lla.state.la.us/PublicReports.nsf/87D9DDAEC96EFE3A86257F94007293F3/\\$FILE/0000E78F.pdf](https://app.lla.state.la.us/PublicReports.nsf/87D9DDAEC96EFE3A86257F94007293F3/$FILE/0000E78F.pdf)

storm made landfall.³⁸⁷ None of the prisoners were paid for their work.³⁸⁸ Similarly, inmates from the Louisiana State Penitentiary were used to sandbag the premises in preparation for Hurricane Katrina.³⁸⁹

Likewise, Florida required its prisoners to work as an unpaid labor crew in cleaning up debris from Hurricane Irma in 2017.³⁹⁰ Hundreds of Florida inmate laborers populated both hurricane and road debris cleanup crews after the storm.³⁹¹ Like Louisiana, Florida is another state that greatly profits from inmate labor, saving an estimated \$59 million dollars per year in state costs from their work.³⁹²

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.³⁹³ The inmate firefighters now live full time in special inmate fire camps, which are located near potential fire zones.³⁹⁴

There are definite benefits to working as an inmate firefighter, such as higher hourly pay (one dollar an hour fighting fires),³⁹⁵ far looser restrictions, and reductions in sentence length.³⁹⁶ However, the inmates are still exposed to dangerous working conditions, routinely work grueling 24 hour shifts, and get only two-three weeks of formal training.³⁹⁷ In contrast, civilian firefighters get three years of training and apprenticeship.³⁹⁸ Inmate firefighters are four times more likely to get injured and eight times more likely to suffer from smoke inhalation,³⁹⁹ and several have died doing such work.⁴⁰⁰ In addition, until recently, there was no way for ex-inmate firefighters to be

³⁸⁷ See Polly Mosendz, *When Do You Move Prisoners Out of a Storm's Path*, BLOOMBERG NEWS (September 8, 2017), <https://www.bloomberg.com/news/articles/2017-09-08/when-do-you-move-prisoners-out-of-a-hurricane-s-path>

³⁸⁸ *Id.*

³⁸⁹ See Jordan Smith, *Inmate Populations in a Disaster: A Labor Force, a Vulnerable Population, and a Hazard 2*, LSU MASTERS THESES (2016) (unpublished manuscript on file with author), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5492&context=gradschool_theses

³⁹⁰ See Jessica Lipscomb, *Unpaid Florida Prisoners Being Used to Clean Up After Hurricane Irma*, MIAMI NEW TIMES (September 28, 2017), <https://www.miamiherald.com/news/unpaid-florida-prison-inmates-being-used-on-hurricane-irma-cleanup-labor-crews-9701867>

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ See Katrina Schwartz and Kevin Stark, *What's Next for Incarcerated Firefighters*, KQED (November 12, 2020), <https://www.kqed.org/news/11846622/whats-next-for-incarcerated-firefighters-in-california>

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ See Jared Brock, *As California Wildfires Raged, Incarcerated Exploited for Labor*, USA TODAY (November 11, 2020), <https://www.usatoday.com/story/opinion/policing/2020/11/11/california-wildfires-raged-incarcerated-exploited-labor-column/6249201002/>

³⁹⁸ See Jaime Lowe, *The Incarcerated Women Who Fight California's Fires*, NEW YORK TIMES (August 31, 2017), <https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html?action=click&module=RelatedLinks&pgtype=Article>

³⁹⁹ See Abby Vesoulis, *Inmates Fighting California Wildfires Are More Likely to Get Hurt, Records Show*, TIME (Nov. 16, 2018), <https://time.com/5457637/inmate-firefighters-injuries-death/>

⁴⁰⁰ Lowe, *Incarcerated Women*, at *id.*

hired by the state as full time firefighters post-release, as EMT certification would not allow individuals with a felony to apply until 10 years had passed.⁴⁰¹

Over a third of California firefighters are incarcerated,⁴⁰² and inmate fire crews have recently made up to 50 to 80 percent of fire personnel.⁴⁰³ Using inmate firefighters is a huge cost savings to the state, which saves approximately \$100 million a year from using an inmate wildfire fighting force.⁴⁰⁴ Not only do inmate crews perform over 3 million hours of emergency response work per year, but also in non-fire season, they do projects such as clearing debris from streams, picking up litter along state highways and constructing hiking trails.⁴⁰⁵ Inmate firefighters are so valuable to the state that in 2014, when overcrowded California prisons were being litigated, the then-state attorney general Kamala Harris argued against shrinking inmate populations, because any reduction in inmates would severely impact fire camp participation.⁴⁰⁶

Thirty states nationwide rely on prison labor to respond to emergencies and disasters, whether natural or man-made.⁴⁰⁷ These jobs range from those requiring minimal instruction, such as making sandbags and clearing debris, to those which require specialized training, such as firefighting and cleaning up hazardous materials.⁴⁰⁸ Inmates are also 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 for doing so.⁴⁰⁹

Southern states comprise 37% of states using of inmate labor forces for their state-level emergency planning, approximately double the amount of Northeast states.⁴¹⁰ Additionally, those states with higher inmate populations tended to rely more heavily on inmate labor forces for emergencies.⁴¹¹ Finally, 31% of states using inmate labor forces for emergencies had overcrowded prisons.⁴¹²

⁴⁰¹ Brock, *Exploited for Labor*, at *id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ See Jaime Lowe, *In the Line of Fire*, NYT (August 20, 2020), <https://www.nytimes.com/2020/08/30/podcasts/the-daily/california-wildfires-prisoners.html>

⁴⁰⁵ Vesoulis, *Inmates Fighting California Wildfires*, at *id.*

⁴⁰⁶ Lowe, *Incarcerated Women*, at *id.*

⁴⁰⁷ Smith, *Inmate Populations in a Disaster*, at 27.

⁴⁰⁸ See J. Carlee Purdum, *Disaster Work is Often Carried Out by Prisoners—For as Little as 14 Cents an Hour*, TEXAS A&M TODAY (September 15, 2020), <https://today.tamu.edu/2020/09/15/disaster-work-is-often-carried-out-by-prisoners-for-as-little-as-14-cents-an-hour/>

⁴⁰⁹ See J. Carlee Smith, *Inmates: Our Defenders in Disaster*, 8 NATURAL HAZARDS OBSERVER (Jan. 3, 2017), <https://hazards.colorado.edu/article/inmates-our-defenders-in-disaster>

⁴¹⁰ Smith, *Inmate Populations in a Disaster*, at 27.

⁴¹¹ *Id.* at 31.

⁴¹² *Id.* at 33.

Some states, including Alabama,⁴¹³ Georgia,⁴¹⁴ and Colorado,⁴¹⁵ 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 to appear, providing large savings for state and local governments.⁴¹⁶ Some inmate laborers are not paid at all for emergency work under state guidelines.⁴¹⁷ In addition, FEMA reimburses states for “prisoner transportation to the worksite and any extraordinary costs of security guards, food and lodging.”⁴¹⁸

Disasters include public health emergencies as well. During the recent COVID-19 pandemic, inmate laborers not only helped with manufacturing of protective equipment and hand sanitizer, but also did more intimate and potentially dangerous work, such as laundering potentially contaminated hospital laundry,⁴¹⁹ disinfecting cleaning supplies,⁴²⁰ and digging mass graves for those who died of the virus.⁴²¹ In New York, having inmate workers dig mass graves was part of a 2008 emergency pandemic plan drawn up by New York City’s medical examiner.⁴²²

Likewise, inmate laborers in Indiana were tasked with killing chickens infected with avian flu, a potentially deadly threat to humans.⁴²³ Given great concerns over a very infectious bird virus, Indiana began training some of its prisoners to safely transport the chickens before asphyxiating them, while wearing respirators for some protection.⁴²⁴

Given the large, easily accessible, and inexpensive (or free) labor force available for disaster and emergency response, it is not surprising to find many states are incentivized to continue or increase incarceration rates. Specifically, “the utilization of inmate labor forces in the disaster context may suggest a deeper level of entrenchment with regards to the extent in which

⁴¹³ See *Department of Corrections Disaster Assistance and “State of Emergency” Plan*, ALABAMA DEP’T OF CORRECTIONS (January 19, 2000), <http://www.doc.alabama.gov/docs/AdminRegs/AR010.pdf> “The major support of the DOC will be manpower,” *id.* at 2.

