

Compelling Labor and Chilling Dissent: Creative Resistance to Coercive Uses of Solitary Confinement in Prisons and Immigration Detention Centers

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INTRODUCTION

Solitary confinement has been used for centuries as a mechanism for controlling incarcerated people.² Increasingly, however, prisons and immigration detention centers are strategically administering solitary confinement specifically to compel incarcerated people³ to perform labor. The largely uncompensated labor of incarcerated people results in savings for prisons and immigration detention centers across the United States. These economic savings make it efficient for the government to continue filling prisons and immigration detention centers, disproportionately with people of color.

Generally speaking, solitary confinement is the practice of placing incarcerated people into locked cells that are typically smaller than a standard parking spot. Solitary confinement cells are usually windowless rooms containing: a bed, a toilet, and a solid metal door containing a slot to pass meals through.⁴ People are deprived of meaningful human contact in these cells for twenty-two to twenty-four hours per day, usually for an unspecified total number of days and sometimes for decades.⁵

Prisons and detention centers are typically located on the outskirts of communities and are difficult to access.⁶ The practices that occur inside the walls of these facilities are nearly impossible for people to witness by choice. The labor of incarcerated people is typically hidden from view, but the products that they produce are as ubiquitous as speed limit signs⁷ and the services they perform help maintain the growing prison industrial complex. America's use of prison labor spans from California, where the state has relied on incarcerated people to fight wildfires since the 19th century (paying them, still today, less than \$2 an hour),⁸ to Massachusetts, where incarcerated people in Boston have been deployed to shovel snow when the city's resources have fallen short.⁹ Most often, incarcerated people in

¹ J.D. 2020, The University of Texas School of Law.

² See generally Ashley T. Rubin and Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & SOC. INQUIRY 1604 (2018).

³ I use the term "incarcerated person" throughout this article rather than terms like "prisoner," "inmate," or "detainee" that a number of people behind bars have noted are dehumanizing. See Blair Hickman, Commentary, *Inmate. Prisoner. Other. Discussed.*, THE MARSHALL PROJECT (Apr. 3, 2015, 7:15 AM) (documenting the results of a survey asking about the best way to refer to people behind bars and finding that "incarcerated person" is largely the preferred term).

⁴ See JEAN CASELLA & JAMES RIDGEWAY, *Introduction to HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT* 7 (Jean Casella & James Ridgeway eds. 2016).

⁵ *Id.*

⁶ See Keramet Reiter, *No Data, No Change: Bringing Prisons Out of Hiding*, in THE POLITICS OF ABOLITION REVISITED 314, 315-316 (Thomas Mathiesen ed., 2015) ("First, over the course of the U.S. prison-building boom, American prisons have become increasingly geographically isolated....Perhaps the biggest problem with the increasing geographic isolation of American prisons is that the isolation contributes to prison invisibility. U.S. citizens living in major metropolitan areas (as the majority of the population does) might never have occasion to drive past a state or federal prison. Public opportunities to actually go inside these facilities – take a tour, volunteer in education or self-help programs, or conduct research – are all severely limited, in part because of the geographic inaccessibility of so many U.S. prisons").

⁷ Exterior Signs, UNICOR, <https://www.unicor.gov/Category.aspx?idCategory=1626> (last visited May 15, 2020).

⁸ Mihir Zaveri, *As Inmates, They Fight California's Fires. As Ex-Convicts, Their Firefighting Prospects Wilt*, N.Y. TIMES, Nov. 15, 2018, <https://www.nytimes.com/2018/11/15/us/california-paying-inmates-fight-fires.html>.

⁹ See Alan Pyke, *Boston Using Prison Labor to Shovel Heaps of Snow in Frigid Temperature for Pennies*, THINKPROGRESS, Feb. 16, 2015, <https://thinkprogress.org/boston-using-prison-labor-to-shovel-heaps-of-snow-in-frigid-temperatures-for-pennies-d7f2c51db8cc/>; Bruch Western & Linda Forman Naval, *Shoveling a Path Out of Prison*, THE ATLANTIC, Mar. 1, 2015, <https://www.theatlantic.com/politics/archive/2015/03/shoveling-a-path-out-of->

prisons and immigration detention centers are made to perform tasks like mopping the floors and running the kitchens, thereby operating and maintaining the very systems that confine them.

In this piece, I will explain the ways that solitary confinement and forced labor exacerbate each other and I will explore methods of creative resistance to solitary confinement and forced labor.¹⁰ Section I grounds my arguments by explaining how a history of racial capitalism undergirds the intersection of punishment and labor. Section II discusses solitary confinement as a tool to compel labor and punish a refusal to work in prisons and immigration detention centers. Section III documents the use of solitary confinement to chill organized dissent regarding forced labor. Section IV turns to the way forced labor is used to construct the infrastructure of solitary confinement. Finally, section V explores activist and artistic resistance to oppressive practices like solitary confinement and forced labor.

I. SOLITARY CONFINEMENT AS A TOOL OF RACIAL CAPITALISM

Solitary confinement is devastating to a person’s psychological and physiological well-being.¹¹ Research shows that the health consequences of solitary confinement can resemble those of physical torture.¹² Incarcerated people held in solitary confinement account for nearly half of all completed suicides behind bars.¹³ Solitary confinement can trigger extreme psychosis that results in debilitating hallucinations.¹⁴ As Angela Tucker, an incarcerated Black woman described, “I thought I had seen the most of what they can dish out. But this here is the worst. I have never seen anything like it. Living here is like nothing you could ever begin to imagine. It’s like living in a black hole.”¹⁵

In addition, solitary confinement is nearly always coupled with physical violence, ranging from rough treatment to outright assault.¹⁶ Beyond the physical impacts, solitary confinement also threatens an incarcerated person’s chance for early parole and can expand a person’s prison time.¹⁷ The threat of solitary confinement implies the imposition of a range of debilitating punishments that simultaneously leave a person completely alone and inescapably surveilled.

Solitary confinement and forced labor exacerbate each other in our current system of racial capitalism.¹⁸ I understand racial capitalism as a system that designs and re-designs punishments to exploit

prison/386483/ (arguing that instead of using currently incarcerated people to shovel snow, the city should have employed people who had been recently released and should have paid them a fair wage).

¹⁰ Financial motives are only one of the many reasons incarcerated people are forced into solitary confinement and solitary confinement is only one of the many possible punishments for refusing to work. However, the trend of using solitary confinement to compel labor is worth studying as it provides insight into the intersection of two oppressive practices.

¹¹ Solitary confinement is also known as the hole, administrative segregation, ad seg, solitary housing unit, or SHU. Supermax prisons are also composed almost entirely of solitary confinement cells, but I discuss primarily non-supermax facilities in which labor is permitted.

¹² Hernan Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. RED CROSS 591, 607 (2007).

¹³ Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741, 742-43 (2015).

¹⁴ David Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 545 (2019).

¹⁵ Cassandra Shaylor, *It’s Like Living in a Black hole: Women of Color and Solitary Confinement in the Prison Industrial Complex*, NEW ENGLAND J. CRIM. AND CIV. CONFINEMENT 1 (1998) (describing Tucker’s experience of placement in longterm solitary confinement despite suffering from hypertension, diabetes, and asthma).

¹⁶ Erin Hatton, “*Either You Do It or You’re Going to the Box*”: *Coerced Labor in Contemporary America* 45 CRITICAL SOCIOLOGY 912, 913 (2018) (“Moreover, as Bruce, O.T.I., and at least 10 other incarcerated workers report, going to “the box” is nearly always accompanied by some amount of physical violence, whether being “smacked around a little bit” (for O.T.I.) or outright assault (for Bruce)”).

