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Observations to the Committee of Experts on the Application of Conventions and Recommendations (CEACR)

Dear Director-General,

I have the honour of sending to you ITUC's observations on the implementation of Convention No.105 by the Government of the United States of America.

Kindly forward this communication to the Committee of Experts for examination in due course.

Thank you.

Yours sincerely,



Luc Triangle
General Secretary

Introduction

While the United States ratified the Abolition of Forced Labour Convention No. 105 over thirty years ago, the conditions of labor by people incarcerated in U.S. prisons and jails is in violation of its obligations under the convention. The United States incarcerates over 1.2 million people in state and federal prisons, and two out of three of these incarcerated people are also workers. Across the nation, incarcerated workers are coerced to work behind bars; receive little, if any compensation for their labor; are excluded from fundamental workplace protections; and have no meaningful avenues to challenge these conditions. The labor of incarcerated workers in the United States is forced, coercive, and exploitative.

The International Trade Union Confederation (ITUC)¹ welcomes the opportunity to provide this written submission to the International Labour Organization (ILO) Committee of Experts on the Application of Conventions and Recommendations (CEACR).² This submission is made in advance of the CEACR's triennial review of the United States' implementation of ratified ILO Conventions, to provide further context to the U.S. government's submission. It provides additional information regarding U.S. failure to comply with Convention No. 105 and proposes recommendations concerning the treatment of incarcerated workers that will, if adopted, enhance the government's ability to comply with Convention No. 105.

This submission draws from primary research conducted by the American Civil Liberties Union (ACLU) together with the University of Chicago Law School's Global Human Rights Clinic and detailed in greater length in their 2022 report, *Captive Labor: Exploitation of Incarcerated Workers*.³ This submission covers U.S. violations of Convention No. 105, including the coercion the U.S. prison system uses to force incarcerated people to work behind bars, the use of incarcerated workers as a means to further U.S. economic development, and the use of prison labor as a means of racial

¹ The International Trade Union Confederation is a worldwide union network that represents 207 million workers in 163 countries and territories. ITUC's primary mission is to promote and defend workers' rights through international cooperation between trade unions, global campaigning and advocacy within major global institutions. Among its affiliates is the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), a voluntary federation of 56 national and international labor organizations with a total membership of 11.5 million working men and women in the United States, including 3 million members in Working America, its community affiliate.

² This submission was drafted by the American Civil Liberties Union (ACLU). The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 4 million members, activists, and supporters, dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws, and ensuring the United States upholds its international human rights commitments. The ACLU has offices in all 50 states, Puerto Rico, and Washington, D.C.

³ American Civil Liberties Union and University of Chicago Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, June 2022, https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf.

discrimination. It also describes how the U.S. administrative, legislative, and judicial systems have failed to offer relief to incarcerated workers, as well as the extent to which international human rights bodies have examined the issue of forced prison labor in the U.S. and beyond. This submission puts forth a set of recommendations to eliminate the use of forced labor of incarcerated persons. These four key recommendations would help bring the U.S. in line with international labor and human rights standards:

- Repeal federal and state constitutional clauses excluding incarcerated people from bans on slavery and forced labor.
- Ensure that all work in prisons is fully voluntary by eliminating any laws and policies that require forced labor or impose adverse consequences on incarcerated workers who are unable or unwilling to work.
- Amend federal and state laws to ensure that incarcerated workers receive the standard labor protections available to other workers in the U.S. with regard to minimum wages, overtime pay, health and safety standards, unionization and collective bargaining, and protection from discrimination and retaliation, among other protections.
- Amend occupational health and safety and workers' compensation laws that exclude most incarcerated workers from their coverage, ensure federal and state occupational health and safety administrations monitor conditions in all workplaces inside prisons, and provide adequate personal protective and safety equipment to incarcerated workers.

I. U.S. Ratification of ILO Convention No. 105

The U.S. ratified the Abolition of Forced Labour Convention No. 105 on September 25, 1991.⁴ It prohibits the use of forced or compulsory labor as 1) a punishment for the expression of political views, 2) for the purposes of economic development, 3) as a means of labor discipline, 4) as a punishment for participation in strikes, or 5) as a means of racial, religious, or other discrimination.⁵

Forced labor is understood as “all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.”⁶ It concerns working conditions where a person is coerced through some form of violence or intimidation, or by subtle means such as manipulated debt,

⁴ *Ratifications for U.S. of America*, International Labour Organization, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited June 29, 2023).

⁵ Abolition of Forced Labour Convention, Art. 1, 1957 (No. 105).

⁶ Forced Labour Convention, Art. 2(1), 1930 (No.29).

retention of identity papers or threats of denunciation.⁷ While the Forced Labour Convention No. 29, which has not been ratified by the U.S., carves out an exception for forced labor exacted under the supervision and control of a public authority as a “consequence of conviction,” the Abolition of Forced Labour Convention has no such exception.⁸

The ILO’s Committee of Experts on the Application of Conventions and Recommendations explicitly stated that the Abolition of Forced Labour Convention “covers prison labour as well as other forms of forced labour involving discrimination.”⁹ Under the treaty, such forced or compulsory labor must be abolished even if the person concerned was convicted in a court of law and “even where the offence giving rise to the punishment is a common offence which does not otherwise come under the protection of Article 1(a), (c), or (d) of the Convention.”¹⁰ The Committee of Experts later clarified that the treaty “requires the abolition of any discriminatory distinctions made on racial or other grounds ‘in exacting labour’ for the purpose of production or service, and that situations in ‘which punishment involving compulsory labour’ is meted out more severely to certain groups defined in racial and other terms, fall within the scope of the Convention.”¹¹

Moreover, although the U.S. has not ratified the Forced Labour Convention (No. 29), the principles enshrined in the latter instrument are still binding. As a member of the ILO, the U.S. is bound by the ILO’s Declaration on Fundamental Principles and Rights at Work (1998), which requires all ILO member states to promote and realize, in good faith, the principle of the elimination of all forms of forced or compulsory labor irrespective of whether an ILO member state has ratified the Forced Labour Convention (No. 29).

⁷ *What is Forced Labour, Modern Slavery, and Human Trafficking: What is Forced Labour?*, International Labour Organization, <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> (last visited June 29, 2023).

⁸ Forced Labour Convention, Article 2(1), 1930 (No.29); Abolition of Forced Labour Convention, Art. 1, 1957 (No. 105).

⁹ ILO, International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, para. 138 at 230 (1962), [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1962-46-IV\)191-289.pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1962-46-IV)191-289.pdf). For further analysis of the Abolition of Forced Labour Convention (No. 105) and prison labor on the U.S., see also Adelle Blackett and Alice Duquesnoy, *Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination Through the Lens of the ILO’s Abolition of Forced Labor Convention*, 67 UCLA L. REV. 1504 (2021), <https://www.uclalawreview.org/slavery-is-not-a-metaphor-u-s-prison-labor-and-racial-subordination-through-the-lens-of-the-ilos-abolition-of-forced-labor-convention/>.

¹⁰ ILO, International Labour Conference, *Eradication of Forced Labour*, Report III (Part 1B), *General Survey Concerning the Forced Labour Convention*, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) at para. 191 (2007), [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2007\)1B.pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2007)1B.pdf).

¹¹ ILO, International Labour Conference, *Eradication of Forced Labour*, Report III (Part 1B), *General Survey Concerning the Forced Labour Convention*, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) at 81 (2007), [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2007\)1B.pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2007)1B.pdf).

II. Forced Labor in U.S. Prisons

U.S. prison labor practices violate the Abolition of Forced Labour Convention. Incarcerated persons must work unpaid or low wage jobs in inhumane conditions, or receive significant penalties, including solitary confinement and loss of privileges. The U.S. prison system uses the forced labor of incarcerated persons to further its economic development, and as a means of racial discrimination in violation of Article 1 of the Abolition of Forced Labour Convention.¹² This section describes the way in which incarcerated persons are coerced to work in the U.S., details how incarcerated persons are used to further U.S. economic development, and identifies the ways in which prison labor has been used historically, and is used presently to discriminate against and oppress persons of color.

a. Incarcerated People are Forced to Work in U.S. Prisons

While some incarcerated people seek employment while incarcerated, the labor performed by many incarcerated workers in the U.S. is not truly voluntary. Voluntariness implies the right to have a say in what type of work one does and the right to refuse to work at all. Yet 76.7 percent of incarcerated workers surveyed by the Bureau of Justice Statistics reported that they are required to work.¹³ Threats of punishment such as solitary confinement, loss of family visitation, opportunities to reduce one's sentence, and deprivation of access to basic necessities coerce underpaid or free labor from people incarcerated in the U.S.¹⁴ Prison systems across the United States have developed forms of coercion that strip away most or all choices, forcing incarcerated people to work exploitative jobs that they would rarely choose for themselves. Additionally, incarcerated workers are excluded from workplace health, safety, and wage protections that free workers are guaranteed in the U.S., in violation of international standards.¹⁵

¹² Abolition of Forced Labour Convention, Art. 1(b) & (c), 1957 (No. 105).

¹³ U.S. Dep't of Justice, Bureau of Justice Statistics, Survey of Prison Inmates, U.S., 2016. Inter-university Consortium for Political and Social Research [distributor], (Sept. 2021), <https://doi.org/10.3886/ICPSR37692.v4>. This figure is based on ACLU analysis of the published raw survey data.

¹⁴ See, e.g., *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) ("Any unjustified refusal to follow the established work regime is an invitation to sanctions."). See also U.S. Dep't of Justice, Federal Bureau of Prisons, *Inmate Work and Performance Pay*, § 545.20 (Oct. 1, 2008), https://www.onlabor.org/wp-content/uploads/2015/05/5251_006.pdf.

¹⁵ See Special Action Programme to Combat Forced Labour, *Combatting Forced Labour: A Handbook for Employers & Business 2 Employers' Frequently Asked Questions*, International Labour Organization (2015).

The 13th Amendment to the U.S. Constitution, which generally protects against slavery and involuntary servitude, explicitly excludes from its reach those held in confinement due to a criminal conviction.¹⁶ U.S. courts have construed this exception broadly, granting prison administrations unfettered discretion to set prison labor conditions and requirements.¹⁷ While voters in Alabama, Colorado, Nebraska, Nevada, Oregon, Tennessee, Utah, and Vermont have recently passed ballot measures amending their state constitutions to abolish slavery without exception, 15 state constitutions still contain language mirroring the 13th Amendment carve-out for incarcerated labor.¹⁸ The constitution of Georgia, for example, states: “[t]here shall be no involuntary servitude within the State of Georgia *except as a punishment for crime after legal conviction thereof*.”¹⁹ California’s constitution contains almost identical language.²⁰

Mandatory work requirements for incarcerated people are common in most U.S. prisons. In the federal prison system, all “sentenced inmates who are physically and mentally able to work are required to participate in the work program.”²¹ People incarcerated in federal prisons can be disciplined for “refusal to work or accept program assignment,” “unexcused absence from work or a program,” and “failure to perform work as directed.”²² Compulsory prison labor systems are likewise present in

¹⁶ U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the U.S., or any place subject to their jurisdiction”).

¹⁷ See, e.g., *U.S. v. Reynolds*, 235 U.S. 133, 149 (1914) (“There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime”); *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (“Forced labor has been sustained as a means of punishing crime”). See also *Williams v. Henagan*, 595 F.3d 610 (5th Cir. 2010); *Murray v. Mississippi Department Of Corrections*, 911 F.2d 1167 (5th Cir. 1990); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (“The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work... Further, there is no constitutional right to compensation for such work; compensation for prison labor is “by Grace Of The State””); *Ruark v. Solano*, 928 F.2d 947, 949–50 (10th Cir. 1991) (“The thirteenth amendment’s restriction on involuntary servitude does not apply to prisoners”), overruled on other grounds by *Lewis v. Casey*, 518 U.S. 343 (1996); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding “that where a prisoner is incarcerated pursuant to a presumptively valid judgment and commitment order issued by a court of competent jurisdiction and is forced to work pursuant to prison regulations or state statutes, the Thirteenth Amendment’s prohibition against involuntary servitude is not implicated”); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (“Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights... where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises”).

¹⁸ These states are Arkansas, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, North Carolina, North Dakota, Ohio, and Wisconsin.

¹⁹ Ga. Const. art. 1, § XXII (emphasis added).

²⁰ Ca. Const. art. 1, § VI.

²¹ 28 C.F.R. § 545.20(a)(2) (2020).

²² See U.S. Dep’t of Justice, Bureau of Justice Statistics, *Data Collected Under the First Step Act, 2019*, at 12 (Mar. 2020), <https://bjs.ojp.gov/content/pub/pdf/dcfssa19.pdf>.

many state prison systems.²³ For example, Missouri requires incarcerated people to work unless they present proof of inability.²⁴

Incarcerated people who refuse to work or are unable to work are subject to punishment. In state and federal prisons, refusal to work can result in disciplinary or administrative segregation—which often is a form of solitary confinement.²⁵ During this time, incarcerated persons may have most or all of their personal property taken away and are allowed out of their cells only for brief periods to shower and exercise, often at most only an hour a day or every other day, and the “exercise” is usually alone in a small, dog kennel-like enclosure. People incarcerated in federal prisons can be placed in solitary confinement for up to three months as punishment for work-related violations, and up to six months for “encouraging others to refuse to work, or [for] participat[ing] in a work stoppage.”²⁶

Those who refuse to work also typically lose all privileges, including access to personal telephone calls, family visitation, and access to the commissary to buy food, medicine, and other basic necessities. If they refuse a work assignment, incarcerated people in federal and most state prisons additionally risk losing the opportunity to shorten their sentence through earned “good time,” effectively extending their incarceration.²⁷ In fact, a single instance of refusal can add a month back to a sentence in federal prisons.²⁸ State and federal courts have upheld the practice of using prison-specific sanctions for refusing to work or instigating others to refuse work, thus incarcerated workers often have no recourse to challenge their forced labor.²⁹

In Florida, the Inmate Orientation Handbook explicitly informs incarcerated individuals that “[they] do not have the option to refuse work assignments.”³⁰ If they try to, they are severely punished: 60 days of disciplinary confinement and the reduction of 90 days of good time toward their sentence.³¹ In Oregon, because of a ballot measure

²³ E.g., La. R.S. 15:832(A); Ca. Penal § 2700; Fla. Stat. § 946.002(1)(A) (2019); Mo. Ann. Stat. § 217.337 (West 2020); Ga. Comp. R. & Regs. 125-3-2.04(c) (2021); Wash. Admin. Code § 137-25-30 (2019); N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2(B)(5)(iii) (2020).