⁴¹⁴ See Rule 125-3-5-.04, *Work Conditions*, Rules and Regulations of the State of Georgia (March 26, 2021), <http://rules.sos.state.ga.us/GAC/125-3-5-.04?urlRedirected=yes&data=admin&lookingfor=125-3-5-.04>

⁴¹⁵ CO Rev Stat § 17-24-124 (“inmates 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.”)

⁴¹⁶ Purdum, *Disaster Work*, at *id.*

⁴¹⁷ *Id.*

⁴¹⁸ See *Public Assistance Program and Policy Guide*, FEMA (July 1, 2020), https://www.fema.gov/sites/default/files/documents/fema_pappg-v4-updated-links_policy_6-1-2020.pdf

⁴¹⁹ See Emma Ellis, *Covid-19's Toll on Prison Labor Doesn't Just Hurt Inmates*, *Wired* (May 19, 2020), <https://www.wired.com/story/covid-19-prison-labor/>

⁴²⁰ See J. Carlee Purdum, *States Are Putting Prisoners to Work Manufacturing Coronavirus Supplies*, *THE CONVERSATION* (April 21, 2020), <https://theconversation.com/states-are-putting-prisoners-to-work-manufacturing-coronavirus-supplies-135290>

⁴²¹ See Geoff Herbert, *Rikers Island Inmates Offered \$6 Per Hour to Dig Mass Graves in NYC*, *SYRACUSE.COM* (April 1, 2020), <https://www.syracuse.com/coronavirus/2020/04/report-rikers-island-inmates-offered-6-per-hour-to-dig-mass-graves-in-nyc.html>

⁴²² *Id.*

⁴²³ See P.J. Huffstutter, *States Enlist Prisoners, Plan Biosecurity to Combat Avian Flu Threat*, *REUTERS* (May 31, 2015), <https://www.reuters.com/article/us-health-birdflu-usa/states-enlist-prisoners-plan-biosecurity-to-combat-avian-flu-threat-idUSKBN00G0FC20150531>

⁴²⁴ *Id.*

states rely upon inmate labor participation in local economy, and may be serving to further incentivize higher rates of incarceration.”⁴²⁵ In this way, using inmate labor for emergency and disaster response can promote harsher penal policies and more hesitance in repealing older policies.⁴²⁶

Private companies and individuals are also 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 a group of state inmates to cut brush, remove debris, and spray anti-weed herbicide on any excess vegetation, since inmate labor was so much cheaper than civilian labor.⁴²⁷

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

B. Profit for Profit’s Sake

In the 21st century, “the scale of private industry’s involvement in the contemporary criminal legal system is staggering.”⁴²⁸ Private industry plays a role in almost every aspect of mass incarceration and criminal justice, from the smallest to the largest parts.⁴²⁹ Many of these companies profit off of “commercial transactions that transpire in the shadow of criminal law,”⁴³⁰ reaping revenue out of the incarcerated toil of others.

Economic analysis of both 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.⁴³¹ More recent numbers are harder to obtain. Inmate workers are usually excluded from official employment statistics, both state and federal, and there is little economic research done in this area.⁴³² Because there has not been a nationwide census of prisons since 2005, there is no central source for information.⁴³³ In 2005, there were approximately 1.5 million prisoners working in and outside of correctional facilities, with roughly 600,000 people in the manufacturing sector.⁴³⁴ At the time, that represented over 4% of all manufacturing jobs in the country.⁴³⁵

⁴²⁵ Smith, *Inmate Populations in a Disaster*, at 40.

⁴²⁶ *Id.* at 41.

⁴²⁷ *Id.* at 15.

⁴²⁸ Brian Highsmith, *Commercialized (In)Justice: Consumer Abuses in the Bail and Corrections Industry 1*, NATIONAL CONSUMER LAW CENTER (March 18, 2019), <https://www.nclc.org/issues/commercialized-injustice-consumer-abuses-in-the-bail-and-corrections-industry.html>.

⁴²⁹ *Id.* at 1.

⁴³⁰ *Id.* at 7.

⁴³¹ See Asatair Bair, *An Economic Analysis of Prison Labor in the United States* vi, ProQuest Dissertation Publishing (2004), <https://www.proquest.com/docview/305177313>

⁴³² See Darius Rafieyan and Cardiff Garcia, *The Uncounted Workforce*, NPR (June 29, 2020), <https://www.npr.org/transcripts/884989263>

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

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 Colorado Corrections Inc. to source its buffalo milk.⁴³⁶ Leprino was able to purchase the buffalo milk for \$1.19 a pound, half of what it would normally cost on the open market, while paying prisoners only \$4.50 a day.⁴³⁷ Very few customers are aware of the cheese sourcing, however, as Leprino and Colorado Corrections have kept their business very quiet.⁴³⁸

Other large, nationwide food companies have been likewise quietly sourcing much of their work from inmate labor. Hickman Farms, which supplies most of the eggs in southwest Arizona, uses incarcerated workers at their poultry farms, reaping \$18.4 million over 2018-2020 from the collaboration.⁴³⁹ Dairy Farmers of America, a dairy conglomerate supplying 30% 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 \$10.8 million in revenues.⁴⁴⁰ Taylor Farms, producer of salads and salad kits for Walmart, Kroger, and Ralph's, uses Arizona Correctional Industries workers, making \$5.3 million over 2019-2020.⁴⁴¹ Tropaquatics, Inc., a fish distributor, purchases its tilapia from Wyoming Brand Industries, a corrections-based company and formerly used Colorado Correctional Industries for a supplier.⁴⁴²

Often a state's correctional facilities produce and process a wide range of food products. In Texas, inmate workers raised 30 crops that produced more than 11.7 million pounds of food in 2017, both for commercial sale and for feeding prisoners within correctional facilities.⁴⁴³ These included harvesting 123.7 million pounds of cotton, grains, and grasses; producing 5 million eggs; processing 22.7 million pounds of meat; canning 297,143 cases of vegetables; and producing 11.9 million pounds of food.⁴⁴⁴ All of this is produced on the former plantation fields owned and operated by the Texas Department of Criminal Justice, some 130,000 agricultural acres.⁴⁴⁵

Forty-six states run some sort of agricultural production within their prison system, and 20% of those states have large scale operations.⁴⁴⁶ This means that over 30,000 inmates labor, for either little or no money, in highly profitable farming or food-related positions.⁴⁴⁷ In addition,

⁴³⁶ See H. Claire Brown, *How Corporations Buy and Sell Food Made with Prison Labor*, THE COUNTER (May 18, 2021), <https://thecounter.org/how-corporations-buy-and-sell-food-made-with-prison-labor/>

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ See *The Prison Food Machine 10, Eating Behind Bars*, IMPACT JUSTICE, <https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars-Release4.pdf>

⁴⁴⁴ *Id.* at 10.

⁴⁴⁵ See Ashante Reese & Randolph Carr, *Overthrowing the Food System's Plantation Paradigm*, CIVIL EATS (June 19, 2020), <https://civileats.com/2020/06/19/op-ed-overthrowing-the-food-systems-plantation-paradigm/>

⁴⁴⁶ See *The Prison Industrial Complex and Agricultural Labor 1*, HEAL FOOD ALLIANCE, https://drive.google.com/file/d/1ZWdBH5zIKbV6K6subbGMm4nUMY3_ZZgJ/view

⁴⁴⁷ *Id.*

agricultural work is frequently exempt from minimum wage requirements, so prisoners usually are paid very little for their toil.⁴⁴⁸ In some prisons that produce food or process meat and dairy, such as in Arkansas and Indiana, the inmates don't even get to eat what they grow, since most of it is shipped out for sale.⁴⁴⁹

These prison industrial food production arrangements require that inmates labor on farms and in dairies for little to no money, usually lacking basic labor protections.⁴⁵⁰ Moreover, most of this prison-sourced food and labor is kept very secretive—to the point where 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, trout, and tilapia produced by inmate laborers in Colorado, and had done so since 2011.⁴⁵¹ All three products were made by inmates working for Colorado Correctional Industries, which in 2014 employed over 1,800 prisoners.⁴⁵² The working inmates made between 74 cents to \$4 daily, and were eligible for performance bonuses.⁴⁵³

After customer and advocacy groups protested, Whole Foods agreed to stop selling the goods in 2016.⁴⁵⁴ 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.”⁴⁵⁵ Critics, however, responded that Whole Foods was making profits off the backs of the poor and imprisoned,⁴⁵⁶ exploiting both prisoners and existing tax law for increased revenues.⁴⁵⁷

Recent farm labor shortages over the past decade have also 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.⁴⁵⁸ Other states with labor-intensive crops such as apples, onions, and tomatoes, like Washington and Arizona, have followed suit.⁴⁵⁹ After a nationwide crackdown on undocumented farm labor, many farmers and agribusinesses now rely on state prisoners to harvest their produce for the market.⁴⁶⁰ The reliance

⁴⁴⁸ *Id.* at 2.