¹⁷ *Id.* at 913

¹⁸ See Jodi Melamed, *Racial Capitalism*, 1 J. CRITICAL ETHNIC STUD. 76, 76-78 (2015) (“...the term “racial capitalism” requires its users to recognize that capitalism *is* racial capitalism. Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among

people of color, forcing them to use their labor to facilitate white capital accumulation.¹⁹ America's history of chattel slavery serves as the racial, spatial, and economic template for its current system of mass incarceration.²⁰ During chattel slavery, white elites made Black people their property and plantation owners maximized profits by instructing overseers to administer physically and psychologically violent punishments like whipping, mutilation, and branding to force enslaved people to work and maximize the plantation's profits for white slave owners.²¹

As laws and norms have changed over time, punishment practices have changed forms, but have remained intact. Contemporary uses of solitary confinement architecturally resemble the Middle Passage, during which slave traders forced Black people into dark, tight spaces for indefinite periods of time on slave ships.²² Prison labor follows from a history of from slavery on plantations, and later convict leasing and chain gangs. Few Black people were imprisoned in the South prior to the Civil War.²³ However, the prison population ballooned and experienced a demographic shift in the South after the emancipation of enslaved people.²⁴ Southern states transformed their penitentiaries into new, consolidated plantations where formerly enslaved people were again deprived of their freedom and were leased out to perform labor—as legally sanctioned punishment—for private, white-owned farms and other corporations.²⁵

Today, incarcerated people can be forced to work for little to no pay with the profits and savings generated by their labor going directly to counties, states, and for-profit corporations.²⁶ Even when incarcerated people are not producing goods on the open market on a large scale, they still serve as the human commodities of a multi-billion dollar industry focused on punishment.²⁷ For both private and public prisons and detention centers, the bulk of the costs of operating these facilities are labor costs.²⁸ Private facilities, in particular, have an economic incentive to limit costs and increase revenue.²⁹ Reducing the cost of labor actually generates a profit for carceral facilities, as private prisons and detention centers are generally paid a certain fixed amount per their contracts and any amount saved in operation costs

human groups...); *But c.f.* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (defining racial capitalism as “the process of deriving social or economic value from the racial identity of another person” and envisioning a future where race can be disentangled from capitalism).

¹⁹ See William Calathes, *Racial Capitalism and Punishment Philosophy and Practices: What Really Stands in the Way of Prison Abolition*, 20 CONTEMP. JUST. REV. 442, 449 (2017).

²⁰ DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* 44 (2015) (referencing Toni Morrison's 1987 novel *Beloved* to evaluate the connections between racialized punishment on plantations with racialized punishment in the form of the prison-industrial complex).

²¹ Calathes, *supra* note 19, at 444.

²² See CHILDS, *supra* note 20 at 49 (“Like the chain-gang cage, Middle Passage imprisonment expressed as indefinite solitary involves a radical disorientation of temporal experience; in other words, the articulation of racial and spatial terror in the context of the modern prison warps time insofar as the experiential present is haunted in a material fashion by *past*, or *southern*, modes of racial capitalist domination”).

²³ *Id.* at 9 (describing studies explaining the demographic shift in prisons in the South as “...the number of officially imprisoned black people increas[ed] from less than one percent before 1861 to as much as 90 percent in certain counties and states after 1865”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Calathes, *supra* note 19, at 448 (“The Thirteenth Amendment did not abolish slavery, but rather moved it from the plantation, first to the convict leasing system, and today, directly into the prison. As a result of the drug war and mass incarceration, there are more black people enslaved today than in 1800, and incarcerated individuals can be forced to work pennies on the hour with the profits going to counties, states, and private corporations. Many working incarcerated individuals may be totally uncompensated and increasingly are compelled to produce for the market as a condition of their imprisonment”).

²⁷ CHILDS, *supra* note 20 at 190-191 n. 9 (acknowledging the brilliance of Ruth Wilson Gilmore's book *Golden Gulag*, but taking issue with Gilmore's refutation of the argument that the prison-industrial complex represents an extension of slavery).

²⁸ Avlana Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 98 (2016).

²⁹ *Id.*

turns into profits for the private corporations.³⁰ Both the labor and the bodies of incarcerated people feed an expanding prison industrial complex that preys disproportionately on people of color.

People of color are not only disproportionately represented in prisons and immigration detention centers, but they are also disproportionately represented in solitary confinement. Prison officers can place incarcerated people in solitary confinement at their own discretion for nearly any reason, which is a process that is susceptible to racial bias. Data from thirty jurisdictions shows that Blacks comprised a greater percentage of the population in solitary confinement than in the general population, with the reverse being true for whites.³¹ In addition, Hispanic males represented a greater percentage of the solitary confinement population than they did the total general population.³² In civil cases challenging solitary confinement in prisons, the law instructs courts to defer to prison officials' judgment in determining whether the use of solitary confinement was appropriate in a particular case.³³ This level of administrative discretion allows officers to easily mask racial bias with an invented rationale for the imposition of solitary confinement, and any inconsistencies in the administration of solitary confinement usually go unchecked by carceral institutions and the judiciary.

When solitary confinement is used specifically to threaten people to work and as a punishment when they refuse to do so, it continues a legacy of exploiting the labor of people of color to further a system that protects white privilege, power, and profits. People of color are forced to perform labor to benefit a massive carceral system designed as an updated system of slavery to protect white privilege and power while sanctioning the punishment and exploitation of non-white groups.

II. SOLITARY CONFINEMENT AS A TOOL TO COMPEL LABOR

A. Prisons' Use of Solitary Confinement to Compel Labor and Punish a Refusal to Work

Officials in both prisons and immigration detention centers use solitary confinement as a threat to coerce incarcerated people into performing low-wage or no-wage labor and as punishment for refusing to work. Legally, prisons can require incarcerated people to work, even without compensation, due to an exception in the Thirteenth Amendment to the Constitution. Section 1 of the Thirteenth Amendment states: "Neither slavery, nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."³⁴ The amendment, passed as a Reconstruction Amendment following the Civil War, carves out an express exception to the prohibition on slavery, permitting those who have been convicted of a crime to perform unpaid labor or experience involuntary servitude. Rather than abolishing slavery, the Thirteenth Amendment merely moved slavery away from the plantation and into the prison.³⁵ The Thirteenth Amendment provided legal cover for a new era of slavery by racializing criminality and criminalizing race.³⁶

Prison labor in the U.S. takes many forms.³⁷ Both federal and state prisons generally require incarcerated people to work. Prisons rely on the labor of incarcerated people for basic operations

³⁰ *Id.*

³¹ THE ASS'N OF STATE CORR. ADM'RS & THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 5 (2018).

³² *Id.*

³³ Shapiro *supra* note 14 at 545.

³⁴ U.S. CONST. Amend. XIII, § 1 (emphasis added).

³⁵ Calathes, *supra* note 19, at 448.

³⁶ Joan Dayan, *Legal Slaves and Civil Bodies*, 2 NEPANTLA: VIEWS FROM THE SOUTH 3, 16 (2001).

³⁷ This note does not aim to explain all of the different labor structures that state and federal prisons use for employing people incarcerated in their facilities. Instead, I focus on how solitary confinement is used to compel labor in a range of labor structures in both state and federal prisons, as is demonstrated in the examples that follow in this section.

including food service, laundry, and cleaning. In federal prison, all sentenced, incarcerated people without medical exemptions are required to work.³⁸ Most commonly, people incarcerated in federal facilities are given institutional work assignments (such as food service or warehouse operations) that pay between twelve cents and forty cents per hour.³⁹ In addition, the Federal Prison Industries (trade name: UNICOR) is a government-owned corporation that provides jobs for incarcerated people, paying them between twenty-three cents and one dollar and fifteen cents per hour to produce products that are then sold exclusively to the federal government.⁴⁰ In fiscal year 2019, the total UNICOR sales to the federal government topped half a billion at \$531,452,723.⁴¹ Private companies also employ incarcerated people through the federal Prison Industry Enhancement Certification Program, but they employ less than 1% of people in prison through the program.⁴² State prisons have a wide range of pay scales and wage policies in both regular jobs within the facility and in state owned businesses.⁴³ On average, incarcerated workers are paid between 80 cents and \$3.45 per day for the most common prison jobs.⁴⁴ In at least five states, labor within prisons goes completely uncompensated.⁴⁵ Prisons save money when they use the labor of people incarcerated in their facilities instead of hiring outside workers who are entitled to minimum wage payments and basic benefits.

Officials have historically used, and continue to use, solitary confinement as a threat and a consequence for those who refuse to work when instructed to do so.⁴⁶ Eddie Griffin, a person incarcerated at Terre Haute Federal Prison in the 1970s, was placed in solitary confinement at a federal prison in Indiana after he refused to work after twice nearly losing his finger working at the prison machine shop.⁴⁷ When Griffin continued insisting on a job change he was transferred to the Marion federal prison in Illinois, which is where “problem” prisoners who resisted the system were transferred.⁴⁸ At Marion, he was sent to the control unit (the prototype for modern solitary confinement structures).⁴⁹ The perverted logic of the control unit made even unsafe labor seem like a preferred alternative to confinement. Only a fraction of men in the control unit were permitted to work. Griffin reflected, “Although everyone

³⁸ Federal Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited May 20, 2020).

³⁹ Work Programs, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited May 18, 2020).

⁴⁰ UNICOR Program Details, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited May 18, 2020).