²⁴ Mo. Ann. Stat. § 217.337 (West 2020).

²⁵ *Fallis v. U.S.*, 263 F. Supp. 780 (M.D. Pa. 1967).

²⁶ 28 C.F.R. § 541.3 (2020).

²⁷ 28 C.F.R. § 541.3 (2020).

²⁸ See 28 C.F.R. § 541.3 (2020).

²⁹ See, e.g., *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) (“Any unjustified refusal to follow the established work regime is an invitation to sanctions.”). See also U.S. Dep’t of Justice, Federal Bureau of Prisons, *Inmate Work and Performance Pay*, § 545.20 (Oct. 1, 2008), https://www.onlabor.org/wp-content/uploads/2015/05/5251_006.pdf.

³⁰ Florida Department of Corrections, *Inmate Orientation Guide Reception Center Processing* (2016) at 8, <http://www.dc.state.fl.us/pub/files/inmateorientationhandbook.pdf>.

³¹ Fla. Admin. Code R33-601.314,

passed in 1994, the state constitution mandates that all incarcerated people are required to work a minimum of 40 hours per week.³² Those who refuse to comply with Oregon's work requirement may be punished; for instance, workers incarcerated in Oregon state prisons who refused to work shifts at the height of the COVID-19 pandemic reported they were threatened with transfer to more crowded, higher-security units and loss of honor housing, benefits, and privileges.³³

In Texas, all incarcerated people who are able to work are required to do so, and those who refuse to work can be confined to their cell; stripped of their personal property; lose good time credits; and lose access to commissary, recreation, visitation, and personal telephone calls.³⁴ A refusal to work while incarcerated in Tennessee can lead to solitary confinement.³⁵ Workers incarcerated in Illinois report that refusing to work means the loss of recreation time, phone privileges, and warm food.³⁶ An incarcerated person asserting their right to refuse work in Connecticut could lose their place in a community release program.³⁷

In California, when incarcerated people refuse to accept or perform a work assignment, they lose all access to family visits, phone calls (except during emergencies), recreational or entertainment activities, and all personal packages.³⁸ They may face "disciplinary detention or confinement" (solitary confinement) for a period of 10 days. During this time, they have their personal property taken away, are allowed out of their cells for exercise for only one hour per day, five days a week, and lose all privileges, including access to personal nonemergency telephone calls.³⁹ In more serious cases, confinement and loss of privileges may become prolonged or

<https://www.law.umich.edu/special/polyclearinghouse/documents/florida%20inmate%20code%20of%20conduct.pdf>.

³² Oregon Constitution Art. 1 § 41; and Balletopedia Oregon State Prison Inmates Required to Work Full Time, Measure 17 (1994), [https://ballotpedia.org/Oregon_State_Prison_Inmates_Required_to_Work_Full_Time_Measure_17_\(1994\)](https://ballotpedia.org/Oregon_State_Prison_Inmates_Required_to_Work_Full_Time_Measure_17_(1994)).

³³ Honor housing is an area within a higher security prison for selected incarcerated people, usually with fewer restrictions. Jason Wilson, *Inmate Details Alarming Conditions at Oregon Prison Amid Coronavirus Pandemic*, THE GUARDIAN (April 12, 2020); Tess Riski, *Oregon Hospitals Rely on Prison Labor to Do Their Laundry During the Pandemic*, WILAMETTE WEEK (April 22, 2020).

³⁴ Tex. Pub. L. § 497.099(a); Texas Department of Criminal Justice, *Disciplinary Rules and Procedures for Offenders, Correctional Institutions Division* (Aug. 2019) at 23.

³⁵ Tenn. Admin. Code § 41-2-120(a)

³⁶ Written survey response by [Name withheld to preserve anonymity, at survey respondent's request], incarcerated at Centralia Correctional Center, IL (on file with authors).

³⁷ *Administrative Directive 10.1: Inmate Assignment and Pay Plan*, ST. OF CONN. DEP'T OF CORR., 4(a) (2015), <https://portal.ct.gov/-/media/doc/pdf/ad/ad1001pdf.pdf?la=en>.

³⁸ Cal. Code Regs. tit. 15, § 3044(f) (2018).

³⁹ Cal. Code Regs. tit. 15, §§ 3315(f)(5)(d) (2020), 3331(b) (2017).

permanent.⁴⁰ Refusing to work in California can also lead to a “115” write-up,⁴¹ a serious rule violation that then can keep an individual from attaining parole.⁴² N’ashid Abdul Latif, a former hospice worker in California’s Medical Facility prison described the coercion to work while incarcerated: “Often, it’s not a matter of choice. If you get assigned you have to work, otherwise you get a write-up, which can result in adding days to your sentence.”⁴³

In Louisiana, if an incarcerated person refuses to work, fails to perform their assigned jobs with “reasonable speed and efficiency,” or does not answer during work roll calls, they can be placed in solitary confinement for up to 30 days for first offense and up to 180 days for a third offense, although in practice people are placed in confinement for indefinite periods of time for these work offenses.⁴⁴ Dolfinette Martin, the housing director at Operation Restoration who was formerly incarcerated in Louisiana, attested that “the choice [was] work or go to solitary.”⁴⁵

Not only is work compulsory in many state prisons, workers report that illness, injury, disability, or a physical inability to work often does not relieve them of work duties. One formerly incarcerated worker recalled: “I was diagnosed with HIV right when I got into the prison, so I would have days where I physically did not have the energy to stand and work in the kitchen for 12 hours. But I had to work. You don’t get days off. You don’t get to have sick days. And if I didn’t go to work, it was a rule violation.”⁴⁶ A person incarcerated in Louisiana said he was placed in solitary confinement “over and over” because he was unable to perform certain work assignments due to problems with degenerative disks in his spine, anemia, and asthma.⁴⁷ Kelly Savage-Rodriguez, of the California Coalition for Women Prisoners, remembers one incarcerated woman being required to work as a porter almost immediately after having her leg amputated.

⁴⁰ Cal. Code Regs. tit. 15, §§ 3315(g) (2020), 3044(5)-(6) (2018).

⁴¹ Interview with N’ashid Abdul Latif, former hospice worker in California Medical Facility prison (Dec. 16, 2020). (on file with authors).

⁴² Cal. Code Regs. tit. 15, §§ 2281(c), 2402(c), 2422(c), 2432(c).

⁴³ Interview with N’ashid Abdul Latif, former hospice worker in California Medical Facility prison (Dec. 16, 2020). (on file with authors).

⁴⁴ Vera Institute of Justice, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Louisiana Department of Public Safety and Corrections, and Progress Toward Implementation* (May 2019), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations-ldps.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/legacy_downloads/safe-alternatives-segregation-initiative-findings-recommendations-ldps.pdf); Eli Cahan, Nick Chrastil, *Louisiana Policy Intended to Reform Solitary Confinement Still Leaves People in Indefinite Lockdown*, THE INTERCEPT (Dec. 15, 2021), <https://theintercept.com/2021/12/15/solitary-confinement-reform-louisiana-dpsc-vera/>.

⁴⁵ Interview with Dolfinette Martin, housing director, Operation Restoration, in New Orleans, LA (Nov. 8, 2019) (on file with authors).

⁴⁶ *The Uncounted Workforce*, NPR: PLANET MONEY (Jun. 29, 2020), <https://www.npr.org/transcripts/884989263>.

⁴⁷ Solitary Watch, ACLU of Louisiana, and the Jesuit Social Research Institute/Loyola University New Orleans, *Louisiana on Lockdown*, SOLITARY WATCH (Jun. 2019) at 67, <https://solitarywatch.org/wp-content/uploads/2019/06/Louisiana-on-Lockdown-Report-June-2019.pdf>.

Though she was not able to stand because her prosthetics had not yet arrived, she was denied her request to be released from the work assignment.⁴⁸

Incarcerated workers labored during the COVID-19 pandemic under the threat of punishment if they refused their work assignments. Incarcerated workforces were widely used to meet the demands of protective equipment production early in the pandemic.⁴⁹ Incarcerated workers were tasked with manufacturing hand sanitizer, masks, medical gowns, face shields, and other personal protective equipment that they were then prohibited from using to protect themselves.⁵⁰ In at least five states (Michigan, Missouri, New York, Oregon, and Texas), incarcerated workers participated in frontline health roles that put them at high risk of contracting COVID-19.⁵¹ Incarcerated people working in prison laundries in Oregon and Missouri were tasked with cleaning bedsheets, towels, and gowns from hospitals treating COVID-19 patients.⁵² In Texas, previously unpaid incarcerated workers were paid \$2 an hour to work in mobile morgues and transport bodies from the Medical Examiner's Office in El Paso.⁵³ In New York, workers who were tasked with digging mass graves were transitioned from an hourly wage of \$0.65 to \$6. The Rikers Island jail offered personal protective equipment as a "privilege" to any incarcerated worker tasked with digging mass graves.⁵⁴

Even at the height of the pandemic, those who refused work assignments due to health concerns were subject to punishment. For instance, incarcerated workers in Colorado who opted out of kitchen work assignments in 2020 due to health concerns

⁴⁸ Interview with Kelly Savage-Rodriguez, California Coalition for Women Prisoners (Apr. 30, 2020) (on file with authors).

⁴⁹ Rachel Ellis, *Prison Labor in a Pandemic*, 19 CONTEXTS: SOC. FOR THE PUB. 66 (Dec. 14, 2020), <https://journals.sagepub.com/doi/full/10.1177/1536504220977950>.

⁵⁰ Rachel Ellis, *Prison Labor in a Pandemic*, 19 CONTEXTS: SOC. FOR THE PUB. 66 (Dec. 14, 2020), <https://journals.sagepub.com/doi/full/10.1177/1536504220977950>.

⁵¹ Marjorie Segule, Katherine LeMasters, Meghan Peterson et al., *Incarcerated Workers: Overlooked as Essential Workers*, BMC PUBLIC HEALTH 22, 506 (Mar. 2022), <https://doi.org/10.1186/s12889-022-12886-7>.

⁵¹ Tess Riski, *Oregon Hospitals Rely on Prison Labor to Do Their Laundry During the Pandemic*, WILLAMETTE WEEK (Apr. 22, 2020), <https://www.wweek.com/news/2020/04/22/oregon-hospitals-rely-on-prison-labor-to-do-their-laundry-during-the-pandemic/>; Marissane Lewis-Thompson, *Missouri Inmates Clean Hospital Laundry*, ST. LOUIS PUBLIC RADIO (Apr. 29, 2020), <https://news.stlpublicradio.org/health-science-environment/2020-04-29/missouri-inmates-clean-hospital-laundry>.

⁵² Tess Riski, *Oregon Hospitals Rely on Prison Labor to Do Their Laundry During the Pandemic*, WILLAMETTE WEEK (Apr. 22, 2020), <https://www.wweek.com/news/2020/04/22/oregon-hospitals-rely-on-prison-labor-to-do-their-laundry-during-the-pandemic/>; Marissane Lewis-Thompson, *Missouri Inmates Clean Hospital Laundry*, ST. LOUIS PUBLIC RADIO (Apr. 29, 2020), <https://news.stlpublicradio.org/health-science-environment/2020-04-29/missouri-inmates-clean-hospital-laundry>.

⁵³ Alana Rocha, *Incarcerated Texans Enlisted to Work in County Morgue as COVID-19 Deaths Overwhelm El Paso*, TEXAS TRIBUNE (Nov. 15, 2020), <https://www.texastribune.org/2020/11/15/coronavirus-texas-el-paso-inmates-morgue-deaths/>.

⁵⁴ Ryan Grim, *Rikers Island Prisoners Are Being Offered PPE and \$6 an Hour to Dig Mass Graves*, THE INTERCEPT (Mar. 31, 2020), <https://theintercept.com/2020/03/31/rikers-island-coronavirus-mass-graves/>.

lost “earned time,” meaning their parole eligibility dates were pushed later.⁵⁵ Workers who subsequently returned to their job assignments because of the threats of having to serve more time in prison, being placed in more restrictive housing units, and losing phone calls and family visits recently filed a class-action lawsuit alleging that state prison authorities violated the state ban on slavery and involuntary servitude by forcing them to work.⁵⁶ DG Foods, a poultry processing plant in Bastrop, Louisiana, avoided shutting down operations at the height of COVID-19 by relying on incarcerated laborers who similarly faced loss of their earned-time credits should they refuse to work.⁵⁷ A worker incarcerated in Illinois reported she was punished with a rule violation for refusing to report to her job in the kitchen after testing positive for COVID-19.⁵⁸

The prison system does not just coerce and exploit labor through overt punishment, but also through deprivation. While state taxes are used to fund some aspects of prisons, prisons increasingly contract with private companies for the provision of basic services. These private companies, in turn, charge incarcerated people for their services directly at grossly inflated rates. Some of these services are fundamental to normal human life: phone calls to family, medication, medical care, food, warm clothing, and basic hygiene products.⁵⁹ One study of three states found that the average person spent almost \$1,000 per year on basic necessities at the prison commissary.⁶⁰ The cost to an incarcerated person of their own incarceration can run over \$10,000 a year.⁶¹

⁵⁵ Coleen Slevin, *Colorado Inmates Say State Is Violating Ban on Forced Work*, ASSOCIATED PRESS (Feb. 16, 2022); Lora Korpar, *Inmates Say Colorado Prison Added Time to Sentences When They Refused Work*, NEWSWEEK (Feb. 16, 2022).

⁵⁶ *Richard Lilgerose and Harold Mortis v. Jared Polis, Dean Williams, and Colorado Dep’t of Corrections*, Compl. filed Feb. 15, 2022, Dist. Ct. Denver Cty. Colorado, <https://towardsjustice.org/wp-content/uploads/2022/02/Amendment-A-litigation-Complaint-Stamped.pdf>.