⁴⁴⁹ *Prison Food Machine*, at 11.

⁴⁵⁰ Brown, *How Corporations Buy and Sell Food*, at *id.*

⁴⁵¹ See Jennifer Alsever, *Prison Labor's New Frontier: Artisanal Foods*, *FORTUNE* (June 2, 2014), <https://fortune.com/2014/06/02/prison-labor-artisanal/>

⁴⁵² See *Whole Foods to Stop Selling Products Made by Prisoners*, *CHICAGO TRIBUNE* (September 30, 2015), <https://www.chicagotribune.com/business/ct-whole-foods-prisoners-20150930-story.html>

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ See Susanna Kim, *Whole Food Suppliers Defend Using Prison Labor*, *ABC News* (October 15, 2015), <https://abcnews.go.com/Business/foods-suppliers-defend-prison-labor/story?id=34258597>

⁴⁵⁶ *Whole Foods to Stop Selling*, at *id.*

⁴⁵⁷ Kim, *Whole Food Suppliers Defend*, at *id.*

⁴⁵⁸ See Joel Millman, *Captive Labor on the Farm*, *WALL ST. J.* (October 18, 2011), <https://www.wsj.com/articles/SB10001424052970204774604576630972860034248>

⁴⁵⁹ See Stian Rice, *Convicts Are Returning to Farming—Anti-Immigrant Policies Are the Reason*, *The World* (June 11, 2019), <https://www.pri.org/stories/2019-06-11/convicts-are-returning-farming-anti-immigrant-policies-are-reason>

⁴⁶⁰ Millman, *Captive Labor on the Farm*, at *id.*

of agribusiness and farming on cheap labor necessitates the use of a captive labor force such as prisoners.⁴⁶¹

Many farms and farming entities keep their employment of prisoners under the radar to minimize criticism, despite its prevalence.⁴⁶² 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.⁴⁶³ In part, this is likely due to high level of profit reaped from using prisoner labor, which pays inmate workers very minimally. In Arizona, for example, inmates doing farm work through Arizona Correctional Industries (ACI) only receive three to four dollars an hour, and that is before various mandatory correctional deductions.⁴⁶⁴ In contrast, minimum wage for most Arizona farm workers is \$11.00 an hour.⁴⁶⁵

In Montana, dairy conglomerate Darigold ended its 30-year contract with the Montana State Prison, due to Costco's recent decision to phase out all prison-made goods and foods.⁴⁶⁶ Darigold, a marketing and processing subsidiary of the Northwest Dairy Association, is comprised of 350 dairy producers in Washington, Oregon, Idaho and Montana, and a major milk supplier to Costco.⁴⁶⁷ The majority of the prison's raw milk was sold directly to Darigold.⁴⁶⁸ This contract cessation is poised to cost Montana's corrections industry enterprise approximately \$1.5 million dollars, if not more.⁴⁶⁹ To replace the loss in revenue, Montana Correctional Enterprise is planning on raising pheasants for hunting purposes, among other ventures.⁴⁷⁰

One prominent reason for Costco terminating its contract with Montana Correctional Enterprises was over concern regarding prison wages and "the reduced transparency of prison systems in general."⁴⁷¹ 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."⁴⁷² Because wages are so low for most prisoner labor, Costco could not follow its own policy and still buy food products from correctional facilities.

Food for children's school lunches is also often quietly processed by inmate workers. Florida's Prison Rehabilitation and Diversified Enterprises (PRIDE), a privately held non-profit corporation operating the state's 41 prison labor programs, manufactures a large amount of

⁴⁶¹ Rice, *Convicts Returning to Farming*, at *id.*

⁴⁶² Millman, *Captive Labor on the Farm*, at *id.*

⁴⁶³ *Id.*

⁴⁶⁴ See Bill Branson, *Arizona Correctional Industries Partnering with Private Sector Companies*, Better Gov. Competition (July 19, 2011), <http://bgc.pioneerinstitute.org/arizona-correctional-industries-partnering-with-private-sector-companies/>

⁴⁶⁵ Rice, *Convicts Returning to Farming*, at *id.*

⁴⁶⁶ See Seaborn Larson, *Montana State Prison Dairy Loses \$1.5m After Darigold Cuts Contract*, MONTANA STANDARD (May 20, 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

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ See *Statement on Prison Labor, 2020 Update*, COSTCO WHOLESALE CORP. (2020), <https://investor.costco.com/static-files/b19aaa23-709f-4606-a408-4a0f00052b83>

⁴⁷² *Id.* at 1.

processed beef, chicken, and pork for Florida school lunch program.⁴⁷³ Like many other areas of prison labor, however, the prisoner-school lunch association is kept quiet.

C. 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.⁴⁷⁴ These correctional industries are self-funded, not receiving any taxpayer money, and usually run a gamut of programs to send inmates to work at private companies.⁴⁷⁵ They usually operate as a private sector business.⁴⁷⁶ Many state agencies are required to buy products from these quasi-privatized state correctional industries.⁴⁷⁷ This includes public universities.⁴⁷⁸ Every state but Alaska has a correctional enterprise business, staffed by inmate labor to create various goods.⁴⁷⁹

Like 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.⁴⁸⁰ Indeed, inmate wages have gone *down* in the past 20 years.⁴⁸¹ Alabama, Arkansas, Georgia, Oklahoma, and Texas pay their prisoners nothing at all, despite profiting handsomely from their labor.⁴⁸²

Using a captive labor force brings tremendous profit to both the prisons and the outside companies. For example, between 2015-16, CALPIA, California’s correctional industry, made over \$2 million in profit from agriculture and food.⁴⁸³ Likewise, Corcraft, New York’s correctional industry, averages around \$50 million in sales annually, with all profits going to state revenue.⁴⁸⁴ Despite its high revenues, approximately \$30-40 million a year, Corcraft only pays inmate laborers an average \$0.26 an hour.⁴⁸⁵ In comparison, New York’s minimum wage varies from \$15/hour in

⁴⁷³ See Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, THE NATION (August 1, 2011).

⁴⁷⁴ See Olivia Weitz, *With Labor Shortage, Idaho Inmates Learn Farm Work*, SPOKESMAN REVIEW (August 26, 2017), <https://www.spokesman.com/stories/2017/aug/26/with-labor-shortage-idaho-inmates-learn-farm-work/>

⁴⁷⁵ *Id.*

⁴⁷⁶ *About Us*, OREGON CORR. ENTER., https://oce.oregon.gov/content/OCE_About_Us.asp

⁴⁷⁷ Lilah Burke, *Public Universities, Prison Made Furniture*, INSIDE HIGHER ED. (February 14, 2020), <https://www.insidehighered.com/news/2020/02/14/public-universities-several-states-are-required-buy-prison-industries>

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ See *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POLICY INITIATIVE (April 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html

⁴⁸¹ Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State*, PRISON POLICY INITIATIVE (April 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>

⁴⁸² *Id.*

⁴⁸³ *Prison Industrial Complex*, at 2.