⁴¹ FY 2019 FPI Sales By 4-Digit FSC Code and Customer, UNICOR, <https://www.unicor.gov/publications/reports/FY19AnnualSalesReport.pdf> (last visited May 18, 2020).

⁴² Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/reports/pie2020.html>.

⁴³ State and Federal Prison Wage Policies and Sourcing Information, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/reports/wage_policies.html.

⁴⁴ Sawyer & Wagner *supra* note 42.

⁴⁵ *Id.*

⁴⁶ ALISON SHAMES, JESSICA WILCOX & RAM SUBRAMANIAN, VERA INSTITUTE OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 14-15 (2015) (finding that the use of solitary confinement as a response to failing to report to work is common, even though a small number of states have stopped sending people to solitary confinement for minor infractions such as unexcused absence from work).

⁴⁷ Eddie Griffin, *Breaking Men’s Minds: Behavior Control and Human Experimentation at the Federal Prison in Marion*, 4 J. OF PRISONERS ON PRISONS 1 (1993). Eddie Griffin is one of the surviving members of the Marion Brothers. The Marion Brothers were a group of incarcerated people housed at Marion, a federal prison in Illinois, who went on a hunger strike in 1976 to protest the prison’s inhumane conditions.

⁴⁸ *Id.* See also Alan Eladio Gómez, *Resisting Living Death at Marion Federal Penitentiary, 1972*, 96 RADICAL HIST. REV. 58, 59 (2006) (“Marion was a dumping ground, the last stop for anybody who resisted the system or who saw something wrong within the prison and struggled against it”); Adam Ewing, *In/visibility: Solitary Confinement, Race, and the Politics of Risk Management*, 119 TRANSITION 109, 119 (2016) (explaining that most of the “problem” prisoners were black and Latino “political prisoners”).

⁴⁹ *Id.*

recognizes that the work is exploitative, it is generally considered a privilege. The rest of the control unit prisoners spend 23 ½ hours in a day locked in their cells.”⁵⁰

The use of solitary confinement to punish a person’s refusal to work has been documented in cases heard even by the country’s highest court. In 1976, the U.S. Supreme Court decided *Estelle v. Gamble*, holding that while the Constitution requires prisons to provide medical care for incarcerated people, prison personnel’s negligent or inadvertent failure to provide adequate medical care does not constitute cruel and unusual punishment.⁵¹ In *Estelle, J.W. Gamble*, who was incarcerated in the Huntington Unit of the Texas Department of Corrections, was injured when a 600-pound bale of cotton fell on him during a prison work assignment at a prison textile mill.⁵² Gamble continued experiencing debilitating pain for the next several months and refused to return to work due to his pain. As a result of his refusal to work, Gamble was brought before the prison disciplinary committee where he testified that he could not work due to his severe back pain and high blood pressure.⁵³ The committee responded by placing Gamble in solitary confinement without even giving him a medical evaluation.⁵⁴ Gamble remained in solitary confinement for months where he experienced, in his words, “blank-outs” and chest pain.⁵⁵ The facts supporting complaints in numerous cases expose the ubiquity of administering solitary confinement as a punishment for refusing to work.⁵⁶

The choice between performing labor or placement in solitary confinement is a cruel one. Kevin “Rashid” Johnson, who is currently serving a life sentence despite maintaining his innocence, has refused to perform prison labor ever since he was convicted of murder in 1990 when he was eighteen years old.⁵⁷ His refusal to perform prison labor means that his life sentence has become a life sentence in solitary confinement.⁵⁸ In his words, “Prisoners who do not agree to such abject slavery are put in solitary confinement. I know from personal experience. Apart from six months when I was in general population in Oregon, I have been held inside isolation cells without pause since 1994.”⁵⁹ A refusal to perform labor fundamentally changes the nature of an incarcerated person’s sentence without explicit judicial sanction.

Narrative accounts of people released from New York State prisons also evidence the use of solitary confinement as a consequence for refusing to work.⁶⁰ One recently released person explained that he was put in solitary confinement for refusing to clean up the blood of another incarcerated person.⁶¹ Another person was placed in solitary confinement for refusing to clean up feces, and yet another was

⁵⁰ Griffin *supra* 47, at 7.

⁵¹ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

⁵² *Gamble v. Estelle*, 516 F.2d 937, 938 (5th Cir. 1975), *rev’d*, 429 U.S. 97 (1976).

⁵³ *Id.* at 939.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See, e.g., Fallis v. United States*, 263 F. Supp. 780, 783 (M.D. Pa. 1967) (“There is no question but that federal prisoners may be required to work in accordance with institution rules. This is not cruel or unusual punishment, double jeopardy or involuntary servitude. His failure to work has resulted in his being placed in administrative segregation. This is entirely consistent with the institution’s duty to maintain effective prison discipline”); *Tinsley v. Pittari*, 952 F. Supp. 384, 387 (N.D. Tex. 1996)

(“Although her request for relief from work had not been approved as of March 20, 1996, Tinsley refrained from going to work at that time. She was told to go to work. When she refused to do so, she was placed in a segregation unit”).

⁵⁷ Kevin “Rashid” Johnson, *Prison Labor is Modern Slavery. I’ve Been Sent to Solitary for Speaking Out*, THE GUARDIAN, Aug. 23, 2018, <https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Erin Hatton, “*Either You Do It or You’re Going to the Box*”: *Coerced Labor in Contemporary America* 45 CRITICAL SOCIOLOGY 907, 912 (2018) (examining labor coercion through analysis of 41 in-depth interviews with recently-released people about their labor in New York State prisons).

⁶¹ *Id.*

sent “to the box” for refusing to clean up the “snuff” that a correction officer would regularly spit on the floor.⁶²

During the 2020 COVID-19 pandemic, prisons used the threat of solitary confinement to compel labor across the country despite the danger of working in crowded environments that facilitate the rapid spread of a contagious and deadly virus. In New York, incarcerated people worked under the threat of solitary confinement to mass-produce hand sanitizer for less than a dollar per day for Corcraft, the state-owned corporation that uses prison labor to manufacture products.⁶³ Corcraft generates \$30-40 million in revenue annually in sales from other state agencies, but pays its nearly 2,000 incarcerated New Yorkers as little as \$0.26 cents per hour.⁶⁴ New York City’s current minimum wage is \$15 per hour, so each incarcerated New Yorker forced to work for Corcraft saves the state up to \$14.74 per hour.⁶⁵

Though incarcerated people were producing hand sanitizer to help stop the spread of COVID-19 in New York, they were not allowed to use the hand sanitizer they produced because hand sanitizer is considered contraband in prison.⁶⁶ Instead, protecting incarcerated people during the COVID-19 pandemic meant placing them in solitary confinement. Incarcerated people were placed in solitary confinement after showing symptoms of COVID-19 or testing positive, incentivizing incarcerated people to hide their symptoms and continue working if possible.⁶⁷ Incarcerated people were coerced to unnecessarily put their own lives at risk to produce hand sanitizer for people on the outside who were capable of social distancing in a way that incarcerated people were not.

In California, prison guards threatened to put incarcerated people into solitary confinement for refusing to work in the prison’s kitchen during the COVID-19 pandemic.⁶⁸ A family member of a person incarcerated at the Terminal Island prison, a federal prison in San Pedro, shared a note she received from her brother: “I like the kitchen but its [sic] tiring...I tried to quit but they said they will send me to the hole because no one wants to work and all the jail is infected.”⁶⁹ Even in situations of especially heightened danger, prisons continue using the threat of solitary confinement to compel incarcerated people to work for little to no pay, putting the lives of incarcerated people at risk to avoid paying minimum wage to outside workers with basic worker’s protections.

⁶² *Id.*

⁶³ Press Release, The Legal Aid Society, Legal Aid Condemns Governor Cuomo, Corcraft For Exploiting Incarcerated New Yorkers To Produce Cheap Hand Sanitizer (Mar. 9, 2020) *available at* <https://legalaidnyc.org/wp-content/uploads/2020/03/03-09-20-LAS-Condemns-Governor-Cuomo-Corcraft-For-Exploiting-Incarcerated-New-Yorkers-To-Produce-Cheap-Hand-Sanitizer.pdf> [hereinafter The Legal Aid Society, Corcraft Exploitation in Production of Hand Sanitizer] (“These individuals work for less than a dollar a day under threat of punishment—including solitary confinement—if they refuse. This is nothing less than slave labor and it must end. Albany must pay these individuals the minimum wage and lawmakers must legislate to eradicate forced labor across our state for good”).