⁵⁷ Jerry Iannelli, *Video Captures Poor Conditions at Louisiana Poultry Plant Where Prisoners Are Sent To Work*, THE APPEAL (May 28, 2020), <https://theappeal.org/louisiana-poultry-plant-prison-labor/>.

⁵⁸ Written survey response by [Name withheld to preserve anonymity, at survey respondent’s request], incarcerated at Decatur Correctional Center, IL (on file with authors).

⁵⁹ See Stephen Rahe, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative, (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>; Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Center for Justice (2005), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration>.

⁶⁰ Stephen Rahe, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative, (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

⁶¹ Ella Baker Center for Human Rights, *Who Pays: The True Costs of Incarceration on Families* (Sept. 2015), <http://whopaysreport.org/who-pays-full-report/>; FWD.us and Cornell University, *Every Second: The Impact of the Incarceration Crisis on America’s Families* 10 (Dec. 2018), <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf>.

b. Low-Wage or Unpaid Incarcerated Workers Are a Source of Economic Development for the U.S.

The forced, low-wage or free labor of incarcerated workers is used to further U.S. economic development, in violation of Article 1 of the Abolition of Forced Labour Convention. Incarcerated workers typically earn little to no pay at all, with many making just pennies an hour and yet state, local, and federal governments rely on incarcerated workers to maintain the prisons that confine them, bolster the economy, offset budget shortfalls, and produce goods and services.⁶²

i. Paid in Pennies

Incarcerated workers in U.S. prisons are often working for paltry wages or no wages at all. In the U.S., the average hourly pay for incarcerated workers is \$0.13-\$0.52 for non-industry jobs, and \$0.30-\$1.30 for jobs in state-owned correctional industries.⁶³ The ACLU's research found that the average minimum hourly wage paid to workers for non-industry jobs is 13 cents, and the average maximum hourly wage is 52 cents.⁶⁴ The overwhelming majority of workers have jobs that support the operation of the prison facilities and are compensated at the lower end of prison pay scales. Prison maintenance jobs pay anywhere from nothing to pennies per hour. Several prisons in Maine do not pay at all for laundry, kitchen, cleaning, and grounds-keeping work.⁶⁵ The state of Connecticut pays incarcerated workers employed in maintenance jobs 75 cents a day.⁶⁶ And in Kansas, maintenance workers make just over five cents an hour.⁶⁷

Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina, and Texas pay zero compensation to incarcerated people for the vast majority of work assignments. For instance, in Texas, only the approximately 80 workers employed by private companies through the PIECP program are paid a wage,⁶⁸ while the rest of the state's

⁶² Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

⁶³ The American Civil Liberties Union and the Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor: Exploitation of Incarcerated Workers*, (June 2022).

⁶⁴ See Appendix B of *Captive Labor, Id.*, for the wages paid to incarcerated workers in each state and in federal prisons, and see Appendix C for calculated average and hourly wages paid to incarcerated workers.

⁶⁵ Maine Department of Corrections, FOIA response document (on file with authors).

⁶⁶ Connecticut Department of Correction, *Administrative Directive: Inmate Assignment and Pay Plan*, Directive 10.1 (effective Oct. 22, 2015), <https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad1001pdf.pdf>.

⁶⁷ Kansas Department of Corrections, *Internal Management Policy & Procedure: Resident Work Assignments*, Policy 10-109A (effective Jan. 21, 2022), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-10/10-109a-resident-work-assignments.pdf/view>; Kansas Department of Corrections, *Internal Management Policy & Procedure: Programs and Services: Offender Work Assignments*, Policy 10-109J at 2 (effective Oct. 13, 2016), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-10/10-109j/view>.

⁶⁸ Texas Department of Criminal Justice, Frequently Asked Questions, <https://www.tdcj.texas.gov/faq/cid.html> (stating "Inmates are not paid for their work"); Chris Tomlinson, *Prison Slave Labor Isn't Just a Problem in China. It Happens in Texas, Too*, HOUSTON CHRONICLE (Aug. 27, 2021)

incarcerated workers—121,167 workers as of April 2019—labor unpaid.⁶⁹ In South Carolina, more than 90 percent of the state’s incarcerated workers are not paid for their work.⁷⁰

Incarcerated workers’ wages remain stagnant for years, even decades. Incarcerated workers in New York state last received a pay increase in 1993.⁷¹ Workers in South Dakota have been paid \$0.25 per hour for non-industry jobs for more than 20 years.⁷² In Vermont, most incarcerated workers have been paid \$0.25 per hour since 1988, when the pay scale for non-industry jobs was last revised.⁷³ Workers in Illinois received a pay raise in 2021 for the first time in 11 years, an increase of merely 14 cents per day for general laborers, who are now paid \$0.85 to \$1.10 per day.⁷⁴

<https://www.houstonchronicle.com/business/columnists/tomlinson/article/Tomlinson-Prison-slave-labor-persists-in-Texas-16414140.php>; Editorial: *Unpaid Prison Labor is Wrong. End it Now*, HOUSTON CHRONICLE (Dec. 3, 2020), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Unpaid-prison-labor-is-wrong-End-it-15771108.php>; Vicky Camarillo, *The Penal System Today is Slavery: Lawmakers Finally Start to Talk About Unpaid Labor in Texas Prisons*, TEXAS OBSERVER (May 10, 2019), <https://www.texasobserver.org/penal-system-slavery-unpaid-labor-texas/>. An exception to this policy was granted to incarcerated workers tasked with working in mobile morgues during COVID-19, who were paid \$2 an hour after refusing to work unpaid. Alana Rocha, *Incarcerated Texans Enlisted to Work in County Morgue as COVID-19 Deaths Overwhelm El Paso*, TEXAS TRIBUNE (Nov. 15, 2020), <https://www.texastribune.org/2020/11/15/coronavirus-texas-el-paso-inmates-morgue-deaths/>.

⁶⁹ Texas Legislative Budget Board, Fiscal Note, 86th Legislative Regular Session, In Re: HB3720 (Apr. 17, 2019) <https://capitol.texas.gov/tlodocs/86R/fiscalnotes/pdf/HB037201.pdf#navpanes=0>; Vicky Camarillo, *The Penal System Today is Slavery: Lawmakers Finally Start to Talk About Unpaid Labor in Texas Prisons*, TEXAS OBSERVER (May 10, 2019), <https://www.texasobserver.org/penal-system-slavery-unpaid-labor-texas/>.

⁷⁰ In South Carolina, incarcerated people working in all institutional jobs, some correctional industries jobs, and on community labor crews are not paid any wage. As of June 2018, the most recent available data, these unpaid job assignments constituted more than 90 percent of the state’s 14,786 incarcerated workers. See South Carolina Department of Corrections, *Inmate Pay*, § 3 (2014), <http://www.doc.sc.gov/policy/ADM-15-13.htm.pdf>; South Carolina Department of Corrections Letter to South Carolina Legislative Oversight Committee, *Inmate Work: Earning and Supervision Details, Policies, and Statutes* (May 24, 2019), <https://www.scstatehouse.gov/CommitteeInfo/HouseLegislativeOversightCommittee/AgencyWebpages/Corrections/Statistics%20by%20type%20of%20inmate%20work%20-%20qualifications,%20number%20working,%20costs,%20etc..pdf>.

⁷¹ Kate Lisa, *Campaign Launched to Raise Pay, Secure Labor Rights for Prisoners*, HUDSON VALLEY 360 (Jan. 17, 2022), https://www.hudsonvalley360.com/news/nystate/campaign-launched-to-raise-pay-secure-labor-rights-for-prisoners/article_46dc9d5a-cbfe-5240-abfd-ddf3d0457da8.html; Joseph Spector, *Big Raise? Prison Inmates Could Get a Major Boost in their Wages in New York*, DEMOCRAT & CHRON. (Feb. 7, 2019), <https://www.democratandchronicle.com/story/news/politics/albany/2019/02/07/big-raise-prison-inmates-could-get-major-boost-minimum-wages-new-york/2799895002/>.

⁷² South Dakota Department of Corrections, *Inmate Work Assignments and Pay*, Policy 1.5.A.1 (effective Jan. 4, 2019), at 4 (Revision Log), <https://doc.sd.gov/documents/Inmate%20Work%20Assignments%20and%20Pay142019.pdf>.

⁷³ Vermont Agency of Human Services, Department of Corrections, *Inmate Wage Plan*, Policy 394 (effective May 30, 1988), <https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/394-Inmate-Wage-Plan.pdf>.

⁷⁴ Illinois Department of Corrections, Administrative Directive 05.03.103, *Monetary Compensation for Assignments for Individuals in Custody* (July 1, 2021); Illinois Department of Corrections, Administrative Directive 05.03.103A, *Monetary Compensation for Inmate Assignments* (May 1, 1992, amended July 1, 2010).

Even these low wages are not theirs to keep. Across the U.S., as much as 80 percent is deducted from an incarcerated person's paycheck for court-imposed fines, taxes, family support, restitution, and room and board, among other fees. These wage deductions often leave incarcerated workers with less than half of their gross pay. For instance, in the first half of 2021, 59 percent of the wages earned by incarcerated workers employed in the Federal Prison Industries program, known as UNICOR, was deducted by the federal government.⁷⁵ West Virginia deducts 40 percent from incarcerated workers' earnings to cover financial obligations such as restitution.⁷⁶ In Nevada, 80 percent of incarcerated workers' wages were deducted until the state legislature passed a law that went into effect in July 2021, capping wage deductions at 50 percent.⁷⁷

In many states a majority of these wage deductions are for room and board. In a single year, over \$22.5 million was deducted from the wages of incarcerated workers employed by private corporations through the PIECP program nationwide, more than 60 percent of which went to room and board.⁷⁸ In Minnesota, 77 percent (\$3.48

⁷⁵ Nationally, incarcerated workers employed in the PIECP program earned \$10,034,501 in gross wages in the first quarter of 2021 and \$11,689,205 in the second quarter of 2021, of which \$5,947,107 and \$6,884,581 was deducted respectively. National Correctional Industry Association (NCIA), *Prison Industry Enhancement Certification Program Certification & Cost Accounting Center Listing: Quarterly Report, Statistics for the Quarter Ending June 30, 2021*, (Baltimore, MD: NCIA, Dec. 2, 2021), <https://www.nationalcia.org/statistical-reports>, https://4c99dc08-46a7-4bd9-b990-48103d668bb3.filesusr.com/ugd/569cf7_7722ec64545745f780ef9e63e75e7482.pdf; NCIA, *Prison Industry Enhancement Certification Program Certification & Cost Accounting Center Listing: Quarterly Report, Statistics for the Quarter Ending March 31, 2021*, (Baltimore, MD: NCIA, 2021), <https://www.nationalcia.org/statistical-reports>, https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_e0d06d60f81e41cab23b5ec50294401b.pdf.

⁷⁶ West Virginia Division of Corrections, Policy Directive 111.06, *Financial Responsibility Program for Inmates* (Nov. 1, 2014), FOIA response document (on file with authors).

⁷⁷ Nevada Senate Bill 22, <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7197/Overview>; Nev. Rev. S. 209.247; Sean Golonka, *Inmate Advocates and Family Members Seek to Lower Deductions from Offender Accounts*, NEVADA INDEPENDENT (Mar. 4, 2021), <https://thenevadaindependent.com/article/inmate-advocates-and-family-members-seek-to-lower-deductions-from-offender-accounts>; Dana Gentry, *Cannizzaro Challenges Prison Director on Inmate Money Seizures*, NEVADA CURRENT (Mar. 4, 2021), <https://www.nevadacurrent.com/blog/cannizzaro-challenges-prison-director-on-inmate-money-seizures/>; Michael Lyle, *NDOC Hasn't Implemented Law Capping Deductions on Inmate Bank Accounts*, NEVADA CURRENT (July 12, 2021), <https://www.nevadacurrent.com/2021/07/12/ndoc-hasnt-implemented-law-capping-deductions-on-inmate-bank-accounts/>.

⁷⁸ *Id.*; NCIA, *Prison Industry Enhancement Certification Program Certification & Cost Accounting Center Listing: Quarterly Report, Statistics for the Quarter Ending December 31, 2020*, (Baltimore, MD: NCIA, 2021), <https://www.nationalcia.org/statistical-reports>, https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_581cb12b96244d80bf38ed972e18fef6.pdf; NCIA, *Prison Industry Enhancement Certification Program Certification & Cost Accounting Center Listing: Quarterly Report, Statistics for the Quarter Ending September 30, 2020* (Baltimore, MD: NCIA, 2020), <https://www.nationalcia.org/statistical-reports>, https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_e2b3759067374286b6578b24ea6ae87a.pdf.

million) of wages earned by incarcerated workers were deducted in fiscal year 2021, about two-thirds of which went to “cost of confinement.”⁷⁹

ii. Maintenance Work

Federal and state governments offset budget shortfalls by forcing incarcerated laborers to work to maintain the very prisons that confine them.⁸⁰ Of the nation’s roughly 800,000 incarcerated laborers, more than 80 percent perform maintenance labor for the facilities in which they are held.⁸¹ This maintenance labor allows prisons to significantly offset their operating costs. When incarcerated people serve as janitors, plumbers, electricians, and food servers—often involuntarily and typically for little or no pay—facilities are spared hiring outside market-rate laborers.⁸² According to the Bureau of Justice Statistics, state governments spend nearly \$50 billion a year to keep over 1 million people in prisons (the U.S. spends over \$81 billion to run its corrections system—including prisons, jails, parole, and probation—that keeps nearly 2 million people behind bars).⁸³ While less than 1 percent of state correctional budgets goes to wages for incarcerated workers,⁸⁴ more than two-thirds (68 percent) of state prison expenditures is spent on wages and benefits for the public sector staff who operate prisons and jails.⁸⁵ Payroll for state correctional staff alone totals over \$2 billion each month.⁸⁶

⁷⁹ Filiberto Nolasco Gomez, *An Update on Prison Labor in Minnesota*, WORKDAY MINNESOTA (Jan. 5, 2022), <https://workdayminnesota.org/an-update-on-prison-labor-in-minnesota/>.