⁴⁸⁴ See Christopher Robbins, *New York State's New Hand Sanitizer is Made by Prisoners Paid an Average 65 Cents An Hour*, GOTHAMIST (March 9, 2020), <https://gothamist.com/news/new-york-states-new-hand-sanitizer-made-prisoners-paid-average-65-cents-hour>

⁴⁸⁵ See Redmond Haskins and Bianca Tylek, *FOIL Disclosure: Despite Millions in Revenue From NYS Agencies – Over \$340 Million Spanning Nine Fiscal Years – Corcraft Continues To Pay Incarcerated New Yorkers Pennies On The Dollar 1-2*, LEGAL AID NEW YORK CITY (March 12, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/03-12-20-FOIL-Disclosure-Corcraft.pdf>

New York City to \$11.80/hour upstate.⁴⁸⁶ Similarly, 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 dollars in 2019.⁴⁸⁷ Finally, Oregon Correctional Enterprises (OCE), Oregon's corrections industry, made \$28.5 million dollars in 2019, while keeping inmate wages at approximately \$1.25 an hour.⁴⁸⁸ Oregon also has a state law requiring inmates to work 40 hours a week.⁴⁸⁹

These type of state correctional enterprises were first legalized by Congress in 1995 with the Prison Industries Act (PIA).⁴⁹⁰ The PIA was initially designed "to encourage states and units of local government to establish employment opportunities for prisoners that approximate private sector work opportunities."⁴⁹¹ In addition, the Prison Industry Enhancement Certification Program (PIECP) exempts certified state and local departments of corrections from normal restrictions from selling prisoner-made goods in interstate commerce.⁴⁹² PIECP also allows certified corrections departments to sell more than \$10,000 worth of prisoner-made goods to the Federal government.⁴⁹³ State deductions/wage capture from prisoner wages under PIECP can be up to 80% of hourly monies,⁴⁹⁴ making inmate labor profitable for state corrections industries, if not for themselves.

And yet despite all this profit gleefully being made, many companies are still remarkably shy about admitting their use of prisoner labor. Numerous companies use subcontracts to work with other businesses, who then are the ones to actually contract with the prison.⁴⁹⁵ In Minnesota, for example, Plastech utilized the labor of 32 state inmates to work in its plastics company in 2020.⁴⁹⁶ Plastech is a major supplier for Fujitsu,⁴⁹⁷ but since the prisoners are only reported as working for Plastech, there is no link between Fujitsu's products and prison labor. Indeed, Fujitsu's own corporate responsibility guidebook for their suppliers forbids the use of forced labor,

⁴⁸⁶ Robbins, *New York State's New Hand Sanitizer*, at *id.*

⁴⁸⁷ *Private Companies Producing with U.S. Prison Labor in 2020; Prison Labor in the U.S., Part II*, CORPORATE ACCOUNTABILITY LAB (August 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>

⁴⁸⁸ See Mark Wilson, *Oregon Prison Industry Program Nets Record \$28.5 Million as Prisoners Earn \$1.25/Hour*, PRISON LEGAL NEWS (April 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/oregon-prison-industry-program-nets-record-285-million-prisoners-earn-125hour/>

⁴⁸⁹ *Id.*

⁴⁹⁰ Elk & Sloan, *Hidden History of ALEC and Prison Labor*, at *id.*

⁴⁹¹ *Id.*

⁴⁹² Nancy E. Gist, *Prison Industry Enhancement Certification Program 1*, BUREAU OF JUSTICE, <https://www.ojp.gov/pdffiles/pie.pdf>

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 2.

⁴⁹⁵ See Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (March 15, 2010), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/>

⁴⁹⁶ See Minnesota, *Prison Industry Enhancement Certification Program Certification & Cost Accounting Center Listing 19*, NCIA, https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_8d3b0797c98b469c831c436f5db359b4.pdf

⁴⁹⁷ See *Fujitsu Honors 13 Companies with 2017 Fujitsu Supplier Award*, FUJITSU (May 29, 2018), <https://www.fujitsu.com/caribbean/about/resources/news/press-releases/2018/fnc-20180529.html>

which the company defines as “inhumane prison labor in harsh environments.”⁴⁹⁸ The Fujitsu guidebook also directs suppliers to “pay appropriate wages,” which is defined as paying the legal minimum wage or more.⁴⁹⁹ Thus either Fujitsu is unaware that Plastech is using prison labor in violation of its corporate responsibility guidelines, or is simply ignoring this abuse.

In sum, inexpensive prison labor is a strong force limiting serious criminal justice reform.⁵⁰⁰ 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.⁵⁰¹ It is yet another way that profits continue to be squeezed out of carceral punishment—simply the latest, most palatable iteration.

Part IV: How the Law Helps Maintain Profit in Carceral Punishment

As Noah Zatz argues, “prisoners' labor is located outside the economy on conventional maps of social spheres drawn by lawyers, demographers, and economists.”⁵⁰² 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 non-profit and for-profit companies. Prison labor, like family labor, is classified as “non-market work,”⁵⁰³ 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 allows companies to classify inmate workers as something other than “employees.” In general, when workers are employees, the entity that employs them must withhold and pay employment taxes, as well as file employment tax returns.⁵⁰⁴

Prisons, businesses, and various other actors do not want imprisoned laborers to be classified as employees, because the Fair Standards Labor Act would then require the inmates to be paid minimum wage and overtime.⁵⁰⁵ The exemption of inmate workers from employee status is embedded in several different areas of the law, as detailed below.

⁴⁹⁸ See Respect for Human Rights and Labor, *Fujitsu Group Supply Chain Corporate Social Responsibility Guidebook 1*, FUJITSU LTD. (September 2015), <https://www.fujitsu.com/us/Images/FJ%20CSR%20Guidebook%20v2.0%20En.pdf>

⁴⁹⁹ Respect for Human Rights and Labor, *CSR Guidebook*, at 2.

⁵⁰⁰ *Prison Labor in the U.S., Part II*, at *id.*

⁵⁰¹ *Id.*

⁵⁰² Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 864 (2008).

⁵⁰³ *Id.* at 864.

⁵⁰⁴ See *Determining Worker Status 28*, IRS FEDERAL-STATE REFERENCE GUIDE (July 2020), <https://www.irs.gov/pub/irs-pdf/p963.pdf>

⁵⁰⁵ See *Employment Relationship Under the Fair Standards Labor Act 1*, U.S. DEP'T OF LABOR, Wage & Hour Division (July 2008), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf>

1. Internal Revenue Service classifications

For tax purposes, the Internal Revenue Service does not seem to classify inmate workers as employees. Rev. Rule 75-325 holds that inmate workers performing services for the Federal Prison Industries are not its employees for income tax withholding purposes.⁵⁰⁶ Additionally, Code § 3121(b)(7)(F) holds that services done by state inmates are excepted from the term “employment,” and thus, the social security tax.⁵⁰⁷

The determination of whether workers are employees or not has significant consequences for tax liability and reporting.⁵⁰⁸ Employment taxes for those classified as employees include federal income tax withholding, Old-Age, Survivors and Disability Insurance tax (OASDI or Social Security), and Medicare, as well as any state or local taxes.⁵⁰⁹

Inmates can be responsible for paying taxes on any income they earn while imprisoned, however. In Arizona, for example, the state decided that any inmates earning over \$600 should have that income reported to the IRS.⁵¹⁰ \$600 is the IRS threshold amount for tax payment.⁵¹¹ Any taxes owed would come from an inmate's financial account, where their labor wages are deposited.⁵¹² The rate of these taxes, usually imposed on independent contractors, is approximately 15.3% of earnings.⁵¹³

Tax-paying inmates are also 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.⁵¹⁴ This includes the recent CARES ACT stimulus payments.⁵¹⁵

In addition, a company's use of carceral labor can result in significant federal tax credits.⁵¹⁶ Under the federal Work Opportunity Tax Credit (“WOTC”), private employers and companies who utilize prison labor can reduce their federal income tax liability by hiring current or ex-

⁵⁰⁶ See Marie Cashman, *Prison Workers* 4, Office of Chief Counsel, IRS, (January 30, 2004), <https://www.irs.gov/pub/irs-wd/0526018.pdf>

⁵⁰⁷ *Id.* at 6.

⁵⁰⁸ *Determining Worker Status*, at 28.