⁶⁴ Press Release, The Legal Aid Society, FOIL Disclosure: Despite Millions In Revenue From NYS Agencies – Over \$340 Million Spanning Nine Fiscal years – Corecraft Continues To Pay Incarcerated New Yorkers Pennies On The Dollar (Mar. 12, 2020) *available at* <https://legalaidnyc.org/wp-content/uploads/2020/03/03-12-20-FOIL-Disclosure-Corcraft.pdf>.

⁶⁵ *Id.*

⁶⁶ The Legal Aid Society, Corcraft Exploitation in Production of Hand Sanitizer, *supra* note 63.

⁶⁷ Jean Casella and Katie Rose Quandt, Prisons Use of Solitary Confinement Explodes with the COVID-19 Pandemic, While Advocates Push for Alternatives, SOLITARY WATCH (April 10, 2020), <https://solitarywatch.org/2020/04/10/prisons-use-of-solitary-confinement-explodes-with-the-covid-19-pandemic-while-advocates-push-for-alternatives/>.

⁶⁸ David Rosenfeld & Haley Munguia, Families of Prisoners at Terminal Island Protest Outside Facility, MERCURY NEWS (May 3, 2020, 12:36pm), <https://www.mercurynews.com/2020/05/03/families-of-prisoners-at-terminal-island-protest-outside-facility/>.

⁶⁹ *Id.*

B. *Immigration Detention Centers' Use of Solitary Confinement to Compel Labor and Punish a Refusal to Work*

Immigration detention is the latest strategy in America's long history of placing people of color in confinement and using their imprisoned bodies to develop local economies.⁷⁰ While private corporations house less about eight percent of the nation's prison population, these for-profit corporations house over two-thirds of people in immigration detention.⁷¹ Private detention centers are paid a predetermined fee per detainee per night, meaning they have an incentive to keep costs per person as low as possible to make the most profit.⁷² In 2018, \$2.32 billion of federal contract revenue went to ten major contractors to federal agencies that are involved in running immigration and corrections operations.⁷³ Angela Davis has described immigration detention as the "fastest-growing area" of the prison-industrial complex, noting "some of the most repressive immigration laws have been drafted by private prison companies precisely because they see immigrant detention as the most profitable sector of the private prison industry."⁷⁴

The Thirteenth Amendment's carve-out that allows for prison labor does not apply to labor in immigration detention.⁷⁵ The Thirteenth Amendment prohibits slavery and indentured servitude, but carves out an exception for parties who have been duly convicted of committing a crime. Immigrant detainees are civil detainees who have usually not been convicted of committing any crime meaning the Thirteenth Amendment's carve-out that allows for prison labor does not apply to labor in immigration detention.⁷⁶ However, forced labor in immigration detention is still a reality both for those enrolled in ICE's "Voluntary Work Program" and those not formally enrolled, as people who refuse to work are punished using a range of tactics including solitary confinement.⁷⁷ People in the so-called Voluntary Work Program are usually paid one dollar per day and people forced to work outside of the program are paid nothing.⁷⁸ The people in immigration detention get paid mere cents per hour of work, saving immigration detention centers approximately \$40 million per year by not having to pay the \$7.25 minimum wage to outside workers.⁷⁹

⁷⁰ Southern Poverty Law Center, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, ADELANTE ALABAMA WORKER CENTER, SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 5 (2017), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf (drawing a parallel between the South's history of using chain gangs and "leasing" prisoners to companies to perform labor and the contemporary immigration detention system in which immigrants are commodified and denied access to legal rights).

⁷¹ Clyde Haberman, *For Private Prisons, Detaining Immigrants is Big Business*, N.Y. TIMES (Oct. 1, 2018) <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html>.

⁷² History of Racial Injustice: For Profit Detention Centers, EQUAL J. INITIATIVE, <https://eji.org/history-racial-injustice-for-profit-detention-centers>.

⁷³ ALAN ZIBEL FOR PUBLIC CITIZEN, DETAINED FOR PROFIT: SPENDING SURGES UNDER U.S. IMMIGRATION CRACKDOWN 1 (2018) available at <https://www.citizen.org/article/detained-for-profit-spending-surges-under-u-s-immigration-crackdown/>. Note that the \$2.32 billion number is not exclusive to contracts for immigration detention, but the majority of the contracts involved immigration detention.

⁷⁴ See Interview by Amy Goodman and Juan González with Angela Davis, DEMOCRACY NOW, March 6, 2014, https://www.democracynow.org/2014/3/6/part_2_angela_davis_on_solitary [hereinafter Angela Davis Interview 2014].

⁷⁵ See U.S. CONST. Amend. XIII, § 1.

⁷⁶ See Victoria Law, Opinion, *End Forced Labor in Immigration Detention*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/forced-labor-immigrants.html>.

⁷⁷ *Id.*

⁷⁸ See U.S. IMMIGR. & CUSTOMS ENF'T U.S., 5.8 VOLUNTARY WORK PROGRAM, available at <https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf>.

⁷⁹ Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html>.

Though the practice of solitary confinement originated in adult prisons, solitary confinement, as a mechanism of power and control, is versatile in its applications.⁸⁰ The immigration detention system, along with other systems,⁸¹ has adopted the widespread use of solitary confinement.⁸² One of the ways immigration detention centers use the threat of solitary confinement is to compel immigrant detainees to perform labor.⁸³

The threat of solitary confinement is used to coerce people to work, regardless of whether or not they consented in any way to have jobs. For example, eight people detained at the Aurora Detention Facility, operated by the GEO Group have filed declarations in a federal case explaining that they were all forced to clean the housing units for no pay and under the threat of solitary confinement.⁸⁴ Alejandro Hernandez Torres, one of the detained people, explained his experience:

When I first arrived at the Aurora Detention Facility, I did not have a \$1/day job in the voluntary work program. During that time, I had to work for no pay doing cleaning work in the common and private living areas...None of us got paid anything for the work we did on the cleaning crews. If anyone refused to do this work, they would be put in segregation, or “the hole.” I know this because the guards told us that if anyone didn’t do the work, they’d be put in segregation and because during the time I was detained, I witnessed at least 10 people get put in segregation for refusing to do the pod cleaning work.⁸⁵

Guards at immigration detention centers use the threat of solitary confinement to threaten immigrants to do work to maintain the detention center, often for no pay or semblance of consent.

The severe psychological and physical harms caused by solitary confinement are especially pronounced for people with pre-existing mental health issues or with past experience

⁸⁰ See MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 205 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1997) (describing the Panopticon as “polyvalent in its applications,” noting that it “is a type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organization, of disposition of centres and channels of power, of definition of the instruments and modes of intervention of power, which can be implemented in hospitals, workshops, schools, and prisons”).

⁸¹ For examples of how other systems are using solitary confinement see Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1 (2015) (explaining the widespread practice of placing incarcerated juveniles in solitary confinement); Heather Vogell, *Violent and Legal: The Shocking Ways School Children Are Being Pinned Down, Isolated Against Their Will*, PROPUBLICA (June 19, 2014) (describing how children in public schools experienced restraint and seclusion in “scream rooms” at least 267,000 times in a single school year).

⁸² See e.g., Spencer Woodman, Maryam Saleh, Hannah Rappleye & Karrie Kehoe, *Solitary Voices: Thousands of Immigrants Suffer in Solitary Confinement in ICE Detention*, THE INTERCEPT (May 20, 2019), <https://theintercept.com/2019/05/21/ice-solitary-confinement-immigration-detention/> (describing how ICE uses solitary confinement as a go-to tool for immigrant detainees, rather than a last resort); Antonio Cucho & Karrie Kehoe, *Explore: How US Immigration Authorities Use Solitary Confinement*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (May 20, 2019), <https://www.icij.org/investigations/solitary-voices/how-us-immigration-authorities-use-solitary-confinement/> (an interactive visual tool providing information on more than 8,400 records describing the placement of immigrant detainees in solitary confinement in facilities operated by ICE).

⁸³ See *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 911 (10th Cir.), cert. denied, 139 S. Ct. 143, 202 (2018). Another method of compelling labor is to charge detained people high rates for essential items such as food, hygiene products, and phone access. High prices for essential items make working in detention a non-choice. In addition, detention center officials can compel labor by threatening the initiation of criminal proceedings, loss of commissary, or locking down the unit.