⁸⁰ Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

⁸¹ Beth Schwartzapfel, *Taking Freedom: Modern-Day Slavery in America’s Prison Workforce*, PAC. STANDARD (May 7, 2018), <https://psmag.com/social-justice/taking-freedom-modern-day-slavery>.

⁸² See, e.g., Fla. Stat. § 946.002; Ark. Stat. § 12-30-401; La. Rev. Stat. § 15:870.

⁸³ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Justice Expenditures and Employment in the U.S., 2017* (July 2021) at 5-6, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf>; U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2020—Statistical Tables* (Dec. 2021) at 7, <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>; Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2022*, by Wendy Sawyer and Peter Wagner (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

⁸⁴ Estimate calculated by economist Eric Seligman, based on analysis of the wage data from the Bureau of Justice Statistics 2004 Survey of Prison Inmates and Bureau of Prisons data on state correctional spending, extrapolating to aggregate numbers of the total prison population. Interview with Eric Seligman, John Jay College of Criminal Justice, City University of New York (March 28, 2022).

⁸⁵ Vera Institute of Justice, *The Price of Prisons: Examining State Spending Trends, 2010-2015* (May 2017) at 9, <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>. See also John Pfaff, *The Incalculable Costs of Mass Incarceration*, THE APPEAL (Sept. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration/>; Prison Policy Initiative, *Following the Money of Mass Incarceration* (Feb. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

⁸⁶ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Justice Expenditures and Employment in the U.S., 2017* (July 2021) at 8, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf>.

Prisons struggling to operate on their state-provided budgets rely on incarcerated laborers to perform essential maintenance tasks, like cleaning prison yards and servicing police cars, to offset budget shortfalls.⁸⁷ The cost-savings of unpaid and grossly underpaid prison maintenance labor saves state governments billions of dollars a year in prison upkeep. In 2004, the value of services provided by incarcerated workers laboring to maintain and operate the prisons that confine them was conservatively estimated to be \$9 billion.⁸⁸

iii. State Correctional Industries

Prison labor not only saves federal and state governments money by funding their bloated prison systems, it also provides a cheap and compliant labor force in correctional industries, the state-owned businesses that produce goods sold to other state entities. State prison industries, or “correctional industries,” are state-owned corporations that produce goods, services, and commodities sold to other government agencies. The federal government and all states except Alaska operate their own correctional industries.⁸⁹ These industries are involved in a variety of production and services, such as sign and license plate manufacturing, meat and milk processing, optical and dental laboratories, and recycling and metal shops.⁹⁰ The federal industry program, known as UNICOR, likewise advertises an extensive product list.⁹¹ A state agency that needs office chairs can contract with a prison to produce them. An office park with an asbestos problem can contract with a prison to remove it. A new governor can contract with a prison to print thousands of new letterheads.⁹²

Many states require all state agencies, political units, and public institutions to purchase manufactured goods, including furniture, cleaning supplies, printed materials, and uniforms, from their state correctional industries.⁹³ Correctional industries programs are not limited to manufacturing, as states rely on incarcerated workers to provide a variety of services, such as data entry, repairing state-owned vehicles, and washing laundry for public hospitals and universities. For example, people incarcerated in New York and Oregon help staff the states’ Department of

⁸⁷ *Id.*

⁸⁸ Asatar Bair, *An Economic Analysis of Prison Labor in the U.S.*, PhD diss., University of Massachusetts Amherst (2004) at 194.

⁸⁹ Alaska’s legislature repealed the state’s prison industries program in 2005.

⁹⁰ See, e.g., Illinois Department of Corrections, *ICI Criteria for Inmate Assignment by Function*, FOIA response document (on file with authors); Michigan Department of Corrections, *Appendix D – Available Work Assignments – Michigan State Industries (MSI)*, FOIA response document (on file with authors).

⁹¹ See UNICOR, *Product Lines*, https://www.unicor.gov/publications/corporate/CATMC4505_C.pdf.

⁹² See generally, National Correctional Industries Association, *Online Buyers’ Guide*, <https://my.nationalcia.org/buyers-guide?reload=timezone>

⁹³ See, e.g., Wis. Stat. § 303.01 Va. Code Ann. § 53.1-59; see also Ill. Comp. Stat. 5/3-12-7 (2010). See also Illinois Correctional Industries, *FAQ: Frequently Asked Questions (2015)* (<http://www.icicatalog.illinois.gov/documents/faq.pdf>).

Motor Vehicles (DMV) call centers, fielding questions directed towards the department.⁹⁴

The labor of incarcerated persons working in state prison industries generates significant wealth in the U.S. economy. In 2021 alone, incarcerated workers in state prison industries programs were estimated to produce more than \$2 billion in goods and commodities nationally.⁹⁵ The federal government's UNICOR prison industries program reported \$404 million in net sales of goods and services produced by the 16,315 federally incarcerated workers employed in the program in 2021.⁹⁶

iv. Public Work Assignments

Public work assignments, or “community work crews,” help state and local governments offset budget deficits in reliance on the cheap or free labor of incarcerated persons. States and municipalities contract with state departments of corrections to use the labor of incarcerated workers for a variety of public works projects, mostly off prison grounds. Incarcerated workers maintain cemeteries, school grounds, fairgrounds, and public parks; do road work; construct buildings; clean government offices; clean up landfills and hazardous spills; undertake forestry work in state-owned forests; and treat sewage. In some states, including Arkansas,⁹⁷ Florida,⁹⁸

⁹⁴ Otak, *Coffee Creek Correctional Facility* (2020), <https://www.otak.com/about/projects/coffee-creek-correctional-facility/>; Todd Clear, Michael Riesig, & George Cole, *American Corrections* (Boston: Cengage Learning, 2019).

⁹⁵ According to the National Correctional Industries Association (NCIA), the value of saleable goods and services produced by incarcerated workers in prison industries programs nationwide totaled \$2,089,022,613 in 2021. Telephone interview with Wil Heslop, interim executive director, NCIA, Nov. 18, 2021, citing 2021 NCIA Directory.

⁹⁶ U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Prison Industries, Inc. (UNICOR), *Fiscal Year 2021 Annual Management Report* (Nov. 12, 2021), https://www.unicor.gov/publications/reports/FY2021_AnnualMgmtReport.pdf. See also UNICOR, *FY 2021 FPI Sales by 4-Digit FSC Code and Customer* (2021), <https://www.unicor.gov/publications/reports/FY21AnnualSalesReport.pdf> (reporting that net sales totaled nearly \$543 million).

⁹⁷ Arkansas Division of Correction, *Annual Report: Fiscal Year 2020* (Mar. 2021), at 38, <https://doc.arkansas.gov/wp-content/uploads/2021/03/Division-of-Correction-FY20-Annual-Report-Board-of-Corrections-Approved-March-19-2021.pdf>; Arkansas Division of Correction, *Inmate Handbook* (Mar. 2020) at 6, https://doc.arkansas.gov/wp-content/uploads/2020/09/Inmate_Handbook_Updated_March_2020_Final_02_28_2020_pdf.pdf.

⁹⁸ Ben Conark, *Work Forced: A Century Later, Unpaid Prison Labor Continues to Power Florida*, FLORIDA TIMES-UNION (May 26, 2019), <https://stories.usatodaynetwork.com/workforced/>.

Georgia,⁹⁹ Mississippi,¹⁰⁰ South Carolina,¹⁰¹ and Texas,¹⁰² these workers are not paid at all for their work.

At least 41 state departments of correction have public works programs that employ incarcerated workers.¹⁰³ About 44 percent of public prisons nationwide assign incarcerated workers to work on public works assignments outside the prison.¹⁰⁴ In Florida, for instance, about 3,500 unpaid incarcerated workers work on state road

⁹⁹ Georgia Department of Corrections (GDC), *County Prisons*, <http://dcor.state.ga.us/Divisions/Facilities/CountyPrisons> (stating “Some low-security, long-term state prisoners are incarcerated at county work camps. They provide unpaid, yet highly-skilled work to the counties in which they are housed.... GDC offenders assist in the maintenance of roads and parks; work at local landfills; serve on local fire crews; assist with small construction projects for government agencies, and assist local government agencies as needed.”); Georgia Department of Corrections, *Reentry & Cognitive Programming*, <http://www.dcor.state.ga.us/Divisions/Facilities/Transitional> (stating “The maintenance residents are assigned full-time to maintain the facility or other state facilities in the area. For example, approximately half of the residents assigned to the Atlanta Transitional Center are maintenance workers who provide details to the Governor’s Mansion, the State Capitol Complex, and the State Highway Patrol Headquarters. These residents are not paid any wages.”); Adrian Drepaul, *I Had a Shitty Job in Prison*, MARSHALL PROJECT (Aug. 8, 2019), <https://www.themarshallproject.org/2019/08/08/i-had-a-shitty-job-in-prison>; Grady Capstone Journalist, *Use of Unpaid Inmate Labor Scrutinized in Athens-Clarke County*, GRADY NEWSOURCE (Apr. 5, 2019), <https://gradynewsource.uga.edu/use-of-unpaid-inmate-labor-scrutinized-in-athens-clarke-county/>.

¹⁰⁰ Mississippi Department of Corrections, *Inmate Work Crews*, <https://www.mdcc.ms.gov/Institutions/Pages/Inmate-Work-Crews.aspx>.

¹⁰¹ South Carolina Department of Corrections (SCDC), SCDC Policy, Admin-15.13; *Inmate Pay*, § 3 (2014), <http://www.doc.sc.gov/policy/ADM-15-13.htm.pdf>; S.C. Code Ann. § 24-3-40; SCDC letter to South Carolina Legislative Oversight Committee, *Inmate Work: Earning and Supervision Details, Policies, and Statutes* (May 24, 2019), <https://www.scstatehouse.gov/CommitteeInfo/HouseLegislativeOversightCommittee/AgencyWebpages/Corrections/Statistics%20by%20type%20of%20inmate%20work%20-%20qualifications,%20number%20working,%20costs,%20etc..pdf>.

¹⁰² Texas Department of Criminal Justice, *Administrative Directive: Use of Offender Labor for Community Work Projects*, AD-007.11 (rev. 4, Oct. 26, 2015), <https://www.tdcj.texas.gov/documents/policy/AD0711.pdf>; Texas Department of Criminal Justice, *Community and Public Work Project* (Aug. 17, 2015), https://www.tdcj.texas.gov/TDCJ_community_work.html.

¹⁰³ These states are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

¹⁰⁴ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Census of State and Federal Adult Correctional Facilities, 2019 – Statistical Tables* (Nov. 2021) at 3, 13, <https://bjs.ojp.gov/content/pub/pdf/csfac19st.pdf>. In 2005, the last year for which such data was made public, over half of these prisons were located in the South. Of 798 correctional facilities with public works programs in 2005, 447 were located in the South, 98 in the Northeast, 133 in the Midwest, and 120 in the West. U.S. Dep’t of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2005* (Oct. 2008) at Appendix Table 16, <https://bjs.ojp.gov/content/pub/pdf/csfac05.pdf>.

crews and “community work squads,” required to provide labor for hundreds of state and municipal agencies and dozens of state colleges and nonprofits.¹⁰⁵

In North Carolina, nearly 1,000 incarcerated workers work on the state’s roads for the state Department of Transportation and on manual labor jobs for other state and local government agencies.¹⁰⁶ In Arizona, 1,083 incarcerated people work on public works crews for the Department of Transportation and other state, local, and county entities through intergovernmental agreements with the corrections department.¹⁰⁷ These workers logged more than 1.8 million hours of work for the community during fiscal year 2020.¹⁰⁸ In Washington state, about 1,000 people work in similar community work programs through which incarcerated workers work on stream clean-ups, land clearance, farming, and development of parks and recreation areas.¹⁰⁹ In Mississippi, each state prison provides incarcerated workers’ labor for free to local towns and municipalities.¹¹⁰ In Arkansas, incarcerated people on “inmate work crews” logged nearly half a million hours in regional maintenance alone in 2020.¹¹¹

Through such programs, incarcerated workers also perform critical work preparing for and responding to natural disasters, including sandbagging, supporting evacuations, clearing debris, and assisting with recovery and reconstruction after hurricanes, tornadoes, mudslides, or floods.¹¹² For example, in Florida, hundreds of unpaid incarcerated workers were tasked with picking up fallen trees and other debris after Hurricane Irma, and in Texas hundreds of unpaid incarcerated workers filled sandbags in preparation for Hurricane Harvey, forced to work in the storm’s path while people

¹⁰⁵ Ben Conark, *Work Forced: A Century Later, Unpaid Prison Labor Continues to Power Florida*, FLORIDA TIMES-UNION (May 26, 2019), <https://stories.usatodaynetwork.com/workforced/>.

¹⁰⁶ North Carolina Department of Public Safety, *Fiscal Year 2019-2020 Annual Statistical Report* (2020) at 16-17, <https://files.nc.gov/ncdps/FY-2019-20-Annual-Statistical-Report.pdf>.

¹⁰⁷ Arizona Department of Corrections Rehabilitation and Reentry, *Corrections at a Glance, February 2022* (Mar. 8, 2022), <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2022/cagfeb-22.pdf>.

¹⁰⁸ Total hours logged by incarcerated workers on community labor through their work on fire crews, public sector work crews, and Arizona Department of Transportation work crews was 1,829,348 in FY 2020. Arizona Department of Corrections, *Corrections at a Glance, June 2020* <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2020/cagjune-20.pdf>.

¹⁰⁹ Washington State Department of Corrections (WDOC), *Participation by Program Summary* (2020), <https://www.doc.wa.gov/docs/publications/reports/700-SR002-second-quarter.pdf>; WDOC, *Class IV Off-Site Work Crew*, Policy Document 700.400 (2019), <https://www.doc.wa.gov/information/policies/files/700400.pdf>.

¹¹⁰ Mississippi Department of Corrections, *Inmate Work Crews*, <https://www.mdcc.ms.gov/Institutions/Pages/Inmate-Work-Crews.aspx>.

¹¹¹ Arkansas Division of Correction, *Annual Report Fiscal Year 2020* (2021) at 21, <https://doc.arkansas.gov/wp-content/uploads/2021/03/Division-of-Correction-FY20-Annual-Report-Board-of-Corrections-Approved-March-19-2021.pdf>.