⁵⁰⁹ *Id.*

⁵¹⁰ See Craig Harris, *Arizona Inmates Working Prison Jobs Might Owe Uncle Sam for the First Time*, AZCENTRAL (Feb. 3, 2017), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/02/03/arizona-inmates-working-prison-jobs-might-owe-uncle-sam-first-time/97414206/>

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ 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/>

⁵¹⁵ *Id.*

⁵¹⁶ See Patrice Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 689 (2015).

felons.⁵¹⁷ The tax credit is per employee, and can range from \$1,200 to \$9,600, depending on the qualifications of the individual hired.⁵¹⁸

2. Fair Labor Standards Act classifications

FLSA was promulgated in 1938 to protect workers, 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 government.⁵¹⁹ The FLSA was enacted to eliminate “labor standards 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.⁵²⁰ 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.⁵²¹ Although the FLSA does not specifically exempt prisoners from minimum wage requirements, most courts have held that carceral laborers are not covered.⁵²² These courts contend that prisoners cannot be defined as a class of “employees” to which the Act applies.⁵²³ Since inmate laborers cannot be considered “employees” under FLSA, they cannot also be subject to any of the Act’s provisions, including minimum wage requirements.⁵²⁴

Under FLSA, an employee relationship only exists where “the alleged employer (1) had the power to hire and fire 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.”⁵²⁵ Because most inmate labor is controlled by their individual correctional facility, the FLSA usually does not apply. Overall, courts have generally held that FLSA only applies to prisoners when they are part of a work release program laboring for private firms, under the primary supervision of those businesses.⁵²⁶

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

⁵¹⁷ *Work Opportunity Tax Credit*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit>

⁵¹⁸ *Proposed Legislation to Increase WOTC Minimum to \$5,000 per Employee for All Targeted Groups*, 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/>

⁵¹⁹ See Catherine Ruckeshaus, *Fair Labor Standards Act at 80: It’s More Important than Ever*, NAT’L EMPLOY. L. PROJECT (June 26, 2018), <https://www.nelp.org/commentary/fair-labor-standards-act-at-80-its-more-important-than-ever/>

⁵²⁰ 29 U.S.C. § 202(a).

⁵²¹ See *Young v. Cutter Biological*, 694 F. Supp. 651, 655 (D. Ariz. 1988) (citing 29 U.S.C. § 203(d)).

⁵²² See Katherine Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. C.R. – C.L. L. REV. 681, 695 (2018); see also *Watson v. Graves*, 909 F.2d 1549, 1554-55 (5th Cir. 1990).

⁵²³ See Matthew Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PENN. J. LABOR & EMPLOY. L. 191, 193 (2002).

⁵²⁴ *Id.*

⁵²⁵ *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

⁵²⁶ *Carter v. Dutchess Comm. College*, 735 F.2d 8, 11 (2d Cir. 1984).

inmate labor as noneconomic.⁵²⁷ 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.⁵²⁸

3. OSHA, the Toxic Substances Control Act, and the Clean Air Act

Federal prisoners are not considered employees under OSHA,⁵²⁹ the Toxic Substances Control Act (TSCA),⁵³⁰ and the Clean Air Act (CAA).⁵³¹ Due to such classification, a federal prisoner cannot report or file a complaint about working conditions in her place of carceral labor.⁵³² The Department of Justice has determined that “federal prisoners clearly are not parties to a contractually based employer-employee relationship as contemplated in TSCA, the CAAA, or OSHA.”⁵³³ Indeed, since the work that prisoners do can be classified as involuntary servitude, federal prisoners are legally incapable of entering into “any contract of hire.”⁵³⁴ 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,” is not applicable to federal prisoner work.⁵³⁵

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.⁵³⁶ In addition, private equity has enabled the growth of many private companies working in corrections, both large and small, ones that assist in placing prisoners into carceral labor situations.⁵³⁷ As long as finance and banking continue to support inmate labor on behalf of private companies, it will be nearly impossible to eradicate.

1. Banks floating private prison industries

Several multinational banks grant loans and extend other financing agreements which help support private prison industries, which make tremendous profits off of carceral labor.⁵³⁸ GEO

⁵²⁷ Zatz, *Boundaries of Markets*, *supra* note __, at 882.

⁵²⁸ *Id.*

⁵²⁹ 29 U.S.C. § 652, § 3.

⁵³⁰ 15 U.S.C. § 262

⁵³¹ 42 U.S.C. § 7622, § 312.

⁵³² See *Whether a Federal Prisoner Worker is an “Employee” Within the Meaning of Certain Federal Statutes* 202, MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION (September 19, 1988), <https://www.justice.gov/file/24126/download>

⁵³³ *Id.* at 204.

⁵³⁴ *Id.* at 205.

⁵³⁵ *Id.*

⁵³⁶ See Laura I Appleman, *Treatment Industrial Complex*, at 41-42.

⁵³⁷ *Id.* at 41.

⁵³⁸ See Shahrzad Habibi et al., *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons*, IN THE PUBLIC INTEREST (Apr. 5, 2019), <http://www.inthepublicinterest.org/wp-content/uploads/Updated-2019-Data-Brief->

Group and CoreCivic, among other private prison companies, manage their debt financing through a combination of credit, loans, and bonds.⁵³⁹

GEO Group and CoreCivic both have revolving lines of credit with various banks, which allow them to borrow and repay funds at will, up to their credit limit.⁵⁴⁰ 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.⁵⁴¹ Finally, banks underwrite the corporate bonds issued by private corrections companies, which are then purchased by private banks and resold on the secondary market.⁵⁴² The banks receive millions of dollars in interest and fees in return.⁵⁴³

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.⁵⁴⁴ Given how many private prison companies organize and profit from carceral labor through their work farms, rehabilitation centers and halfway houses,⁵⁴⁵ the funding of these companies needs to be carefully scrutinized and regulated. Currently there is no such oversight, financial or other.

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 on prison labor, with millions of dollars held in these vehicles.⁵⁴⁶ Specifically, Vanguard and Fidelity, the two major U.S. investment funds, own stock in various companies that use inmate labor. For example, Vanguard Total Stock Market Index Fund (\$VTSAX) has \$150.91 billion invested in 38 companies generally involved in the prison industrial complex, amounting to 14% of the fund assets.⁵⁴⁷ Likewise, Vanguard ESG U.S. Stock ETF (\$ESGV) has \$477.4 million invested in 18 companies involved in the prison industrial complex, amounting to 14% of the fund assets.⁵⁴⁸

The-Wall-Street-Banks-Still-Financing-Private- Prisons-FINAL-EMBARGOED-UNTIL-4-8-19-1030am.pdf, archived at <https://perma.cc/9SWS-8C39>

⁵³⁹ Appleman, *TIC*, at 42.

⁵⁴⁰ Habibi, at 1.

⁵⁴¹ *Id.* at 3.

⁵⁴² *Id.*

⁵⁴³ *Id.*

⁵⁴⁴ See Matt Stroud, *Why Would a Prison Corporation Restructure as a Real Estate Company?*, FORBES (Jan. 31, 2013), <https://www.forbes.com/sites/mattstroud/2013/01/31/why-would-a-prison-corporation-restructure-as-a-real-estate-company/#214bb67b6caa>, archived at <https://perma.cc/GBK8-TCBL>

⁵⁴⁵ Appleman, *TIC*, at 18 – 23.

⁵⁴⁶ *Id.* at 44.

⁵⁴⁷ See *Vanguard Total Stock Market Index Fund*, PRISON FREE FUNDS (February 27, 2021), <https://prisonfreefunds.org/fund/vanguard-total-stock-market-index-fund/VTSAX/prison-industrial-complex-investments/FSUSA002PT/FOUSA00L83>

⁵⁴⁸ See *Vanguard ESG U.S. Stock ETF Fund*, PRISON FREE FUNDS (February 27, 2021), <https://prisonfreefunds.org/fund/vanguard-esg-us-stock-etf/ESGV/prison-industrial-complex-investments/FS0000DVU7/F000010QC6>

Fidelity also has invested in both private prison companies and companies using inmate labor. This includes Fidelity® Total Market Index Fund (\$FSKAX), which has \$8.04 billion invested in 38 prison companies, amounting to 13% of fund assets.⁵⁴⁹ Additionally, Fidelity Series Total Market Index Fund has \$4.82 billion invested in 38 companies involved in the prison industrial complex, amounting to 13% of fund assets.⁵⁵⁰

Moreover, private prison companies, as well as many corrections-serving businesses, rely heavily on carceral labor in prisons, detention centers, and halfway houses, a model which is an essential part of their *modus operandi*.⁵⁵¹ 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.⁵⁵² Likewise, many smaller companies such as Keefe Group, iCare (a subsidiary of Aramark), and Securus Technologies have extremely profitable vending contracts with various correction facilities, charging high prices to inmates for phone calls, necessary toiletries, and even care packages.⁵⁵³

In addition to Vanguard and Fidelity, many passively-managed index funds (frequently integrated into mutual funds or 401Ks) own stock in prison industries and companies using carceral labor.⁵⁵⁴ The companies range from private prison companies to companies that rely on prison laborers for some of their business, including Aramark, Acadia Healthcare,⁵⁵⁵ Costco,⁵⁵⁶ 3M,⁵⁵⁷ and Walmart.⁵⁵⁸ Accordingly, many investors are unaware of their passive funding and support of companies using carceral labor.