⁸⁴ *Id.*

⁸⁵ Declaration of Alejandro Hernandez Torres at 1 *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 911 (10th Cir.), cert. denied, 139 S. Ct. 143, 202 (2018).

of trauma.⁸⁶ People in immigration detention are particularly likely to have survived persecution, torture, and abuse in their countries of origin and further trauma while journeying to America, meaning that the already-severe harms of solitary confinement are exacerbated for immigrant detainees.⁸⁷ The threat of solitary confinement can hold added weight for immigrants who carry recent memories of torture.⁸⁸

III. THE USE OF SOLITARY CONFINEMENT TO CHILL ORGANIZED DISSENT REGARDING FORCED LABOR

When incarcerated people organize to resist a system that uses their bodies for savings and profits, prison officials turn to solitary confinement as punishment to silence them and to prevent further dissent that might threaten the institution's profit model. In the fall of 2018, incarcerated people across the U.S. organized a national prison strike that received international attention. From August 21, 2018 to September 9, 2018, incarcerated people in prisons and immigration detention centers across the United States organized a strike to advocate for "the end of modern day slavery," among other goals including: "humane living conditions, access to rehabilitation, [and] sentencing reform."⁸⁹

Even before the strike began, thousands of incarcerated people were pre-emptively placed in solitary confinement or transferred to different prisons.⁹⁰ According to a spokesperson for the Incarcerated Workers Organizing Committee, an organization that supported the prison strike, leaders of the strike were "picked off, one by one, and thrown into solitary confinement in anticipation of the strike that was coming."⁹¹ Over a month before the strike was set to start, Kevin "Rashid" Johnson, an organizer of the strike, was moved to a different prison and placed in a cell on death row, despite never having been sentenced to the death penalty.⁹² Johnson hypothesized, "there can be only one reason they have put me here - to shut me up and prevent me fraternizing with other prisoners as they fear I will radicalise them and encourage them to resist their oppression."⁹³ Johnson's transfer and placement in a cell on death row served as a warning to other incarcerated people: resisting prison labor will restrict your freedom even more severely.

During the strike, incarcerated people across the nation refused to let companies profit from their presence in prisons and to let governments save money by using the labor of incarcerated people.⁹⁴

⁸⁶ MIKE CORRANDI, KRISTINE HUSKEY, CHRISTY FJIO ET AL., PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE U.S. DETENTION SYSTEM 1, 32 (2013), <https://phr.org/wp-content/uploads/2013/04/Solitary-Confinement-April-2013-full.pdf>.

⁸⁷ *Id.*

⁸⁸ Carrying past trauma is, of course, not unique to immigrants. Family violence, gender-based violence, racial violence, extreme poverty, and a range of other triggers can result in trauma, regardless of a person's immigration status. However, I emphasize the unique trauma of those in immigration detention as they are usually asylum-seekers fleeing persecution in their homelands and are likely to have recent memories of violence at the hands of the state.

⁸⁹ Press Release, National Prison Strike August 21st-September 9th 2018, Jailhouse Lawyers Speak (@JailLawSpeaks), TWITTER (April 24, 2018, 6:28 AM), <https://twitter.com/JailLawSpeak/status/988771668670799872>; See Ed Pilkington, *Major Prison Strike Spreads Across US and Canada as Inmates Refuse Food*, THE GUARDIAN (Aug. 23, 2018), <https://www.theguardian.com/us-news/2018/aug/23/prison-strike-us-canada-forced-labor-protest-activism>.

⁹⁰ Press Release, National Lawyers Guild, De-NJ NLG Prisoners' Legal Advocacy Network (PLAN) Mounts Legal Responses to Widespread Reports of Prisoner Abuses in Aftermath of the 2018 National Prison Strike (Sep. 20, 2018), <https://www.nlg.org/plan-prison-strike-response-2018/>.

⁹¹ Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, THE GUARDIAN (Aug 31, 2018), <https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation>.

⁹² Johnson, *supra* note 57.

⁹³ *Id.*

⁹⁴ *Id.*

Incarcerated people engaged in strategies like refusing to work and boycotting the commissary.⁹⁵ However, these incarcerated people experienced retaliation, often in the form of solitary confinement.⁹⁶ Prior to and during the strike, solitary confinement was used as a strategy to deter other incarcerated people from striking, allowing prisons to protect not only a sense of order, but also their financial model—one that relies on incarcerated workers.⁹⁷

The use of solitary confinement to chill dissent about labor practices and other prison conditions was not unique to the 2018 prison strike. In October 2019, the vast majority of incarcerated people at Clallam Bay Corrections Center (CBCC) in Washington State refused to attend breakfast and other activities to protest the “slave wages” they received to pay for “shoddy yet expensive products and services,” among other issues.⁹⁸ The wages they received were insufficient to pay the skyrocketing costs of essential items behind bars, such as hygiene products, food items, and telephone calls. After locking down the entire prison for a day, CBCC staff dressed in riot gear, woke up a number of the men who had skipped breakfast, shackled them, and loaded them onto a bus for a sixteen-hour trip to Washington State Penitentiary (WSP) in Walla Walla.⁹⁹ Upon arriving at WSP, at least fifteen of the men were thrown into solitary confinement for weeks without any explanation.¹⁰⁰ None of the men placed in solitary confinement had engaged in, threatened, or encouraged any acts of violence at any point.¹⁰¹ The transfer of a subset of the protesting men to a separate facility was likely an attempt by the prison officials to deter any further protest of the labor conditions at the original prison. And, by placing the transferred men into solitary confinement at a different facility, prison officials punished the transferred men, likely hoping to deter them from protesting at any future facilities.

The use of solitary confinement to prevent and punish organized dissent extends to immigration detention centers. In Lumpkin, Georgia, for example, immigrants are detained at the Stewart Detention Center, a private detention center run by a billion-dollar prison company called “CoreCivic.”¹⁰² There, immigrants are forced to work, essentially for free, to purchase basic necessities including food, phone cards, and hygiene products (including toothpaste, toilet paper, and soap).¹⁰³ Immigrants who “refuse to work, organize a work stoppage, or participate in a work stoppage” are placed in solitary confinement.¹⁰⁴ In November 2017, officers at Stewart Detention Center placed Shoaib Ahmed, a 24-year-old asylum-seeker from Bangladesh, in solitary confinement for organizing a work stoppage after he was not paid for his work. Officers at Stewart held Ahmed in solitary confinement after overhearing him say “no work tomorrow.”¹⁰⁵ Ahmed recalled feeling pain in his head while he was in solitary confinement and remembered wanting to loudly call out “Release me. Please take me to some open site,” even though he knew that raising his voice was an infraction that would extend his time in isolation.¹⁰⁶ “Sometimes I

⁹⁵ *Id.*

⁹⁶ Lartey, *supra* note 91.

⁹⁷ *Id.*

⁹⁸ Complaint for Injunctive and Declaratory Relief at 2, *Augustine v. Washington Department of Corrections* (Sup. Ct. of Wash., County of Thurston) (2019).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 3.

¹⁰² *See generally* Complaint for Declaratory & Injunctive Damages, *Wilhen v. Corecivic, Inc.*, 2018 WL 1836209 (M.D.Ga.) [hereinafter “Complaint for Damages in *Wilhen v. Corecivic, Inc.*”].

¹⁰³ *Id.* at 14, citing U.S. Dep’t of Homeland Sec., Office of the Inspector Gen., OIG-18-32, Concerns about ICE Detainee Treatment at Detention Facilities 7 (2017) *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.*

¹⁰⁶ Spencer Woodman, *Private Prison Continues to Send Ice Detainees to Solitary Confinement for Refusing Voluntary Labor*, THE INTERCEPT (Jan. 11, 2018), <https://theintercept.com/2018/01/11/ice-detention-solitary-confinement/>.

think the segregation will kill me,” he recalled.¹⁰⁷ By threatening and implementing solitary confinement for those who refuse to work, immigration detention facilities ensure an available labor pool of detained immigrants who will work nearly for free, allowing private detention facilities like Stewart to operate at enormous profits.¹⁰⁸

In addition, in February 2018, over one hundred and twenty immigrant detainees at the Northwest Detention Center, run by the private prison company “GEO Group,” in Tacoma, Washington, engaged in a hunger strike to protest their conditions of confinement. Their complaints included “the wage of one dollar per day paid to detainees for cooking, cleaning, and otherwise maintaining the center,” the food they received.¹⁰⁹ In response, guards used physical violence against the detainees and placed them in solitary confinement.¹¹⁰ In immigration detention centers (and in other spaces of confinement) solitary confinement is a capitalist tool for corporations to profit from the cruel treatment of vulnerable groups.