¹¹² J. Carlee Purdum and Michelle Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, RISK, HAZARDS & CRISIS IN PUBLIC POLICY (May 12, 2020).

outside prisons were evacuated.¹¹³ Incarcerated firefighters also fight wildfires in Arizona, California, Colorado, Georgia, Idaho, Montana, Nevada, New Mexico, North Carolina, Oregon, South Dakota, Tennessee, Washington, and Wyoming. For instance, Georgia's incarcerated firefighter unit responds to over 3,000 calls annually, assisting with wildfires, structural fires, and motor vehicle accidents—all for zero pay.¹¹⁴

The Florida Department of Corrections estimates the value of the labor of the 3,500 unpaid incarcerated workers working on state road crews and community work squads to be about \$147.5 million over a five-year period.¹¹⁵ “There’s no way we can take care of our facilities, our roads, our ditches, if we didn’t have inmate labor,” Warren Yeager, a former Gulf County, Florida, commissioner told the *Florida Times-Union*.¹¹⁶ State governments also rely on incarcerated workers as a low-wage labor force to respond to a variety of disasters and emergencies throughout the country.¹¹⁷ At least 30 states explicitly include incarcerated workers as a labor resource in their state-level emergency operations plans.¹¹⁸

v. Labor for the Private Sector

Finally, state prison systems profit from labor contracts signed with private companies that employ incarcerated workers, and the private sector benefits significantly from coerced prison labor. Private companies benefit from prison labor by directly employing incarcerated workers through the Prison Industry Enhancement Certification Program (PIECP) and other means, and by purchasing goods and services through correctional industries for a lower cost than they would pay in the private market.

¹¹³ Jessica Lipscomb, *Unpaid Florida Prisoners Being Used to Clean Up After Hurricane Irma*, MIAMI NEW TIMES (Sept. 28, 2017) <https://www.miamiherald.com/news/unpaid-florida-prison-inmates-being-used-on-hurricane-irma-cleanup-labor-crews-9701867>; Polly Mosendz, *When Do You Move Prisoners Out of a Storm’s Path?*, BLOOMBERG (Sept. 8, 2017), <https://www.bloomberg.com/news/articles/2017-09-08/when-do-you-move-prisoners-out-of-a-hurricane-s-path>.

¹¹⁴ Georgia Department of Corrections, *Fire Services and Life Safety*, <http://www.dcor.state.ga.us/Divisions/Facilities/FireServices>; Georgia Department of Corrections, *Fiscal Year 2020 Report* at 60, <http://www.dcor.state.ga.us/sites/default/files/sites/all/gdc/files/pdf/Research/Monthly/GDC%20FY2020%20Annual%20Report.pdf>; Georgia Department of Corrections, *2017 Fiscal Year Report* at 24, <http://www.dcor.state.ga.us/sites/default/files/sites/all/gdc/files/pdf/Research/Monthly/GDC%20FY2017%20Annual%20Report.pdf>; Erin Paige McGonigle, *First Responders, Second Priority: Georgia’s Inmate Firefighter Program and International Human Rights Standards*, 48 GEORGIA J. INTL. & COMP. L. 189 (Apr. 11, 2021), <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2471&context=gjicl>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ J. Carlee Purdum and Michelle Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, RISK, HAZARDS & CRISIS IN PUBLIC POLICY (May 12, 2020).

¹¹⁸ *Id.*

Private companies continue to employ incarcerated workers, benefitting from their labor without adequate compensation. For example, Arizona Correctional Industries has a private labor contract program that allows private companies headquartered in Arizona to directly employ incarcerated workers outside of the Prison Industry Enhancement Certification Program. As of February 2022, 974 incarcerated people employed by Arizona Correctional Industries work for outside employers through labor contracts.¹¹⁹ The average wage in these non-PIECP positions is typically \$3 to \$4 per hour—far less than the prevailing wage legally required by the PIECP program.¹²⁰

Arizona Correctional Industries' best customer in fiscal year 2020 was Hickman's Egg Ranch / Hickman's Family Farms, which paid more than \$7 million to the state prison industries program that year for labor contracts to employ incarcerated workers, outside PIECP, who were paid \$4.25 to \$5.25 an hour to care for chickens, provide farm maintenance, and package eggs.¹²¹ Hickman's is the fourth-largest U.S. egg producer, and its eggs are sold at grocery stores around the Southwest. Taylor Farms, North America's largest supplier of salads and fresh-cut vegetables, paid over \$2.2 million to Arizona's prison industries program for labor contracts to employ incarcerated workers to cut and package fruit and vegetables for the company.¹²² Taylor Farms supplies some of the nation's biggest fast food and grocery chains, including Chipotle, Costco, Kroger, McDonald's, Pizza Hut, Ralphs, Safeway, Subway, Target, Walmart, and Whole Foods Market.

Even when employed through PIECP, incarcerated workers experience exploitation. While PIECP is intended to offer job training at prevailing wages to incarcerated persons, private companies continually reap the benefits of cheap incarcerated labor while circumventing the requirements of PIECP without consequence. Through PIECP, private companies can contract with correctional institutions to employ prison workers to produce goods, either at production workshops within prisons or offsite. Today, 4,860 incarcerated workers nationwide are employed in PIECP to produce goods authorized for sale in interstate commerce on behalf of private corporations.¹²³

¹¹⁹ Arizona Department of Corrections Rehabilitation and Reentry, *Corrections at a Glance, February 2022* (Mar. 8, 2022), <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2022/cagfeb-22.pdf>; Arizona Correctional Industries, *Achieving Balance: 2020 Annual Report* (2021) at 21, https://aci.az.gov/sites/default/files/ACI_AR_2020.pdf.

¹²⁰ Pioneer Institute, *Arizona Correctional Industries Partnering with Private Sector Companies*, (July 19, 2011), <http://bgc.pioneerinstitute.org/arizona-correctional-industries-partnering-with-private-sector-companies/>.

¹²¹ Arizona Correctional Industries, *Achieving Balance: 2020 Annual Report* (2021) at 21, https://aci.az.gov/sites/default/files/ACI_AR_2020.pdf; Arizona Auditor General, *Arizona Department of Corrections, Rehabilitation and Reentry, Capital Projects Funding and Department Finances, Performance Audit* (Oct. 2020) at 20-21, https://www.azauditor.gov/sites/default/files/20-109_Report.pdf.

¹²² *Id.*

¹²³ As of the second quarter of 2021 ending on June 30, 2021, 4,738 incarcerated workers were employed through PIECP. See, National Correctional Industries Association, *Prison Industry Enhancement Certification*

Although private corporations participating in this program are required to adhere to some minimal labor standards, which include paying incarcerated workers the “prevailing wage,” they enjoy significant benefits and cost-savings from employing this captive labor force.¹²⁴

Some private companies participating in PIECP have successfully avoided paying prevailing wages by exploiting loopholes and employing a variety of tricks. One tactic has been to divide incarcerated workers into two groups: one which creates *pieces* of a product and a second which *assembles* the pieces (only the final assembly group is paid the prevailing wage).¹²⁵ Another tactic, refined by Florida’s PRIDE, involved prolonging “training programs” to justify paying incarcerated PIECP participants artificially depressed wages instead of the prevailing wage.¹²⁶ Incarcerated workers about to complete their PRIDE training program on one piece of equipment were moved to train on another piece of equipment at the last moment to restart the process.¹²⁷ None of these companies, including PRIDE, has been charged with violating the terms of the program, but their practices illustrate how easy it is to squeeze profits out of the program.

There is little recourse for incarcerated workers being exploited under PIECP. The accountability mechanism for labor abuses in PIECP programs has been captured by the entities benefitting from prison labor. The National Correctional Industries Association, an organization run by a board of directors who represent different prison industry departments and corporations from across the country, monitors PIECP. In essence, the people implementing PIECP are charged with monitoring their own implementation—hardly a logical or effective oversight structure.¹²⁸

The private sector’s involvement in prison labor extends beyond directly contracting incarcerated labor, but also through purchasing cheap goods and services from prison industries. The products, goods, and services, that incarcerated workers create are a significant part of the U.S. economy. Colorado Correctional Industries, for example,

Program (PIECP) Certification & Cost Accounting Center Listing: Q2 2021 Certification Listing Report (Dec. 2, 2021), <https://www.nationalcia.org/statistical-reports>, https://4c99dc08-46a7-4bd9-b990-48103d668bb3.filesusr.com/ugd/569cf7_cf27cb77182443a69a2de109c9175110.pdf.

¹²⁴ See Bureau of Justice Assistance, *Prison Industry Enhancement Certification Program Brief* (2002).

¹²⁵ Julie Goodridge et al., *Prison Labor in the U.S.: An Investor Perspective*, N. STAR ASSET MGMT. 22 (2018), <https://missioninvestors.org/sites/default/files/resources/Prison%20Labor%20in%20the%20United%20States%20-%20An%20Investor%20Perspective.pdf>; NCIA, *PIECP, Prison Labor, Prison Industries Violations, PIECP Program Violations*, http://prison-labor.50megs.com/rich_text_1.html.

¹²⁶ Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (Mar. 5, 2010), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/>.

¹²⁷ *Id.*

¹²⁸ National Correctional Industries Association (NCIA), *Our Leadership*, <https://www.nationalcia.org/our-leadership>.

sold goods and services to around 100 private companies, which generated more than \$6.2 million in revenue for the state correctional industries program in 2020.¹²⁹ Utah Correctional Industries sold goods and services to almost a thousand private companies, including major corporations such as 3M Company, Allstate Insurance Company, American Apparel, American Express, Apple Inc., AT&T Mobility, Costco, Enterprise Rent-a-Car, FedEx, Frito Lay Inc., Fujifilm North America, Hertz Corporation, Hewlett-Packard, Hickory Farms, Infiniti Motor Company, Little Caesars Enterprises, Lowe's, KFC, OfficeMax, Pepsi-Co, Procter & Gamble, Sara Lee Corporation, T-Mobile, Verizon, and Xerox Corporation.¹³⁰

These products are then sold by private companies to consumers who may be unaware they originated with prison labor. Agricultural products provide an instructive example. Colorado's and South Carolina's prison industries programs sell milk produced by incarcerated workers employed in prison dairies to Dairy Farmers of America, the conglomerate that markets about 30 percent of the milk produced in the U.S..¹³¹ The two state prison industries programs sold more than \$10.5 million worth of milk from 2017 to 2020 to Dairy Farmers of America, which manufactures brands including Borden, Breakstone, Plugrá, and T.G. Lee Dairy.¹³²

In Louisiana, Louis Dreyfus Commodities, a commodities trader, purchased \$2.4 million worth of corn and soybeans produced by incarcerated workers employed in the state prison industries program from 2017 to 2020, while numerous livestock auction companies purchased at least \$5 million worth of livestock raised by workers incarcerated in Louisiana prisons during that same time period.¹³³ The livestock sold at auction on the open market later finds its way as meat sold to consumers with no indication that it originated with the labor of incarcerated workers. Leprino Foods Company, which supplies mozzarella to Domino's Pizza, Papa John's, and Pizza Hut, purchased more than 600 tons of buffalo milk from 2017 and 2020 produced by incarcerated people working in Colorado Correctional Industries.¹³⁴

¹²⁹ Colorado Department of Corrections, *Private Sector Customers*, FOIA response document (on file with authors); Colorado Correctional Industries, *Annual Report 2020* (July 2020) at 4, https://www.coloradoci.com/bin-pdf/annualReport/07_2020_annrep.pdf; Colorado Correctional Industries, *Partner Companies*, <https://www.coloradoci.com/bin-pdf/partnerCompanies.pdf>.

¹³⁰ Utah Department of Corrections (UCI), *UCI Public Customer Suppliers*, FOIA response document (on file with authors) (also listing customers).

¹³¹ 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/>; Colorado Department of Corrections, *Private Sector Customers*, FOIA response document (on file with authors).

¹³² 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/>.

¹³³ *Id.*; Michael Sainato, *Corporations Are Making Millions of Dollars from US Prison Labor*, REAL NEWS (Jan. 5, 2022), <https://therealnews.com/corporations-are-making-millions-of-dollars-from-us-prison-labor>.

¹³⁴ *Id.*

c. Forced Prison Labor in the U.S. is a Form of Racial Discrimination and Oppression

Incarcerated labor has a long and problematic history in the U.S., inherently tied to racial oppression. The U.S.' legacy of slavery and racism is inseparable from its modern system of racial oppression – mass incarceration – where people of color, particularly Black people, are disproportionately incarcerated and subjected to forced prison labor reminiscent of chattel slavery. Some of the racism of prison labor is explicit, such as the use of modern-day penal plantations,¹³⁵ where predominantly Black incarcerated workers are forced to do agricultural work, sometimes on the sites of former slave plantations and producing the same crops grown by enslaved people. Other forms of racism are more covert, such as discriminatory prison labor assignments, where incarcerated persons of color are assigned to lower wage work and work assignments that will not improve their job prospects outside of prison. Incarcerated people have almost no avenue for relief for the racism and discrimination they experience in work assignments behind bars. In August 2022, the U.N. Committee on the Elimination of Racial Discrimination has expressed concerns “about reports indicating that the overrepresentation of racial and ethnic minorities in prison results in high proportions of convicted inmates from these minorities being subjected to prison labour without just and favourable remuneration or other basic labour protections.”

Last year, following an official visit to the United States, the International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement declared its astonishment that “forced prison labour exists to this day in the United States, constituting a contemporary form of slavery,” and recommended that the United States “eliminate the free or poorly paid prison forced labour” and “ensure that incarcerated workers have their labour rights assimilated to the rights of all other non-incarcerated workers, including the payment of the local minimum wage.”¹³⁶

¹³⁵ See, e.g., Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 835 (2012); Georgia Department of Corrections, *Food & Farm Services Fact Sheet* (Jan. 2015), http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Fact_Sheets/Info_Sheets_Food_Services.pdf; Tatum Isaacs, *Farmers Behind Bars: A Critical Analysis of Prison Farm Labor in Kentucky and Beyond*, KENTUCKY J. OF EQUINE, AGRICULTURE & NATURAL RESOURCES L. (2017), <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1177&context=kjeanrl>; Rob Goyanes, *The Secret History of Florida Prison Labor*, NEW TROPIC (Jan. 4, 2016), <https://thenewtropic.com/prison-labor-florida/>; Hannah O. Brown, Becca Burton, and Lyndsey Gilpin, *How Incarcerated People Powered the University of Florida's Agricultural Research Program*, SOUTHERLY, <https://southerlymag.org/powered-by-prisons/>.