Higher education also supports prisons and carceral labor through its investment strategies.⁵⁵⁹ Although Columbia University and the UC system have divested from prisons and correctional facilities, most colleges and universities have retained their investments.⁵⁶⁰

⁵⁴⁹ See *Fidelity Total Market Index Fund*, PRISON FREE FUNDS (February 27, 2021), <https://prisonfreefunds.org/fund/fidelity-total-market-index-fund/FSKAX/prison-industrial-complex-investments/FSUSA003JP/F00000MJS0>

⁵⁵⁰ See *Fidelity Series Total Market Index Fund*, PRISON FREE FUNDS (February 27, 2021), <https://prisonfreefunds.org/fund/fidelity-series-total-market-index-fund/FCFMX/prison-industrial-complex-investments/FS0000EA8M/F000011YJJ>

⁵⁵¹ See Rebekah Entralgo, *Tackling Prison Profiteers Will Take More Than Banning Private Prisons*, INEQUALITY (February 1, 2021), <https://inequality.org/great-divide/prison-profiteers-ban/>

⁵⁵² See Tanay Edwards, *It's Time for Investors to Dump Shares of Companies that Profit from Mass Incarceration and Prison Labor*, MARKETWATCH (June 30, 2020), <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>

⁵⁵³ *Id.*

⁵⁵⁴ See *Companies, Prison Industry Companies*, PRISON FREE FUNDS, <https://prisonfreefunds.org/companies>.

⁵⁵⁵ See *Acadia Healthcare*, INVESTIGATE (July 19, 2019), <https://investigate.afsc.org/acadia-healthcare>

⁵⁵⁶ See *Costco Wholesale*, INVESTIGATE (September 9, 2020), <https://investigate.afsc.org/company/costco-wholesale>

⁵⁵⁷ See *3M Co*, INVESTIGATE (August 9, 2018), <https://investigate.afsc.org/company/3m>

⁵⁵⁸ See *Walmart*, INVESTIGATE (September 10, 2020), <https://investigate.afsc.org/company/walmart>

⁵⁵⁹ See Sarah Brodsky, *Investors Question Private Prison Holdings*, IMPACT INVESTING EXCHANGE (Apr. 11, 2019), <https://www.impactinvestingexchange.com/investors-question-private-prison-holdings/>

⁵⁶⁰ See James Brewer, *Are You Unknowingly Investing In Private Prisons*, FORBES (Feb. 25, 2021), <https://www.forbes.com/sites/jbrewer/2021/02/25/are-you-unknowingly-investing-in-private-prisons/?sh=66e05e0c226b>

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.

Part V: Solutions, Regulatory and Otherwise

There are various ways to attack the use of abusive carceral labor in state, federal, and industrial setting. These include filing 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 private prisons themselves.

A. Regulation and Lawsuits

1. Regulatory Power

Congress has the power to regulate inmate labor in federal prisons, but historically has not done so.⁵⁶¹ The Fair Labor Standards Act of 1938, however, guarantees a minimum wage and overtime to all of those employed in the U.S., and could easily be applied to inmate labor.⁵⁶² Although courts and legislatures have read a prisoner exemption into their interpretation of FLSA,⁵⁶³ this may conflict with a more general Supreme Court holding, stating that “[s]pecificity in stating exemptions strengthens the implication that employees not thus exempted ... remain within the Act.”⁵⁶⁴

State and federal courts have held that prisoners are not employees because incarcerated individuals are removed from the national economy.⁵⁶⁵ 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 lawsuits pending against correctional facilities for 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.⁵⁶⁶ The prisoners allege “slave labor” conditions during their incarceration by the Colorado

⁵⁶¹ See Ruben Garcia, *U.S. Prisoners' Strike is a Reminder How Common Inmate Labor Is*, CBS NEWS (September 3, 2018), <https://www.cbsnews.com/news/u-s-prisoners-strike-is-reminder-how-commonplace-inmate-labor-is/>

⁵⁶² <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FairLaborStandAct.pdf>

⁵⁶³ See *supra* Part III.

⁵⁶⁴ *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950).

⁵⁶⁵ See Renee Henson, *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).

⁵⁶⁶ See Brian Maass, *Colorado Inmates Sue Over 'Slave Labor,' Demand Minimum Wage, Paid Vacations, Paid Sick Leave*, CBS DENVER (July 27, 2020), <https://denver.cbslocal.com/2020/07/27/slave-labor-prison-lawsuit-minimum->

prison system.⁵⁶⁷ 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 vacations, paid sick leave, and medical benefits.⁵⁶⁸ Colorado's 2018 change to its state constitution, eliminating slavery and involuntary servitude as potential punishments to crime, carved out room for the lawsuit to be filed, as the prisoners now argue they are subject to slave labor conditions, which are unconstitutional.⁵⁶⁹

Eight California prisoners in Alameda County, CA have likewise 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.⁵⁷⁰ The plaintiffs claimed that their unpaid work for Aramark was forced labor, violated the U.S. Constitution and the Trafficking Victims Protection Act, and ignored Prop. 189, a 1990 California law requiring private companies to pay prisoners fair wages.⁵⁷¹ The federal complaint argues that prisoners are entitled to wages equal to non-incarcerated workers, and are eligible for overtime pay.⁵⁷² The class action also alleges that that the jail's deputies forced prisoners to work by either threatening solitary confinement, longer sentences, or firing.⁵⁷³ The plaintiffs have sought compensatory and punitive damages, attorney's fees, and declaratory and injunctive relief.⁵⁷⁴

Following a similar lawsuit in 2020, Nebraska was required to start paying its inmate work force between \$20 and \$30 dollars a week for their labor within its jails laundering sheets, landscaping, and cleaning bathrooms.⁵⁷⁵ 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.⁵⁷⁶ Nebraska inmate labor is not compensated at minimum wage, however.⁵⁷⁷

These recent prisoner suits offer one way for inmate laborers to attempt to get paid a proper minimum wage from their work efforts. Individual or even class lawsuits, however, are a slow and chancy way to claw back some of the profit made by the state and private companies, and only give relief to a small group of plaintiffs even if successful.

wage/#:~:text=The%20measure%20passed%20with%2066,of%20the%20changed%20state%20constitution.&text=%E2%80%9CI%20always%20viewed%20it%20as%20slave%20labor%2C%E2%80%9D%20said%20Bassford.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ See Madison Pauly, *Jail Inmates Worked for a \$16 Billion Company Without Pay. Now They Want Their Wages*, MOTHER JONES (January 6, 2020), <https://www.motherjones.com/crime-justice/2020/01/alameda-santa-rita-jail-aramark-unpaid-wages-lawsuit/>

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ Ruelas, *Complaint for Damages and Declaratory and Injunctive Relief*, at *id.*

⁵⁷⁵ See Riley Johnson, *Lancaster County Jail Inmates Now Paid for Work after Nebraska Voters Passed Slavery Ban*, LINCOLN JOURNAL STAR (Jan. 21, 2021), 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

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

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 13th Amendment.⁵⁷⁸ The joint resolution would have banned slavery and involuntary servitude as legal punishments for crimes.⁵⁷⁹ The original resolution did not pass in the 116th Congress.⁵⁸⁰

The resolution was re-introduced on June 18, 2021 by Oregon Senator Jeff Merkley and Georgia Representative Nikema Williams.⁵⁸¹ The bill's sponsors argued that eliminating this particular clause from the 13th 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."⁵⁸² As outside supporters of the bill noted, "it targets forced labor and not prison work programs, which are voluntary."⁵⁸³ 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 be punished, 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 into our system of mass incarceration that this potential Amendment would only ameliorate part of the problem.