IV. USING FORCED LABOR TO CONSTRUCT THE INFRASTRUCTURE OF SOLITARY CONFINEMENT

In state and federal prisons, the forced labor of incarcerated people is used to construct the infrastructure of incarcerated people’s own oppression. For example, the solitary confinement cells that are used to compel incarcerated people to perform labor are furnished by items themselves constructed using the labor of incarcerated people. The Federal Prison Industries (trade name: UNICOR) is a government corporation that sells services and goods produced by incarcerated people.¹¹¹ Some of the items available for purchase from UNICOR include “segregation beds” and “segregation desks” for use in solitary confinement.¹¹² Available on their website is a “Single Segregation Bed,” with a description that states “restraint loops available upon request.”¹¹³ Prison labor, then, is a double evil: incarcerated people are not only coerced into providing no-wage or low-wage labor with the threat of solitary confinement, but their labor is also used to manufacture spaces and objects that do violence to them by destroying their mental and physical well-being.

In addition, double segregation beds, triple segregation beds, and ladders to connect the bunked segregation beds are also available on UNICOR’s website.¹¹⁴ These bunked beds for use in solitary confinement cells feed the deadly trend of prisons placing two or even three people together in single

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Plaintiff’s Complaint for Injunctive & Declaratory Relief at 1–2, *Flores v. United States Immigration & Customs Enforcement*, No. C18-5139 BHS-DWC, 2018 WL 3427814 (W.D. Wash. July 16, 2018), <https://www.aclu-wa.org/file/102580/download?token=dO6wVdRy>.

¹¹⁰ *Id.* at 12.

¹¹¹ About Us, UNICOR, <https://www.unicor.gov/index.aspx> (last visited May 20, 2020).

¹¹² Single Segregation Bed 27 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1248> (last visited May 20, 2020); Single Segregation Bed 30 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1249>; Single Segregation Bed, 27 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1248> (last visited May 20, 2020); Segregation Desk, Square Tube, UNICOR, <https://www.unicor.gov/Product.aspx?idproduct=1256> (last visited May 20, 2020).

¹¹³ Single Segregation Bed 27 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1248> (last visited May 20, 2020); Single Segregation Bed 30 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1249> (last visited May 20, 2020); Single Segregation Bed, 27 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1248> (last visited May 20, 2020).

¹¹⁴ Double Segregation Bed 30 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1252> (last visited May 20, 2020); Double Segregation Bed, 32 x 80, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1253> (last visited May 20, 2020); Double Segregation Bed, 36 x 80, <https://www.unicor.gov/Product.aspx?idProduct=1254> (last visited May 20, 2020); Triple Segregation Bed, 30w, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=3872> (last visited May 20, 2020); Triple Segregation Bed, 27”W, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=3870> (last visited May 20, 2020); Bunk Bed Ladder, 15 x 48, UNICOR, <https://www.unicor.gov/Product.aspx?idProduct=1255> (last visited May 20, 2020).

solitary confinement cells as a result of overcrowding.¹¹⁵ Over eighty percent of people held in solitary confinement in federal prison share their parking lot-sized cells with cellmates, sleeping on bunked beds that were almost certainly constructed by other incarcerated people.¹¹⁶ Ironically, when prison officials use the threat of solitary confinement to compel incarcerated people to work, they are compelling incarcerated people to physically construct the comfortless solitary confinement cells at the very center of their threats. The labor of incarcerated people is used to construct innovations that make life behind bars even more dangerous and unbearable.

Incarcerated people's labor is used to construct products that are used at nearly every stage of the criminal law system. For example, Texas Correctional Industries (TCI), a for-profit prison industries program overseen by the Texas Department of Criminal Justice, uses the labor of incarcerated people to make a range of products, including those used for law enforcement purposes, in courtrooms, and in prisons. The products constructed for law enforcement include: officer duty belts, embroidery for sheriff's badges, gas can holsters, and thrust belts. The products constructed for courtrooms include: custom made courtrooms, judges chairs, and even a "constitutional chair."¹¹⁷ The products constructed for prisons include bunks, desks, and floor-mounted stools for use in solitary confinement and elsewhere.¹¹⁸ Incarcerated people working for TCI manufacture products, typically without pay, that are used to further incarcerated peoples' own oppression at each stage of the criminal law system. In addition to manufacturing products to further their own oppression, incarcerated people are also made to produce products whose enjoyment is forbidden to them while they are in confinement. An entire category of TCI's product line is titled "Parks & Outdoors," and includes items like campfire rings and grills that a person might enjoy on a picnic with family.¹¹⁹ The labor of incarcerated people is used to reproduce the very systems that oppress them and also to build a world that these oppressive systems are preventing them from enjoying.

In immigration detention centers, too, forced labor is used to construct and reconstruct solitary confinement through the maintenance of solitary confinement cells. Immigrants detained in CoreCivic's facilities, for example, have reported having to clean intake areas and solitary confinement units as part of the "Voluntary Work Program."¹²⁰ Part of the profitability of CoreCivic's immigration detention enterprise comes directly from threatening immigrants with solitary confinement to force them to clean, maintain, and operate those very same solitary confinement cells without meaningful compensation.¹²¹

And, more generally, according to the Detainee Orientation Handbook that CoreCivic claims to provide to all immigrants at Stewart Detention Center in Lumpkin, Georgia, the work assignments that may be available through the "Voluntary Work Program" include titles like: administration porter, hallway porter, commissary, night floor crew, pod crew, and shower porter.¹²² People held in immigration detention are forced, with the threat of solitary, to contribute to nearly every aspect of maintaining the infrastructure of the detention facility. Immigrants' labor in detention is used to further the very violence and oppression that is used against them.

¹¹⁵ Joseph Shapiro, *Doubling Up Prisoners in 'Solitary' Creates Deadly Consequences*, NPR (Mar. 24, 2016), <https://www.npr.org/2016/03/24/470824303/doubling-up-prisoners-in-solitary-creates-deadly-consequences>.

¹¹⁶ *Id.*

¹¹⁷ About Us, Texas Correctional Industries, <http://www.tci.tdcj.texas.gov/info/about/default.aspx> (last visited May 20, 2020).

¹¹⁸ *Id.*

¹¹⁹ Campfire Ring w/ Stove, Texas Correctional Industries, <http://www.tci.tdcj.texas.gov/products/metal/park/campfireringwstove.aspx> (last visited May 20, 2020).

¹²⁰ Complaint for Damages in *Wilhen v. Corecivic, Inc.*, *supra* note 102, at 10.

¹²¹ *Id.* at 8.

¹²² *Id.* at 9–10.

V. CREATIVE RESISTANCE TO SOLITARY CONFINEMENT AND PRISON LABOR

A. *A Need to Resist Beyond the Courtroom*

The same power imbalances that have led to an expansion of the carceral state also plague court systems in the United States. These historical and contemporary power imbalances make courts imperfect venues for challenging practices like solitary confinement and forced labor. Incarcerated people's lack of resources and political power places them at a severe disadvantage in a court system that is bound by laws that further restrict the advocacy power of incarcerated people.

A member of Jailhouse Lawyers Speak (JLS), a network of incarcerated self-educated legal advocates, pointed to the 1996 Prison Litigation Reform Act (PLRA) as a major obstacle to seeking redress.¹²³ The JLS member described how the PLRA created a process that was “taxing” for incarcerated people and filled with loopholes that made it nearly impossible for incarcerated people to file and win lawsuits in federal courts.¹²⁴ The PLRA requires incarcerated people to file a grievance with the prison they are housed within and to pursue administrative appeals before bringing the issue to court.¹²⁵ It also requires them to pay burdensome court filing fees.¹²⁶ The passage of the PLRA caused a drastic drop in the number of civil rights-related cases brought by incarcerated people and also increased the difficulty of winning the few cases that incarcerated people managed to bring.

In addition, labor protections under the Fair Labor Standards Act of 1938 (FLSA) do not extend to people incarcerated in prison or immigration detention.¹²⁷ The FLSA provides federal minimum wage guarantees to individual “employees” who work for “employers,” but these guarantees do not extend to incarcerated people, making it difficult to challenge forced labor practices.¹²⁸

Nevertheless, using litigation to challenge solitary confinement, forced labor, and the intersection between the two remains an important strategy in protecting and expanding the rights of incarcerated people and has achieved significant successes.¹²⁹ In fact, a case's docket often contains filings such as complaints and accompanying affidavits, amicus briefs, and other documents that reveal—sometimes for the first time—practices behind bars that are typically hidden from view.

Litigation should be supplemented with other advocacy tactics that directly engage with communities and press community members to develop a habit of resisting oppressive practices behind bars. The stories and insights about oppressive practices that are meticulously documented and bravely revealed in the litigation process should be retold in ways that are accessible to the public without doing harm to the people still behind bars.