¹³⁶ International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement, Report to the United Nations Human Rights Council, *Visit to the United States of America*, paras. 110-114, 156, (Sept. 26, 2023), <https://www.ohchr.org/en/documents/country-reports/ahrc54crp7-international-independent-expert-mechanism-advance-racial>.

i. The History of Incarcerated Labor in the U.S. is Rooted in Slavery and Racial Oppression

The roots of modern-day labor programs can be traced to the end of the Civil War and the passage of the 13th Amendment to the Constitution in 1865. The 13th Amendment outlawed slavery and involuntary servitude, “except as a punishment for crime whereof the party shall have been duly convicted.”¹³⁷ Given this gaping loophole, states turned to incarcerated labor as a means of partially replacing chattel slavery and the free labor force slavery provided.

In the North, incarcerated people were contracted out to private individuals and entities to perform labor in industrial factories.¹³⁸ Under this contract system, incarcerated laborers were often forced to work 14 to 16 hours a day and were brutally punished for not working fast enough, for accidentally damaging equipment, and sometimes for no reason at all.¹³⁹ These severe punishments, which included hoisting incarcerated individuals “up by the thumbs with fishing line and a pulley mechanism attached to the ceiling,”¹⁴⁰ allowed Northern states to produce in one year alone what, in today’s dollars, amounts to over \$30 billion worth of prison-made goods.¹⁴¹ By the late 1800s, over 75 percent of the North’s incarcerated population worked in these factories. This economic exploitation fell largely upon impoverished, immigrant, and African American communities who made up the majority of the incarcerated population in the North.¹⁴²

In the South, conditions for incarcerated people were just as brutal, with incarcerated workers being forced to labor for up to 17 hours each day, building factories, laying railroads, and mining coal.¹⁴³ Under the convict leasing system, this work was conducted under the supervision of private employers who could bid on and “lease” incarcerated people for days, months, or years to work on plantations and at coal mines, turpentine farms, sawmills, phosphate pits, railways, and brickyards.¹⁴⁴ These private employers had unfettered control over unpaid, predominantly Black workers

¹³⁷ U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the U.S., or any place subject to their jurisdiction”).

¹³⁸ Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 J. OF LAB. AND SOC’Y 327, 333 (2012).

¹³⁹ *Id.* at 334-35.

¹⁴⁰ *Id.* at 335.

¹⁴¹ *Id.* at 334.

¹⁴² *Id.* at 327.

¹⁴³ *Id.* at 338; Christopher R. Adamson, *Punishment after Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 556 (1983).

¹⁴⁴ MATTHEW MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (Columbia, SC: University of South Carolina Press, 1996); Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 835, 877 (2012).

and subjected them to brutal punishments such as whipping and branding and, in many cases, worked incarcerated people to death.¹⁴⁵ In Mississippi, not a single leased convict lived long enough to serve a 10-year sentence.¹⁴⁶ Because the leasing system was so profitable for Southern states and lessees alike, new laws known as Black Codes were passed which permitted sheriffs to arrest Black men on specious charges and indirectly allowed states to expand their convict leasing programs.¹⁴⁷

Organized free labor, disgruntled by having to compete with incarcerated labor, was the driving force behind the fall of the contract system in the North and the convict leasing programs in the South.¹⁴⁸ By the 1890s, 35 states capitulated to rising union pressure to scale back incarcerated labor programs as a way to reduce competition in the labor market. The result of this concession was the implementation of the “state-use system,”¹⁴⁹ in which the state became the only lawful purchaser of incarcerated labor and goods.¹⁵⁰ When Congress established the first federal prisons in 1891, a similar system was adopted in which incarcerated people could be forced to work and produce certain commodities, provided that these workers were “employed exclusively in the manufacture of such supplies for the Government.”¹⁵¹

As state corrections systems expanded, so too did the number of state-sponsored incarcerated labor programs. Work crews, commonly known as chain gangs, were first established in the 1890s in Georgia and spread throughout the South as states began to phase out the convict lease system.¹⁵² These chain gangs consisted of prisoners, the vast majority of whom were Black men, shackled together with chains wrapped around their ankles, day and night, even while working, sleeping, or eating. They were forced to engage in unpaid labor in brutal conditions outside of the prison, such as road construction, ditch digging, rock breaking, highway maintenance, and farming, under the supervision of correctional officers armed with shotguns and whips. Chain gangs became more prevalent in the early 20th century as states gradually abolished the convict leasing system, as Georgia did in 1908 and later Alabama in 1928. By 1923

¹⁴⁵ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 8, 56, 67 (New York: Anchor Books, 2008); Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 J. OF LAB. AND SOC’Y 327, 337 (2012).

¹⁴⁶ *Id.* at 339.

¹⁴⁷ Heather Ann Thompson, *Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LAB.: STUD. IN WORKING-CLASS HIST. 15, 16 (2011); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (New York, Free Press, 1997).

¹⁴⁸ Stephen P. Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 361-62 (1998).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Three Prisons Act, ch. 529, sec. 2, 26 Stat. 839 (1891).

¹⁵² ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (New York: Verso, 1996).

every state except for Rhode Island had used chain gangs to build and repair roads, but the practice was most widely used in the South.¹⁵³

In 1913, Wisconsin established the first work-release program in the U.S..¹⁵⁴ This program allowed those convicted of misdemeanors to leave jail during the day for the limited purpose of attending work (and sometimes school, community service, or other activities).¹⁵⁵ Since the workers' wages were collected directly by the jail, which also profited from reduced supervisions costs, the model proved to be quite cost-effective.¹⁵⁶ Several states were quick to adopt near-identical versions of the Wisconsin program, while others sought to further reduce the costs associated with incarcerating large swaths of their population by expanding the program to prisons and allowing those convicted of minor felonies to participate as well.¹⁵⁷

A similar growth in incarcerated labor programs occurred within the federal system as well. In 1934, four years after the Federal Bureau of Prisons was first established, Congress authorized the creation of the Federal Prison Industries program (later rebranded as "UNICOR" in 1977). This program allowed federal prisons to employ incarcerated individuals "in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision of the State in which they are imprisoned."¹⁵⁸ The initial aim of this program, like many of those discussed above, was to offset the costs of incarceration by allowing state governments to profit from prison labor.¹⁵⁹

ii. Penal Plantations

While chain gangs and convict leasing practices are no longer in use in the U.S., the racist legacy of these programs continues to this day. Twenty-seven percent of public prisons have work programs in farming and agriculture.¹⁶⁰ In Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, and Texas, incarcerated workers are tasked with agricultural work on penal plantations or prison farms.¹⁶¹

¹⁵³ MITCHEL P. ROTH, *PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA* (Westport, CT: Greenwood Press, 2006).

¹⁵⁴ Stanley E. Grupp, *Work Release in the U.S.*, 54 J. CRIM. L. AND CRIMINOLOGY 267 (1963).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Act of May 14, 1930, ch. 274 § 3, 46 Stat. 325 (1930).

¹⁵⁹ Heather Ann Thompson, *Rethinking Working-Class Struggle through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LAB.: STUD. IN WORKING-CLASS HIST. 15, 20 (2011).

¹⁶⁰ U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of State and Federal Adult Correctional Facilities, 2019 – Statistical Tables* (Nov. 2021) at 13, <https://bjs.ojp.gov/content/pub/pdf/csfac19st.pdf>.

¹⁶¹ See, e.g., Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 835 (2012); Georgia Department of Corrections, *Food & Farm Services Fact Sheet* (Jan. 2015),

These penal plantations have direct roots in the Black chattel slavery of the South and some are situated on land that was originally the site of slave plantations. At some of these prisons, incarcerated workers today produce some of the same crops that were grown by enslaved people on the same land less than 160 years earlier.¹⁶²

For example, at the Louisiana State Penitentiary, known as Angola, the nation's largest maximum-security prison situated on 18,000 acres of land that was originally the site of slave plantations, incarcerated workers work field crops including cotton, corn, soybeans, and sugarcane for only two cents an hour.¹⁶³ Every person incarcerated in Angola, 74 percent of whom are Black¹⁶⁴—and most incarcerated across Louisiana—starts work in the fields, and switching jobs is difficult.¹⁶⁵ Field laborers work with limited access to water, minimal rest, and no restroom facilities, under the supervision of armed correctional officers on horseback.

In Arkansas, about 3,000 incarcerated workers labor on 20,344 agricultural acres spread across five prisons unpaid, with no limit to their daily hours, and without scheduled, guaranteed breaks.¹⁶⁶ Many of these workers are assigned to field work on the “hoe squad,” digging ditches, pulling weeds, clearing land, and picking crops while watched by correctional officers on horseback.¹⁶⁷ At Cummins Unit, a maximum-

http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Fact_Sheets/Info_Sheets_Food_Services.pdf; Tatum Isaacs, *Farmers Behind Bars: A Critical Analysis of Prison Farm Labor in Kentucky and Beyond*, KENTUCKY J. OF EQUINE, AGRICULTURE & NATURAL RESOURCES L. (2017),

<https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1177&context=kjeanrl>; Rob Goyanes, *The Secret History of Florida Prison Labor*, NEW TROPIC (Jan. 4, 2016), <https://thenewtropic.com/prison-labor-florida/>; Hannah O. Brown, Becca Burton, and Lyndsey Gilpin, *How Incarcerated People Powered the University of Florida's Agricultural Research Program*, SOUTHERLY, <https://southerlymag.org/powered-by-prisons/>.

¹⁶² See, e.g., Andrea Kelley, Arabella Saunders, and Marin Wolf, *From Plantation to Prison: How Oppression Led to High Rates of Disease, Death for Black North Carolinians*, NORTH CAROLINA HEALTH NEWS (Feb. 23, 2021), <https://www.northcarolinahealthnews.org/2021/02/23/from-plantation-to-prison-how-oppression-led-to-high-rates-of-disease-death-for-black-north-carolinians/>.

¹⁶³ Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 835, 874 (2012); La. Admin Code Tit.22, §331(10).

¹⁶⁴ Louisiana Department of Corrections, *Demographic Dashboard, Facility Breakout: LSP* (Dec. 31, 2021), <https://doc.louisiana.gov/demographic-dashboard/>.

¹⁶⁵ Interview with Andrea Armstrong, Loyola University New Orleans, College of Law Professor, in New Orleans, LA (Nov. 6, 2019) (on file with authors) (interview concerning issues reported to Professor Armstrong by incarcerated people).

¹⁶⁶ Arkansas Division of Correction, *Annual Report, Fiscal Year 2019* (2020) at 42, https://doc.arkansas.gov/wp-content/uploads/2020/09/Division_of_Correction_FY19_Annual_Report_BOC_Approval-5272020.pdf; Arkansas Department of Corrections, *An Overview of Arkansas Department of Correction's Agriculture Division & Explanation of Selected Audit Findings*, Oct. 20, 2016, https://doc.arkansas.gov/wp-content/uploads/2020/09/Agriculture_Division_Overview_for_102016.pdf; Riley Kovalcheck, *The Modern Plantation: The Continuities of Convict-Leasing and an Analysis of Arkansas Prison Systems*, 7 CLA J. 96 (2019); Jeannie Roberts, *Prison Farms: A Growing Concern for Some Critics*, ARKANSAS DEMOCRAT GAZETTE, Feb. 16, 2016.

¹⁶⁷ See, e.g., Lamar Moore, *Arkansas Prisons' Unpaid Labor Program is Criminal*, PRISON JOURNALISM PROJECT (Feb. 22, 2022), <https://prisonjournalismproject.org/2022/02/22/arkansas-prisons-unpaid-labor->

security state prison in Arkansas that was designed as a prison for Black men and where the population today is disproportionately Black, incarcerated people work in the fields cultivating and picking row and vegetable crops including corn, soybeans, rice, wheat, and oats; work in slaughterhouses, poultry, and swine management; and work in egg production, picking through 100,000 eggs a day.¹⁶⁸ The prison is situated on 11,347 acres of farm land that was the site of part of the Cummins and Maple Grove slave plantations.¹⁶⁹

In Mississippi, incarcerated workers plant, harvest, and process crops including soybeans, corn, blueberries, pecans, tomatoes, turnip greens, and field peas. The farming work takes place at Mississippi State Penitentiary (known as Parchman Farm) in Parchman, and South Mississippi Correctional Institution in Leakesville. Parchman was built in the early 20th century and modeled after antebellum slave plantations; the governor of Mississippi at the time the prison opened referred to it as running “like an effective slave plantation.”¹⁷⁰ Today it is located on 18,000 acres and leases an additional nearly 8,000 acres for its agricultural work, and 67 percent of the incarcerated population is Black.¹⁷¹

At North Carolina’s Roanoke River Correctional Institution (formerly known as Caledonia Correctional), located on 7,500 acres on the site of the former Caledonia plantation, incarcerated workers cultivate row crops such as corn, wheat, and soybeans; vegetables including sweet corn, collard greens, sweet potatoes, squash,

[program-is-criminal/](#); Happy Stompingbear, *Hoe Squad: The Work That We Do*, PRISON JOURNALISM PROJECT (Oct. 11, 2020), <https://prisonjournalismproject.org/2020/10/11/hoe-squad-the-work-that-we-do/>; Molly Minta, *Incarcerated, Infected and Ignored: Inside the Cummins Prison Outbreak*, ARKANSAS TIMES (June 18, 2020), <https://arktimes.com/arkansas-blog/2020/06/18/incarcerated-infected-and-ignored-inside-the-cummins-prison-outbreak>; Rachel Aviv, *Punishment by Pandemic*, NEW YORKER (June 15, 2020), <https://www.newyorker.com/magazine/2020/06/22/punishment-by-pandemic>.