2. Amending State Constitutions

Approximately 20 states still have similar slavery and indentured servitude clauses in their constitutions permitting either human bondage or prison labor after conviction of a crime.⁵⁸⁴ Colorado,⁵⁸⁵ Utah, and Nebraska⁵⁸⁶ have removed such constitutional provisions from their state constitutions.⁵⁸⁷ Colorado's constitution now simply states, ""There shall never be in this state either slavery or involuntary servitude," eliminating language similar to the Thirteenth

⁵⁷⁸ U.S. CONST., 13TH AM.

⁵⁷⁹ S.J. Res. 81 (116th Congress), December 20, 2020, <https://www.govinfo.gov/content/pkg/BILLS-116sjres81is/pdf/BILLS-116sjres81is.pdf>

⁵⁸⁰ *Id.*

⁵⁸¹ *Ahead of Juneteenth, Merkley, Williams Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment*, Merkley Senate (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>

⁵⁸² *Id.*

⁵⁸³ See Terry Tang, *Lawmakers Mark Juneteenth by Reviving "Abolition Amendment,"* A.P. NEWS (June 18, 2021), <https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0>

⁵⁸⁴ *Id.*

⁵⁸⁵ See Bill Chappell, *Colorado Votes to Abolish Slavery, Two Years After Similar Amendment Failed*, NPR (March 7, 2018), <https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed>

⁵⁸⁶ Tang, *Abolition Amendment*, at *id.*

⁵⁸⁷ See Elena Lynn Gross, *Alabama, Utah, Nebraska Remove Racist Language from State Constitutions*, Forbes (November 4, 2020), <https://www.forbes.com/sites/elanagross/2020/11/04/alabama-utah-nebraska-remove-racist-language-from-state-constitutions/?sh=316132461301>

Amendment.⁵⁸⁸ In 2020, Utah and Nebraska both voted to delete language from their state constitutions allowing slavery and involuntary servitude as punishment.⁵⁸⁹

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 state constitution permitting slavery or involuntary servitude as punishment for a crime.⁵⁹⁰ 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.”⁵⁹¹ Article I, § 33 would be replaced by text clearly stating that slavery and involuntary servitude is forbidden in Tennessee.⁵⁹² Tennessee’s Department of Corrections, 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.”⁵⁹³ The resolution next goes before the Tennessee House before being voted on in 2022’s general election.⁵⁹⁴

Minnesota had a similar bill up for vote in the November 2020 election, offering Minnesotans the chance to eliminate slavery and involuntary servitude as possible punishments for crime from their state constitution.⁵⁹⁵ Some constituents, however, were concerned that eliminating such language would make it difficult to continue low-wage inmate work programs in state prisons.⁵⁹⁶

Likewise, there is a bill in the Texas legislature proposing an amendment to the state constitution banning slavery and forced labor for any reason, including as punishment.⁵⁹⁷ The bill’s supporters argue that this type of amendment would not only help stop correctional facilities from imposing mandatory work policies, it would also allow inmates forced to work to take these cases to court.⁵⁹⁸ Although the bill has not yet gotten a committee hearing, if it passes the legislature, the decision to amend the TX constitution would be left up to the state voters.⁵⁹⁹

⁵⁸⁸ Chappell, *Colorado Votes to Abolish Slavery*, at *id.*

⁵⁸⁹ Gross, *Racist Language from State Constitution*, at *id.*

⁵⁹⁰ See *Tennessee Senate OK’s Bid to Remove ‘Slavery’ As Punishment*, ABC News (March 15, 2021), <https://abcnews.go.com/US/wireStory/tennessee-senate-oks-bid-remove-slavery-punishment-76477338>

⁵⁹¹ Art. I, § 33, *The Constitution of the State of Tennessee* 5, TENNESSEE GOVERNMENT (Nov. 4, 2014), <https://www.capitol.tn.gov/about/docs/TN-Constitution.pdf>

⁵⁹² *Id.*

⁵⁹³ *Id.*

⁵⁹⁴ See Slater Teague, *Tennessee Senate Approves Proposed Amendment to Remove Slavery from State Constitution*, WKRN (March 14, 2021), <https://www.wkrn.com/news/tennessee-news/tennessee-senate-approves-proposed-amendment-to-remove-slavery-from-state-constitution/>

⁵⁹⁵ See 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

⁵⁹⁶ *Id.*

⁵⁹⁷ See Sangita Menon, *Bill Seeks to Amend Texas Constitution to Amend Slavery*, NPR (May 9, 2021), <https://www.kut.org/crime-justice/2021-05-08/bill-seeks-to-amend-texas-constitution-to-ban-slavery>

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

These changes to state constitutions are slowly gaining momentum. New Jersey may place a similar bill to its voters in 2021.⁶⁰⁰ In 2020, State Assemblywomen Angela McKnight, Britnee Timberlake and Shanique Speight sponsored a resolution that would amend NJ Constitution's Article 1 with a new paragraph that holds: "No person shall be held in slavery or involuntary servitude in this state, including as a penalty or a punishment for a crime."⁶⁰¹ It would be passed in conjunction with a question to New Jersey voters on election ballots asking them if they approved amending the NJ Constitution for those specified reasons.⁶⁰²

California bans slavery already, but may allow voters to ban involuntary servitude as a criminal punishment.⁶⁰³ The involuntary servitude measure would remove involuntary servitude from Art. 1, Section 6 of the California constitution.⁶⁰⁴ As the measure's sponsor notes, "the euphemistic language of 'involuntary servitude' masks what this nefarious practice is in plain language: forced labor."⁶⁰⁵ As California inmates are not given the choice of working when imprisoned, much California carceral labor is truly involuntary.⁶⁰⁶ Many Californians feel that requiring involuntary labor of prisoners simply continues the legacy of slavery, given the demographics of those incarcerated.⁶⁰⁷

These states considering the elimination of slavery and involuntary servitude from their constitutions are part of a broader abolition movement, seeking to end carceral labor state-wide and in the federal constitution.⁶⁰⁸ The Abolish Slavery National Network (ABNN) is a national coalition seeking to "abolish constitutional slavery and involuntary servitude in all forms, for all people."⁶⁰⁹ The ABNN argues that state constitutions are not symbolic, but important parts of state law, and thus must be amended to eliminate the language of slavery and involuntary servitude.⁶¹⁰

The advocacy and 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 case law, the regulation overseeing prison labor, and the complicated structure of mass incarceration. Abolishing slavery and involuntary servitude for criminal

⁶⁰⁰ Menon, *Bill Seeks to Amend Texas Constitution*.

⁶⁰¹ See David Menzies, *Amend the 13th' Cypher Hopes to Galvanize Support in Fight Against Modern Slavery*, NEW JERSEY (September 17, 2020), <https://www.nj.com/hudson/2020/09/amend-the-13th-cypher-hopes-to-galvanize-support-in-fight-against-modern-slavery.html>

⁶⁰² *Id.*

⁶⁰³ Menon, *Bill Seeks to Amend Texas Constitution*.

⁶⁰⁴ See *Asm. Kamlager Announces ACA 3: The California Abolition Act to Abolish Involuntary Servitude*, CA. STATE ASSEMBLY DEMOCRATIC CAUCUS (March 4, 2021), <https://asmdc.org/press-releases/asm-kamlager-announces-aca-3-california-abolition-act-abolish-involuntary-servitude>

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ See Don Thompson, *Amendment Would Ban Servitude by California Prison Inmates*, A.P. NEWS (February 25, 2021), <https://apnews.com/article/wildfires-san-francisco-constitutions-prisons-coronavirus-pandemic-c182b569cc42d3f75450585979b763e9>

⁶⁰⁸ See *Abolish Slavery National Network*, <https://abolishslavery.us/>

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

punishment is an important symbolic step, but just the beginning of what is needed to start draining the profits out of punishment.