¹²³ Brian Sonenstein, *At Great Risk, Prisoners Seize Reform Narrative and Engage in National Strike*, SHADOW PROOF (Aug. 20, 2018), <https://shadowproof.com/2018/08/20/great-risk-prisoners-seize-reform-narrative-engage-national-strike/>.

¹²⁴ *Id.* (“You have to go through all these different steps, all these different mechanisms. By the time you hit the court, a lot of times the issue is moot. Sometimes you can’t even get the issue filed because you failed to file a simple grievance that the prison considered relevant. There’s so many loopholes. It’s taxing, I mean, they want to charge you for everything, and if you don’t have the money for it, sometimes you got to make an appeal to the court. An appeal to the court may not go through. So you’ve lost your lawsuit altogether, and it’s not because your lawsuit doesn’t have merit”).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Seth Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1287, 1310 (2017).

¹²⁸ *Id.*

¹²⁹ Organizations that have been successful at advancing the rights of incarcerated people include: the American Civil Liberty Union’s (ACLU) National Prison Project, the ACLU’s Immigrants Rights Project, the Southern Poverty Law Center, the Prison Law Office, the Southern Center for Human Rights, and several others. In addition, jailhouse lawyers work tirelessly behind bars to file the required grievances and to advocate for their own rights and the rights of those around them.

B. *Activist and Artistic Resistance to Oppressive Carceral Practices*

Creative resistance to solitary confinement and prison labor requires making visible the oppressive structures and practices that are deliberately hidden from the public's view, and amplifying the voices of those who are constrained by these structures and practices. Using a strategy of visibility is an acknowledgement that exposing conditions and spaces of confinement is a means of resistance, since prison's power lies in "its ability to remove people from view and access, thereby subjecting them to untold and untellable forms of power."¹³⁰ Prisons, and solitary confinement cells in particular, serve as communication barriers as well as physical barriers.¹³¹ Incarcerated people are ostracized from society and can be subject to additional punishment, including solitary confinement, for speaking out. People on the outside have more freedom to disseminate messages about prison practices using methods inaccessible to incarcerated people and without any immediate fear of punishment as severe as solitary confinement.¹³²

Creative resistance can occur both within and beyond the walls of confinement, always working to dissolve the boundary between the "inside" and "outside." Creative resistance from within solitary confinement has taken the form of writings and artwork. For example, from 1964 to 1970, George Jackson¹³³ wrote letters, large from solitary confinement, that called global attention to racist violence in U.S. prisons. The Real Costs of Prisons Project publishes writings, comic books, and other artwork created by people directly experiencing the harms of mass incarceration and solitary confinement.¹³⁴ In addition, currently incarcerated and formerly incarcerated people have exhibited drawings exposing the architectural and emotional dimensions of solitary confinement.¹³⁵ Jesse Krimes, who started creating artwork while held in solitary confinement in federal prison, spent three years behind bars transferring images from the *New York Times* onto prison sheets using hair gel and spoons and drawing narrative

¹³⁰ DAN BERGER, *CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA* 94 (2014).

¹³¹ Jonathan Jackson Jr., *Foreword* to GEORGE JACKSON, *SOLEDAD: THE PRISON LETTERS OF GEORGE JACKSON* at xiii, xix (1994) ("The efficacy of political incarceration in the United States cannot be denied. Prison serves not only as a physical barrier, but a communication restraint. Prisoners are completely ostracized from society, with little or no chance to break through").

¹³² Some people on the outside may fear their own persecution or incarceration as a result of speaking out against oppressive prison practices. In particular, people of color who are more often the subject of brutal police violence might fear speaking out. Those fears are not illegitimate. However, people on the outside are protected by visibility and community support in ways that incarcerated people are not.

¹³³ George Jackson received an indeterminate sentence of one year to life at the age of eighteen after being accused of stealing \$70 from a gas station in Los Angeles.

¹³⁴ See, e.g., Joseph Aragon, *California's S.H.U.s., THE REAL COST OF PRISONS* (Apr. 29, 2010), http://www.realcostofprisons.org/writing/aragon_shus.html ("I am 52 years old and continue to suffer the punitive isolation I was first introduced to at 35 within the walls of California's S.H.U. units...I spent the better part of 2008 and part of 2009 in a cell without any glass in a 2 foot by 4 foot window frame. I had to use the blanket I was issued as a window covering. I slept with all my clothes in a bare mattress so I could have two sheets to cover myself with. I also lived with huge cockroaches and mice and had to secure my food items by hanging them in a t-shirt from the ceiling vent to keep bugs and rodents out. I've had to drink water with toxic levels of arsenic and selenium well above federal standards. If this is not torture, I don't know what is").

¹³⁵ See, e.g., *Art Exhibit Depicts Inmates' Isolation of Solitary Confinement - CBS Chicago*, YOUTUBE (May 15, 2020), https://www.youtube.com/watch?v=tTW_Ig85hAw (showing artist Brian Nelson, who was formerly incarcerated, displaying his drawings alongside the work of other people with past or current experience being held in solitary confinement).

elements onto them.¹³⁶ Now released from prison, Krimes has publicly exhibited his art and has co-founded a fellowship that supports incarcerated artists in creating original works.¹³⁷

When still-incarcerated artists' work is exhibited on the outside, exhibitors should ensure that artists receive some benefit, whether in the form of support to their families or in a fund for the artist. In addition, activists should be careful not to romanticize the concept of art created behind bars in a way that focuses only on the resilience and creativity of incarcerated people while ignoring the brutality of the carceral systems they remain trapped within.

Another type of creative resistance takes the form of collaborations between incarcerated people and people on the outside. For example, "Photo Requests from Solitary" is a participatory project started by the grassroots campaign Tamms Year Ten¹³⁸ in 2009 that invites people held in solitary confinement to request photos of anything (real or imagined) and works with volunteers on the outside to fulfill those image requests.¹³⁹ This project documents the "hopes, memories, and interests of people who live in extreme isolation," while also providing those held in solitary with a connection to the outside.¹⁴⁰ Hundreds of photo requests have been fulfilled and displayed in this ongoing project.¹⁴¹ "Photo Requests from Solitary" provides people in solitary confinement with a visualization of the outside world, while also prompting people in the outside world to consider the dehumanizing and isolating experience of solitary confinement. The participatory nature of the project serves as an invitation for viewers to engage with people in solitary confinement rather than to continue looking away or acting as passive observers.

The 11-year collaboration between an artist and a person in solitary confinement, *The House that Herman Built*, is another example of a creative collaboration challenging solitary confinement.¹⁴² *Herman's House*, a documentary about the collaboration, presented conversations between Herman Joshua Wallace, who had been held in solitary confinement for over thirty years, and Jackie Sumell, an artist on the outside.¹⁴³ In the film, Wallace constructed his dream house from his imagination and Sumell constructed a model of it for Wallace using real materials.¹⁴⁴ The model of the house has been exhibited in at least twelve galleries in five countries.¹⁴⁵ The film and the art exhibition prompt viewers to confront solitary confinement's ability to strip people of a lifetime's worth of actualizing their dreams.¹⁴⁶

¹³⁶ Jesse Krimes, *Apokaluptein:16389067*, <https://www.jessekrimes.com/apokaluptein16389067> (last visited May 15, 2020).

¹³⁷ Right of Return: USA Fellowship, <https://www.rightofreturnusa.com/> (last visited May 15, 2020).

¹³⁸ Tamms Year Ten is a grassroots campaign to close Tamms Correctional Center, a notorious supermax prison in Illinois.

¹³⁹ Information, PHOTO REQUESTS FROM SOLITARY, <http://photorequestsfromsolitary.org/information/> (last visited May 15, 2020).

¹⁴⁰ *Id.*

¹⁴¹ Photo Requests from Solitary, PHOTOREQUESTSFROMSOLITARY, <http://photorequestsfromsolitary.org>. At the time of writing this piece, some of the requests that were waiting to be fulfilled included: "me strapped to train tracks that represent solitary, with people ignoring me;" "police bowing down to revolutionary activists;" incarcerated black man with his mind bound in shackles;" "person deprived by solitary of sight, sound, and speech;" "the sun, moon, and stars around aviator shades;" "people voting for unity, equality, and justice."

¹⁴² HERMAN'S HOUSE THE FILM (Storyhouse entertainment 2012), <https://hermanshousethefilm.com/the-film/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Stephen Holden, *Movie Review: Dreams From His Cell*, N.Y. TIMES (Apr. 18, 2013), <https://www.nytimes.com/2013/04/19/movies/hermans-house-directed-by-angad-bhalla.html>.