¹⁶⁸ Arkansas Department of Corrections, *Cummins Unit*, <https://doc.arkansas.gov/facilities/cummins-unit/>; Arkansas Department of Corrections, *An Overview of Arkansas Department of Correction’s Agriculture Division & Explanation of Selected Audit Findings*, Oct. 20, 2016, https://doc.arkansas.gov/wp-content/uploads/2020/09/Agriculture_Division_Overview_for_102016.pdf; Jeannie Roberts, *Prison Farms: A Growing Concern for Some Critics*, ARKANSAS DEMOCRAT GAZETTE, Feb. 16, 2016. Arkansas Department of Corrections, *Cummins Unit*, <https://doc.arkansas.gov/facilities/cummins-unit/>; Arkansas Department of Corrections, *An Overview of Arkansas Department of Correction’s Agriculture Division & Explanation of Selected Audit Findings*, Oct. 20, 2016, https://doc.arkansas.gov/wp-content/uploads/2020/09/Agriculture_Division_Overview_for_102016.pdf; Jeannie Roberts, *Prison Farms: A Growing Concern for Some Critics*, ARKANSAS DEMOCRAT GAZETTE, Feb. 16, 2016.

¹⁶⁹ *Jobe et al. v. Urquart*, 98 Ark. 525, 136 S.W. 663 (1911).

¹⁷⁰ DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (New York: Free Press, 1997) at 110; Innocence Project, *The Lasting Legacy of Parchman Farm, the Prison Modeled After a Slave Plantation* (May 29, 2020), <https://innocenceproject.org/parchman-farm-prison-mississippi-history/>.

¹⁷¹ Mississippi Department of Corrections, *Monthly Fact Sheet* (Jan. 3, 2022), [https://www.mdcc.ms.gov/Admin-Finance/MonthlyFacts/2022-Fact%20Sheet%201-3-22.1%20\(updated\).pdf](https://www.mdcc.ms.gov/Admin-Finance/MonthlyFacts/2022-Fact%20Sheet%201-3-22.1%20(updated).pdf).

cucumbers, and melons; and manage cattle and chickens.¹⁷² Today, incarcerated workers produce some of the same crops that were grown by enslaved people on the same land.¹⁷³ Incarcerated workers also work in the prison cannery to can crops grown on the farm to supply prison kitchens across the state. Roanoke River Correctional Institution is the largest prison farm in the state; others include Dan River Prison Work Farm and Tyrrell Prison Work Farm, which were constructed by work crews of incarcerated workers in the late 1990s.

The racially discriminatory nature of prison labor is exemplified by the numerous examples of Black incarcerated people being subject to severe punishment for refusing to perform degrading agricultural fieldwork on penal plantations. Multiple respondents to a survey of 700 people incarcerated in Louisiana reported that they were placed in solitary confinement because they were unwilling to work in the fields.¹⁷⁴ One respondent said, “Most of my lockdown came from refusing to be a slave...working in fields of corn, etc. Free people riding horses with guns telling you to pick this, do that, and/or write you up for disciplinary just because he or she can.”¹⁷⁵ When Montrell Carmouche was incarcerated at Louisiana Correctional Institute for Women, they cut grass on a “chain squad,” reminiscent of chain gangs after the Civil War. Once Montrell decided they no longer wanted to participate in forced manual labor, they spent about one year in solitary confinement.¹⁷⁶

In Arkansas, Kaleem Nazeem was repeatedly placed in solitary confinement for months at a time at multiple state prisons, including Cummins Unit and Varner Unit, for refusing to pick cotton. He said, “I had an aversion to picking cotton. The first time I refused to pick cotton, I was placed in solitary confinement. I said I weren’t picking no cotton. For the whole cotton season, four months, I stayed in solitary confinement. Every time the cotton season came around and I found myself on hoe squad, then I opted out and found myself in solitary confinement.” He added, “I was truly experiencing modern day slavery. It was like, to me, to pick cotton was one of the

¹⁷² North Carolina Department of Public Safety, Roanoke River Correctional Institution, <https://www.ncdps.gov/adult-corrections/prisons/prison-facilities/caledonia-correctional-institution>; North Carolina Department of Public Safety, *North Carolina Prison Inmates at Work*, <https://www.doc.state.nc.us/work/workover.htm>.

¹⁷³ Andrea Kelley, Arabella Saunders, and Marin Wolf, *From Plantation to Prison: How Oppression Led to High Rates of Disease, Death for Black North Carolinians*, NORTH CAROLINA HEALTH NEWS (Feb. 23, 2021), <https://www.northcarolinahealthnews.org/2021/02/23/from-plantation-to-prison-how-oppression-led-to-high-rates-of-disease-death-for-black-north-carolinians/>.

¹⁷⁴ Solitary Watch, ACLU of Louisiana, and the Jesuit Social Research Institute/Loyola University New Orleans, *Louisiana on Lockdown*, SOLITARY WATCH (Jun. 2019) at 67, <https://solitarywatch.org/wp-content/uploads/2019/06/Louisiana-on-Lockdown-Report-June-2019.pdf>.

¹⁷⁵ *Id.* at 12.

¹⁷⁶ Interview with Montrell Carmouche, director of Operation Restoration’s Safety and Freedom Fund, New Orleans, LA (Nov. 8, 2019) (on file with authors).

symbols of slavery to me. I was trying to push back on what was basically a former reality for my ancestors and a present reality for me at that time.”¹⁷⁷

iii. Racial Discrimination in the Allocation of Work Assignments

In addition to racially charged prison labor assignments, incarcerated persons of color, particularly Black persons, experience discriminatory placement in lower paying positions than their White counterparts. Michael Gibson-Light, an ethnographer who spent 18 months observing a prison in the U.S. Sun Belt region, found that prisons allocate job assignments along racial lines, even when they have contrary policies in place.¹⁷⁸ Desirable jobs, such as more highly paid work in the call center or the fleet garage where police vehicles are serviced, were more often allocated to white incarcerated people. This can result from biased decisions made by correctional officers as well as systems that rely on peer referral for consideration. Applicants to the call center who “don’t sound like they’re from the *ghetto*” were prioritized, one manager explained to Gibson-Light.¹⁷⁹

These racially discriminatory work assignments are not anomalies. Analysis using data sets from 2004 and 2005 and multilevel modeling to examine the nature of work assignments in state prisons found that race significantly impacted work assignments. The 2016 study found that Black men have significantly higher odds of being assigned to maintenance and other facility services work than White men—41.2 percent of Black men and 35.3 percent of White men were assigned such jobs, which are typically paid the lowest wage, if at all.¹⁸⁰ The study also found that a significantly lower percentage of Black men were assigned work in prison industries—2.8 percent of Black men versus 3.7 percent of White men had such jobs, which are typically the most sought-after and more highly paid jobs that may provide useful skills.¹⁸¹ Men who identified as a race other than Black or White were less likely than White men to be paid for their jobs. While the study did not find significant differences based on gender for most job categories, it did find that women who identified as a race other than Black or White had significantly increased odds of being assigned a maintenance or other facility services job assignment.¹⁸²

¹⁷⁷ Interview with Kaleem Nazeem, board member, Decarcerate, Jonesboro, Arkansas (June 12, 2022).

¹⁷⁸ Michael Gibson-Light, *The Prison as a Market: How Penal Labor Systems Reproduce Inequality*, PhD diss., University of Arizona at 128 (2019) (on file with authors).

¹⁷⁹ *Id.* at 138.

¹⁸⁰ Courtney A. Crittenden, Barbara A. Koons-Witt and Robert J. Kaminski, *Being Assigned Work in Prison: Do Gender and Race Matter?*, FEMINIST CRIMINOLOGY 1-23 (Sept. 2016), https://www.researchgate.net/publication/308104933_Being_Assigned_Work_in_Prison_Do_Gender_and_Race_Matter.

¹⁸¹ *Id.*

¹⁸² *Id.*

Allocation of work assignments can perpetuate racial and socioeconomic inequalities. Dolfinette Martin now works at Operation Restoration, a reentry organization for women in New Orleans, but while incarcerated in Louisiana, she was assigned to manual agricultural labor in the fields. She described how White women worked in “prestigious jobs”—the dining hall, housekeeping, or the “snack shack” for visitors. But “there weren’t a lot of White girls in the field,” she observed.¹⁸³ “The only people who could approach the Deputy Warden to ask for a job were White women,” she said.¹⁸⁴

In Illinois’ Centralia Correctional Center, two incarcerated people separately confirmed the prevalence of racial bias in the allocation of jobs. Ronni Curry explained that prison officials “favor White inmates for the best jobs and positions,”¹⁸⁵ and Jesus Duran observed that “any job outside the kitchen is given mostly to White inmates.”¹⁸⁶ Such racially discriminatory assignments are not just an immediate affront to a person’s dignity—it can make a considerable difference in someone’s reentry prospects. A worker incarcerated at Western Illinois Correctional Center noted that “the White inmates get the plumbing, electrician, and carpentry jobs; and the Black and Latino inmates get the jobs like kitchen, yard gang, laundry, clothing, but none of the jobs that can actually train us to get a good job on the outside.”¹⁸⁷

Incarcerated workers have extremely limited avenues for relief for the racial discrimination they experience behind bars. Title VII of the Civil Rights Acts, which protects employees from employment discrimination, does not indicate if its protections extend to incarcerated workers.¹⁸⁸ As such, certain Circuits exclude incarcerated workers from Title VII protection.¹⁸⁹

III. National Authorities Examining Prison Labor

U.S. law explicitly excludes incarcerated workers from the most universally recognized workplace protections. Incarcerated workers are not covered by minimum wage laws or overtime protection, are not afforded the right to unionize, and are denied workplace safety guarantees. The main U.S. federal statute that sets minimum standards and safeguards for health and safety in the workplace, the Occupational

¹⁸³ Interview with Dolfinette Martin, housing director, Operation Restoration, in New Orleans, LA (Nov. 8, 2019) (on file with authors).

¹⁸⁴ *Id.*

¹⁸⁵ Written survey response by Ronni Curry, incarcerated at Centralia Correctional Center, IL (on file with authors).

¹⁸⁶ Written survey response by Jesus Duran, incarcerated at Centralia Correctional Center, IL (on file with authors).

¹⁸⁷ Written survey response by [Name withheld to preserve anonymity, at survey respondent’s request], incarcerated at Western Illinois Correctional Center, IL (on file with authors).

¹⁸⁸ See Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 Colum. L. Rev. 1048, 1061-1063 (2011).

¹⁸⁹ See *id.* at 1068-1079.

Safety and Health Act (OSHA), excludes most incarcerated workers—namely, those who work in state correctional facilities—from its coverage.¹⁹⁰ Moreover, many health and safety workplace statutes at the state level do the same, resulting in gaps in protections for most incarcerated workers.¹⁹¹ Other federal statutes, such as the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964, and the National Labor Relations Act (NLRA), contain standards that aim to protect the physical and mental health of workers, albeit indirectly, by providing for minimum wage, overtime

¹⁹⁰ The vast majority of incarcerated workers labor within correctional institutions operated by state and local governments, which are not considered “employers” under OSHA. *See* 29 U.S.C. § 652(5)-(6) (“(5) The term “employer” means a person engaged in a business affecting commerce who has employees, but does not include the U.S. (not including the U.S. Postal Service) or any State or political subdivision of a State. (6) The term “employee” means an employee of an employer who is employed in a business of his employer which affects commerce.”). *See also* U.S. Department of Labor, OSHA, Standard Interpretations, *Clarification on whether an employer with multiple facilities needs a separate written ECP for each facility*, 1910.1030; 1960 (2011), <https://www.osha.gov/laws-regs/standardinterpretations/2011-12-13> (“Federal OSHA does not cover state or local government-operated prisons.”). *See also* OSHA, Standard Interpretations, *OSHA Does Not Have Jurisdiction Over State Employees or Inmates*, 1975.5 (1992), <https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1> (“The definition of an ‘employer’ under Section 3(5) of the Occupational Safety and Health Act specifically excludes a State or any political subdivision of a State from coverage under the OSHA Act. Therefore, OSHA does not have jurisdiction over the State of Colorado or its employees, including inmates in correctional institutions, either paid or nonpaid.”). However, according to an OSHA instruction from 1995, “when inmates are required to perform work similar to that outside of prisons, e.g., farming, industries, machine operations, etc., the applicable protections open to anyone else in similar situations should apply, including the right to file a report of hazards with appropriate safety and health officials.” *See* OSHA, Directives, *Federal Agency Safety and Health Programs With the Bureau of Prisons*, U.S. Department of Justice, Directive No.: FAP 01-00-002 (1995), <https://www.osha.gov/enforcement/directives/fap-01-00-002>.

¹⁹¹ For example, Arizona Revised Statutes provide that in the employ of the state, the term “employment” does not apply to services performed by “inmate[s] of a custodial or penal institution.” *See* Ariz. Rev. Stat. Ann. § 23-615 (B)(6). The Michigan Supreme Court and Court of Appeals have held that there is no employer/employee relationship between incarcerated individuals and the state since the relationship is custodial and rehabilitative. *See, Thompson v. Bronk*, 126 Mich 455, 456-457; 85 NW 1084 (1901); *Cadeau v. Boys’ Vocational School*, 359 Mich 598, 608-609; 103 NW2d 443 (1960); *Green v. Department of Corrections*, 30 Mich App 648; 186 NW2d 792; *aff’d* 386 Mich 459; 192 NW2d 491 (1971); *Prisoners’ Labor Union at Marquette v. Department of Corrections*, 61 Mich App 328; 336; 232 NW2d 699; *lv den* 394 Mich 843 (1975). New York state’s Department of Labor Public Employee Safety and Health Field Operations Manual excludes incarcerated people from the definition of public employees, even though the Consolidated Laws of New York do not explicitly exclude them from the definition of employee. New York Department of Labor, *Public Employee Safety and Health Field Operations Manual* (2021), <https://dol.ny.gov/system/files/documents/2021/04/peshfom.pdf>; N.Y. Lab. Law § 27-a (McKinney). Virginia Occupational Safety & Health (VOSH) interpret the exclusion of incarcerated individuals as employees under the Virginia Minimum Wage Act, § 40.1-28.9 to extend to VOSH. However, it considers VOSH to be responsible for prisoners employed by a public employer in a work-release program. Virginia Department of Labor and Industry, Occupational Safety and Health Program, *Administrative Regulations Manual* (Sep. 21, 2006), https://www.vaasphalt.org/wp-content/uploads/2012/10/DOLI_Admin_Regs_Manual_hitching_ride_on_paver_issue.pdf. In California, unlike other states, Cal/OSHA may make recommendations to the Department of Corrections to improve the safety of the working conditions and work areas of state prisoners. Cal/OSHA may also conduct hearings and adopts special orders, rules, or regulations if the Department of Corrections fails to comply with recommendations. Cal. Code Regs. tit. 8, § 344.46.

pay, protection from discrimination, and the right to collectively bargain for improved work conditions—but the vast majority of incarcerated workers are excluded from these too.¹⁹² Such exclusion perpetuates exploitative and discriminatory incarceration system with severe implications for the basic safety, bodily integrity, and mental health of workers in prison.