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, there are still some major banks that 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.⁶¹¹ Over the past 4 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.⁶¹² Approximately 72% of future financing to these companies, with an estimated value of over \$1.9 billion, has disappeared.⁶¹³

As a result, both Geo Group and CoreCivic are currently facing significant cash-flow problems, reflecting their loss of credit access from major banks.⁶¹⁴ Most recently, Regions Bank in Alabama announced the ending of its partnership with CoreCivic, and will not be renewing their 2023 contract.⁶¹⁵ Following suit, Barclays Bank and KeyBank Capital Markets pulled out of a deal to help fund CoreCivic's building of three Alabama prisons.⁶¹⁶ The pressure for banks to distance themselves from the financing of private prison companies continues to increase,⁶¹⁷ 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, their ability to continue to expand across the country will cease. Public pressure and shaming on those remaining banks who continue to fund them may eventually stop 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 REITS such as CoreCivic and Geo Group, it is also possible for banks to support prisoner education,

⁶¹¹ Appleman, *Treatment Industrial Complex*, at 50.

⁶¹² *Id.*

⁶¹³ See Claire Carlile, *Financing Racism in U.S. Private Prisons*, Ethical Consumer (September 11, 2020), <https://www.ethicalconsumer.org/money-finance/financing-racism-us-private-prisons>

⁶¹⁴ See Matthew Clarke, *Private Prison Companies Face Stock Crunch, Credit Crunch*, PRISON LEGAL NEWS (February 1, 2021), <https://www.prisonlegalnews.org/news/2021/feb/1/private-prison-companies-face-stock-crash-credit-crunch/>

⁶¹⁵ See Morgan Simon, *Regions Bank of Alabama Turns Its Back on Core Civic, Announces the Plan to End Relationship*, FORBES (February 1, 2021), <https://www.forbes.com/sites/morgansimon/2021/02/01/regions-bank-of-alabama-turns-its-back-on-corecivic-announces-plan-to-end-relationship/?sh=6d64efc6d15b>

⁶¹⁶ See Morgan Simon, *Toxic Alabama Private Prison Deal Falling Apart with Barclays*, Forbes (April 21, 2021), <https://www.forbes.com/sites/morgansimon/2021/04/21/toxic-alabama-private-prison-deal-falling-apart-with-barclays-exit/?sh=7939e33752f0>

⁶¹⁷ *Id.*

rehabilitation, and job training. Banks should look for opportunities to support organizations that provide education, training and economic opportunity to those who have been incarcerated.⁶¹⁸

For example, Beneficial State Bank⁶¹⁹ supports CROP (Creating Restorative Opportunities and Programs), a non-profit providing released prisoners with restorative assistance, rehabilitation and other needed services to help them thrive in the community.⁶²⁰ Likewise, Bank of America supports formerly-imprisoned entrepreneurs who are operating mission-driven organizations.⁶²¹ 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.⁶²²

3. Eliminating Private Profit from the Carceral World

Although only 8% of prisons are privately-run,⁶²³ 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, telephony, banking, and visitation services has significantly decreased the quality of life for inmates, all while steadily increasing private revenues.⁶²⁴ The cheap pricing offered by these service providers to the state and local county 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.⁶²⁵

The private contractors who operate in public prisons and jails have a vested interest in keep the system of mass incarceration in place, since the more people incarcerated, the more money these companies make.⁶²⁶ In total, there are at least 3,100 corporations that profit from mass incarceration.⁶²⁷

Private businesses have benefited tremendously from the change of public provision of carceral services to private, for-profit provision.⁶²⁸ Incarcerated individuals less so. “The corrections industry operates for the primary purpose of maximizing profits for its owners—

⁶¹⁸ See Randall Leach, *Banks Should Follow and Expand on Biden's Lead and Divest from Mass Incarceration*, *Forbes* (April 15, 2021), <https://www.forbes.com/sites/forbesfinancecouncil/2021/04/15/banks-should-follow-and-expand-on-bidens-lead-and-divest-from-mass-incarceration/?sh=1379e75c4242>

⁶¹⁹ *Id.*

⁶²⁰ See *Working Together to Restore Lives*, CROP ORGANIZATION, <https://www.croporganization.org/experiences/HOME/pages/5e7e597e64a7236b866938dc/home>

⁶²¹ See *Workforce Development and Education*, BANK OF AMERICA, <https://about.bankofamerica.com/en/making-an-impact/workforce-development-programs>

⁶²² *See id.*

⁶²³ See *Private Prisons in the United States*, SENTENCING PROJECT (March 3, 2021), <https://www.sentencingproject.org/publications/private-prisons-united-states/>

⁶²⁴ See Victoria Law, *Public Prisons, Private Profits*, TRUTHOUT (November 1, 2014), <https://truthout.org/articles/public-prisons-private-profits/>

⁶²⁵ Appleman, *Cashing in on Convicts*, at 596-607.

⁶²⁶ Karatzanakis, *The Punishment Industry*, at 860-61.

⁶²⁷ *Corrections Accountability Center: Mapping Private Sector Players* (April 2018), at 1.

⁶²⁸ Appleman, *Cashing in on Convicts*, at 607.

creating strong incentives to achieve *new* forms of monetary extraction in addition to shifting the burden of *existing* costs.”⁶²⁹ 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.”⁶³⁰

Roughly half of American inmates worked in some form in 2020, many unwillingly, and even more under very harsh conditions.⁶³¹ In large part, however, these carceral workers have been ignored and forgotten. “[T]oiling at the margins of the American economy,”⁶³² these incarcerated individuals create 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.⁶³³

As Amna Akbar has argued, our system of mass incarceration demonstrates a passionate “commitment to extracting capital from Black [and minority] labor.”⁶³⁴ And yet there has been little focus until very recently⁶³⁵ 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 altered, the ineradicable extraction of revenues from the corpus of the imprisoned has not changed.

Where to go from here is the difficult question. Answers have ranged from outright abolition of prisons,⁶³⁶ to requiring minimum wage or a living wage for prison labor,⁶³⁷ to

⁶²⁹ NCLC, *Commercialized (In)Justice (Executive Summary)*, *supra* note __, at 1.

⁶³⁰ Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in the Carceral State*, 57 U. LOUISVILLE L. REV. 61, 69 (2018)

⁶³¹ See Daniel Moritz-Rabson, ‘Prison Slavery’: Inmates Are Paid Cents While Manufacturing Products Sold to Government, NEWSWEEK (August 28, 2018), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729>

⁶³² 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).

⁶³³ See Rebecca McLennan, *When Felons Were Human* n.8, On the Human, NATIONAL HUMANITIES CENTER (August 2011), <https://nationalhumanitiescenter.org/on-the-human/2011/08/when-felons-were-human/>

⁶³⁴ Amna Akbar, *Towards A Radical Reimagination of Law*, 93 N.Y.U. L. REV. 405, 449 (2018)

⁶³⁵ See, e.g., Akbar; Roberts, *Abolitionism Constitutionalism*, at 4.

⁶³⁶ See, e.g., *Developments in the Law*, 132 HARV. L. REV. (2019).

⁶³⁷ See Noah Smith, *Paying Minimum Wage to Inmates Helps the Working Class*, CHICAGO TRIB. (June 7, 2017), <https://www.chicagotribune.com/opinion/commentary/ct-prison-inmates-minimum-wage-20170607-story.html>;

eradicating all involuntary carceral labor.⁶³⁸ What is clear, however, is that removing the cash from carceral labor will be no easy task, given the deeply 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, “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.”⁶³⁹ Loosening the commercial grasp will be a long and complex process.

If the history of the prison is the history of brutal prison labor,⁶⁴⁰ 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 undertaken. Otherwise, a criminal sentence will continue to be what it has always been, a “pernicious form[] of servitude,”⁶⁴¹ trapped in the service of endlessly increasing profit, the literal revenues of physical toil, suffering, and exploitation. The 21st century can and must do better.

Ronnie K. Stephens, *Nevada to Weigh Paying Prisoners Minimum Wage*, INTERROGATING JUSTICE (April 21, 2021), <https://interrogatingjustice.org/prisons/nevada-to-weigh-paying-prisoners-minimum-wage/>

⁶³⁸ See Eric Foner, *We Are Not Done with Abolition*, NEW YORK TIMES (December 15, 2020), <https://www.nytimes.com/2020/12/15/opinion/abolition-prison-labor-amendment.html>

⁶³⁹ See James Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment*, 94 N.Y.U. L. REV. 1465, 1530 (2019).

⁶⁴⁰ Stephen Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 342 (1998)

⁶⁴¹ Goodwin, *Modern Slavery*, *id.* at 907.