¹⁴⁶ While Herman's House brings awareness to the issue of solitary confinement, the documentary can be criticized for focusing on the artist and her investment in actualizing a version of the project for her own sake, rather than listening to the needs and desires of Herman Joshua Wallace. At times, the artist even asks Wallace to comfort her when the project does not go according to plan. Wallace notes the power dynamic in a phone recording in the documentary, "Everybody has an agenda. Jackie has an agenda. Jackie has a career. And one can very well say the same thing about me. That I am using Jackie in order to highlight my own struggle, in order to highlight it to the point where it would serve to help my freedom. But let's not take away the relationship that Jackie and I have built

Outside the walls of confinement, people can use art as an activist tool to bring visibility to practices behind bars. Artistic representations of the structure of solitary confinement can allow individuals to imagine the structure of solitary confinement and question the use of solitary confinement as a response in any situation. Deconstructing the structure of practices like solitary confinement involves identifying and isolating the elements of these inhumane practices. Breaking down oppressive structures into their most basic parts reveals the cruelty and inhumanity that lies at the system's core. Representing these oppressive elements artistically can be a powerful tool for activists hoping to cultivate empathy and mobilize action around radically re-envisioning the carceral state.

For example, artist Cameron Rowland has exhibited installations featuring objects built using the labor of incarcerated people.¹⁴⁷ His work traces the racial and economic path of everyday objects, exposing the ways that the criminal law system reproduces itself using the labor of those incarcerated within it.¹⁴⁸ Rowland's 2016 solo exhibition was called *91020000* and featured objects that Rowland had purchased from Corcraft, which uses prison labor to manufacture commodities that are then sold to government entities and certain non-profits.¹⁴⁹ The exhibition contained pieces like *New York State Unified Court System*, a collection of benches built by people incarcerated at Green Haven Correctional Facility.¹⁵⁰ Rowland also exhibited *Leveler (Extension) Rings for Manhole Openings* featuring manhole leveler rings cast by incarcerated people at the Elmira Correctional Facility in New York.¹⁵¹ Rowland's work places the labor of incarcerated people directly in galleries, allowing viewers to confront otherwise unnoticed commodities made behind bars and to calculate the amount the government saves by using the labor of incarcerated people to manufacture those commodities.

My own art represents solitary confinement using abstract forms, inviting viewers to grapple with the spatial, temporal, and emotional elements of solitary confinement.¹⁵² When the instruments and structures of carceral oppression are laid bare and displayed on the "outside," the juxtaposition between these mechanisms of control and one's ordinary life can be jarring. Art, and activism generally, has the power to make instruments of evil inescapable to the conscience by forcing the public to serve as spectators to oppressive instruments that define the daily lives of thousands of people. Art's power lies in its ability to be so accessible that it can prompt even young children to question the institutions and practices that do violence to communities, and imagine what a world without these practices might look like.

Artists and activists must remember, however, that it is impossible for people who have never been locked in a solitary confinement cell to fully understand the daily realities of experiencing solitary confinement.¹⁵³ The 2017 project "Inside the Box" was a traveling replica of a solitary cell that was

during the process of this." Incarcerated Nation Network INC Media, *Incarcerated Nation : Herman's House*, YOUTUBE (May 5, 2017), https://www.youtube.com/watch?v=_WAZjz38SBg.

¹⁴⁷ See Camron Rowland, *Essex Street*, ARTIST BLOG (last visited May 15, 2020), <https://www.essexstreet.biz/artist/rowland>.

¹⁴⁸ Camron Rowland, *New York State Unified Court System*, MUSEUM OF MODERN ART (2016), https://www.moma.org/collection/works/203677?sov_referrer=artist&artist_id=48471&page=1.

¹⁴⁹ Camron Rowland, *Cameron Rowland 912020000*, THE BROOKLYN RAIL (Mar. 2016), <https://brooklynrail.org/2016/03/artseen/cameron-rowland-91020000>.

¹⁵⁰ Rowland *supra* note 148.

¹⁵¹ Camron Rowland, *Leveler (Extension) Rings for Manhole Openings*, MUSEUM OF MODERN ART (2016), <https://www.moma.org/collection/works/203676>.

¹⁵² My work includes the art attached to this piece, *The Margins Come to Center*, which is an abstract representation of the size of a solitary confinement cell. In addition, my project *I feel human when...* is a participatory piece that collects and compiles voice recordings of people finishing the phrase "I feel human when..." to demonstrate the way we deprive people in solitary confinement of the very sensations, experiences, and memories that make people feel human. Another piece *Twenty Three Hours: A Rotation* features, in part, apple stems affixed to canvas and prompts conversation about the arbitrary reasons a person can be sent to solitary confinement, including the simple act of eating the seeds at the core of an apple. These pieces and others have been displayed in community spaces in Austin, Texas.

¹⁵³ See Shaylor *supra* note 15 (describing the impossibility of understanding the experience of solitary confinement).

displayed in Connecticut.¹⁵⁴ The first listed aim of the project was to “provide the public with opportunities to experience what isolated confinement is like.”¹⁵⁵ While the project was a powerful interactive experience for viewers, activists should be careful to avoid purporting to simulate the experience of solitary confinement (or other conditions of confinement) because it is precisely the inescapability and uncertainty of carceral conditions that makes them so violent and destructive.

Still, art can serve as a powerful tool for activists to bring hidden structures out of the shadows and into the light for public scrutiny. To further center the voices of incarcerated people, artists can pair their art with more immediate advocacy by organizing actions like call-in campaigns to push prisons and detention centers to release incarcerated people from solitary confinement.¹⁵⁶

Furthermore, activists must be vigilant in ensuring that artistic displays do not contribute to the very same prison-industrial complex that confines and exploits communities of color. Art institutions are not apolitical spaces. In a 2019 open letter to the Museum of Modern Art (MoMA), artists, academics, and curators called on the museum to sever its tight connections to mass incarceration.¹⁵⁷ They noted “MoMA Board member and CEO of BlackRock, Larry Fink, is the 2nd largest shareholder of prison companies, GEO Group and Core Civic,” emphasizing that “prison companies are a part of the racist state-sanctioned carceral system of the U.S., which has made the country the largest jailer in the world, placing a massively disproportionate number of black and brown bodies behind bars.”¹⁵⁸ Artists should recognize the political nature of art creation and display and be thoughtful about where they display their art. Grassroots displays of activist art in community spaces can facilitate important conversations about carceral practices without inadvertently contributing to the carceral state.

CONCLUSION

Incarcerated people’s experiences with carceral practices such as prison labor and solitary confinement are often buried in legal filings that are inaccessible to the community at large. Prisons and immigration detention centers force labor by threatening and administering punishment in the form of solitary confinement. If an incarcerated person refuses to work or attempts to mobilize others to stop working, that person is placed in a solitary confinement cell. Solitary confinement cells are hidden deeply within already-hidden carceral spaces. Once in solitary confinement, speaking out can be logistically difficult or even deadly. However, people who live beyond prison walls can use art and other creative tactics as methods of resistance. Activists can bear witness to the stories of incarcerated people and expose the horrors of practices that we all silently condone when we do not resist.

The project of liberation does not end with the dismantling of solitary confinement or forced labor behind bars. As Angela Davis has observed, “one can look at solitary confinement as a microcosm of the whole system, solitary confinement within a prison. The prison is a solitary confinement within a society.”¹⁵⁹ So, while solitary confinement and forced labor must be abolished, the destructive and pervasive nature of these practices also serves as a reason to imagine a world without carceral punishment and without carceral facilities generally.

¹⁵⁴ Replica Cell, Stop Solitary: Connecticut, <https://www.stopsolitaryct.org/replicacell> (last visited May 18, 2020).

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g.*, Incarcerated Workers Organizing Committee, <https://incarceratedworkers.org/resources/how-organize-phone-zap> (last visited May 15, 2020) (the Incarcerated Workers Organizing Committee is a project that helped organize the 2018 prison strike and encourages the use of “phone zaps” to get people out of solitary. Phone zaps entail calling prison administrators to encourage them to release a person from solitary confinement).

¹⁵⁷ Open Letter, *MoMa Divest-Full Statement*, NEW SANCTUARY COALITION, https://www.newsanctuarynyc.org/moma_full_statement.

¹⁵⁸ *Id.*

¹⁵⁹ Angela Davis Interview 2014, *supra* note 74.