The U.S. Constitution provides little workplace protection for prison workers. Although the Supreme Court in *Farmer v. Brennan* explained that “prison officials must...take reasonable measures to guarantee the safety of the inmates,”¹⁹³ the court’s “deliberate indifference” test makes incarcerated workers’ access to remedies based on an Eighth Amendment cruel and unusual punishment claim difficult. Under this standard, it is not enough for an incarcerated worker to establish the presence of unsafe working conditions by showing an absence of safety equipment, a lack of training in safety procedures, a pattern of similar injuries, or even the violation of state or federal safety regulations.¹⁹⁴ Instead, an incarcerated worker must meet the much higher burden of proving that the prison official “knew of a substantial risk of serious injury and did nothing to protect [the incarcerated person].”¹⁹⁵ This standard makes proving a constitutional violation related to the conditions of forced labor particularly difficult—if not impossible—for most incarcerated workers.

There are two formal channels through which an incarcerated person can nominally access redress and accountability for their forced labor and mistreatment in the workplace: internal prison grievance procedures and external lawsuits (through the judicial system). However, the two channels are inextricably linked in such a way that

¹⁹² In the case of the Fair Labor Standards Act, there has been no specific guidance from Congress or the Supreme Court as to whether the language is meant to exclude incarcerated workers from its protections. However, most appellate courts have ruled that prison workers are excluded from the definition of “employee” in that Act, thereby excluding them from protection. Lang MJ, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers*, 5 U. Pa. J. Bus. L. 19 (2002); Renee Elaine 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, 200–01 (2018). See also Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 Colum. L. Rev. 1048, 1048–1089 (2011); Andre Montoya-Barthelemy, Letter to the Editor, *The Occupational Health of Prison Inmates: An Ignored Population and an Opportunity*, 61 J. of Occupational Env’tl. Med. e74 (2019). In the case of the National Labor Relations Act, which protects the right of workers to engage in collective bargaining, there has also been little Congressional or Supreme Court guidance as to whether its protections include incarcerated workers. Given that the protections only apply to those who meet the specific legal definition of an “employee,” some lower courts have recognized incarcerated workers employed in private companies through work release as eligible for the NLRA’s protections. However, the vast majority of incarcerated workers who labor within prisons and jails are currently not covered given that federal and state governments, when acting as employers, are excluded from the NLRA. Kara Goad, *Columbia University and Incarcerated Worker Labor Unions under the National Labor Relations Act*, 103 Cornell L. Rev. 177 (2017).

¹⁹³ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotation marks and citations omitted).

¹⁹⁴ See, e.g., *Kulkay v. Roy*, 847 F.3d 637, 643–645 (8th Cir. 2017).

¹⁹⁵ *Bratchett v. Braxton Env’tl. Servs. Corp.*, 564 F. App’x 229, 232 (7th Cir. 2014).

effective remedy and justice for incarcerated workers is often impossible to achieve. In many cases, incarcerated workers cannot even reach the courtroom to advocate for better treatment in violation of their basic human rights under ratified treaties including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Furthermore, the United States has not accepted the individual complaints procedure under ratified human rights treaties.

The Prison Litigation Reform Act (PLRA) of 1996 erected nearly insurmountable barriers to accessing relief through federal courts, and many states have subsequently enacted laws that similarly restrict prisoners' access to state courts.¹⁹⁶ One of the most devastating features of the PLRA is its requirement that incarcerated people exhaust administrative remedies within correctional facilities before they bring suit in court—a requirement that has been used to dismiss countless lawsuits filed by incarcerated people seeking the protection of the courts against dangerous or unhealthy conditions of confinement.¹⁹⁷

Meanwhile, the few administrative remedies available inside prisons tend to be burdensome. Grievance procedures vary, but generally they require that incarcerated individuals submit written complaints to a correctional official, followed by appeals to higher authorities such as a warden.¹⁹⁸ Often these steps must be carried out within strict deadlines, which can be unreasonable for full-time incarcerated workers to meet. For example, in Georgia, the deadline for filing a grievance is 10 calendar days.¹⁹⁹ In California, a person in prison has 30 calendar days from the date of the incident to submit a 602-grievance form and 30 days to appeal any denial.²⁰⁰ Although 30 days may sound like plenty of time, prison grievance procedures can be so complicated

¹⁹⁶ Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the U.S.* (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states>.

¹⁹⁷ 42 U.S.C. 1997(e); *See also* Summary, Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995); Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the U.S.* (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states>.

¹⁹⁸ *See e.g.*, Uptown People's Law Center, *Inmate Grievance Procedure Guide*, <https://www.ilnd.uscourts.gov/assets/documents/forms/paveyhearing/IDOC%20Grievance%20Proc.%20summary.pdf>.

¹⁹⁹ Georgia Department of Corrections, *Standard Operating Procedures, Georgia Statewide Grievance Procedure*, Policy 227.02. *See also, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 118 (2006) (Stevens, J., dissenting) (noting that grievance filing deadlines “are generally no more than 15 days, and ... in nine States, are between 2 and 5 days”).

²⁰⁰ Cal. Code Regs. tit. 15, § 3482(b); Prison Law Office, *How to File a CDCR Administrative Grievance and Appeal* (revised June 2020), <https://prisonlaw.com/wp-content/uploads/2020/08/AdminAppeals-June-2020.pdf>. This timeline does not apply to those alleging sexual abuse. *See* Cal. Code Regs. tit. 15, § 3084(c)(1) (no time limit for filing grievance about staff sexual abuse) and Cal. Code Regs. tit. 15, § 3084 (d)(1) (no time limit for filing grievance about sexual abuse by another incarcerated person.).

and opaque that even a team of 10 qualified lawyers needed 18 months to decipher Illinois' procedures.²⁰¹

Moreover, while incarcerated people must adhere to established timelines, prison authorities face little or no consequences if they simply neglect to address those grievances.²⁰² At the California Institution for Women, run by the California Department of Corrections, the "grievance system is notoriously ineffective, according to those who have tried to lodge complaints."²⁰³ Data obtained in the last five years indicates that only about five percent of grievances reviewed by Illinois prison officials in seven out of the 15 largest state prisons were decided in part, or in whole, in an incarcerated person's favor.²⁰⁴ Most other complaints were simply ignored or "disappeared."²⁰⁵

Beyond the sheer complexity and ineffectiveness of the grievance system, incarcerated people are further discouraged from pursuing complaints due to the threat of retaliation by correctional officers, who otherwise face little accountability for their actions.²⁰⁶ One survey of people incarcerated in Ohio found that 70 percent of those who brought grievances suffered retaliation because of it.²⁰⁷ This type of retaliation can and does include loss of desirable jobs and vocational opportunities.²⁰⁸ For example, Blanca Ruiz-Thompson recalls being threatened with demotion to an undesirable kitchen job whenever she tried to complain about the dangerous work conditions in her Medi-Cal glasses manufacturing position.²⁰⁹

Although the requirement that claimants exhaust internal grievance systems is likely the biggest hurdle incarcerated people face to accessing justice, the PLRA introduced a number of other barriers. First, the law requires that incarcerated individuals pay

²⁰¹ Shannon Heffernan, *From Roaches To Medical Emergencies, Illinois Inmates Say 'There's Nobody That We Can Really Go To For Help'*, WBEZ, NPR (Dec. 2, 2020), <https://www.wbez.org/stories/from-roaches-to-medical-emergencies-illinois-inmates-say-theres-nobody-that-we-can-really-go-to-for-help/160ef42c-e728-4e5d-990b-f584242205df>.

²⁰² Cal. Code Regs. tit. 15, § 3487(a)(1).

²⁰³ Cyrus Dunham, "A Living Hell" Dispatches From a California Prison Amid the Climate and Coronavirus Crises, THE INTERCEPT (Nov. 22, 2020), <https://theintercept.com/2020/11/22/california-women-prison-heat-climate-covid/>.

²⁰⁴ Shannon Heffernan, *From Roaches To Medical Emergencies, Illinois Inmates Say 'There's Nobody That We Can Really Go To For Help'*, WBEZ NPR (Dec. 2, 2020), <https://www.wbez.org/stories/from-roaches-to-medical-emergencies-illinois-inmates-say-theres-nobody-that-we-can-really-go-to-for-help/160ef42c-e728-4e5d-990b-f584242205df>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Ohio Department of Rehabilitation and Correction, *Evaluation of the Inmate Grievance System*, by Vincent M. Nathan, at 25 (Feb. 13, 2001).

²⁰⁸ James E. Robertson, "One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates, 42 U. MICH. J.L. REFORM 611 (2009).

²⁰⁹ Interview with Blanca Ruiz-Thompson, program director, Reentry Relief Project, California (Jun. 16, 2020) (on file with authors)

court filing fees in full. For those who are indigent or unable to afford these upfront costs, the law requires them to pay the filing fee over time, through monthly installments from their prison commissary account. Second, the law includes a three-strikes provision, whereby each lawsuit or appeal filed and dismissed by a judge—because it is deemed frivolous, malicious, or simply insufficient to constitute a proper claim—counts as a “strike.” After three strikes, an incarcerated individual is barred from filing another lawsuit unless they are prepared to pay the entire court filing fee upfront.

Third, the bar for showing enough physical injury to receive judicial redress is inordinately high: An incarcerated man working at the electrical shop of the federal prison in Marion, Illinois, filed suit after his supervisor ordered him to crush fluorescent bulbs containing mercury in an unventilated room. When he asked for a face mask, he was told that he was “shit out of luck.”²¹⁰ The Seventh Circuit Court of Appeals, while recognizing these claims, nonetheless held that he “did not present sufficient evidence that he was exposed to an unreasonably high amount of mercury, that he had sustained injuries because of it, or that the exposure necessarily created a risk of serious future health complications.”²¹¹ Likewise, when an incarcerated worker in Arkansas filed a federal lawsuit against his prison for forcing him to work in the freezing cold and blazing summer heat despite a blood pressure condition that made over-exertion a deadly prospect, the Eighth Circuit Court of Appeals denied his claim, finding that he had not been in imminent danger of physical injury.²¹²

The U.S. judicial system has largely failed to offer relief to incarcerated workers. In 2010, a federal court ruled that “prisoners have no enforceable right to be paid for their work under the Constitution.”²¹³ Higher courts have held repeatedly that the Fair Labor Standards Act, which establishes basic worker protections such as minimum wage, overtime pay, and recordkeeping requirements, does not protect workers in prison.²¹⁴ Courts have reasoned that incarcerated people working full-time for the state

²¹⁰ ACLU, *Know Your Rights, The Prison Litigation Reform Act (PLRA)*, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf. The only exception to this rule is if the incarcerated person is at risk of suffering serious and imminent physical injury. The imminence is evaluated at the time the prisoner attempts to file the new lawsuit, not at the time that the incident that gave rise to the lawsuit occurred. See *Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001) (*en banc*).

²¹¹ *Vidlak v. Cox*, 786 F. App’x 62 (7th Cir. 2019).

²¹² *Vidlak v. Cox*, 786 F. App’x 62, 63 (7th Cir. 2019).

²¹³ *Serra v. Lappin*, 600 F.3d 1191 (9th Cir. 2010).

²¹⁴ The exclusion of prison workers is not explicitly provided for in the FLSA but has developed from judicial precedent. There has been no specific guidance from Congress or the Supreme Court as to whether the language of FLSA is meant to exclude incarcerated workers from its protections. However, most appellate courts have ruled that prison workers are excluded from the definition of “employee” in that Act, thereby excluding them from protection. See Timothy M. Hall, *Coverage, Under Fair Labor Standards Act (FLSA)* (29 U.S.C.A. § 201 et seq.), of *Prisoners Working for Private Individuals or Entities Other Than Prisons*, 110 A.L.R. FED. 839, 2a (2018); Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers*, 5 U. PA. J. BUS. L. 19 (2002); Renee Elaine Henson, *Picking Cotton for*

are not employees but wards, and are thus not guaranteed any “standard of living” like free workers.²¹⁵ This leaves incarcerated people with the responsibilities, anxieties, and dangers of full-time employment without the basic labor protections or wages needed to sustain them.

Incarcerated people across the U.S. have tried to use the courts to challenge the conditions of prison labor. For example, incarcerated workers in Colorado who opted out of kitchen work assignments in 2020 due to COVID-19 health concerns lost “earned time,” meaning their parole eligibility dates were pushed later.²¹⁶ Workers who subsequently returned to their job assignments because of the threats of having to serve more time in prison, being placed in more restrictive housing units, and losing phone calls and family visits recently filed a class-action lawsuit alleging that state prison authorities violated the state ban on slavery and involuntary servitude by forcing them to work.²¹⁷ The case is ongoing, but the Colorado District Court dismissed some of the plaintiffs’ claims, finding that the compulsory labor requirement as applied to the plaintiffs does not constitute indentured servitude or forced labor.²¹⁸ In 2022, incarcerated laborers in Lackawanna County Prison in Pennsylvania attempted to

Pennies: An Exploration into the Law’s Modern Endorsement of a Free-Prison Workforce, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 193, 200–01 (2018).

²¹⁵ See, e.g., *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369 (4th Cir. 2021) (affirming the district court’s dismissal of an action brought by ICE detainees to recover wages under the FLSA for work performed while detained, on the grounds that the FLSA does not apply to custodial settings); *Harker v. State Use. Indus.*, 990 F.2d 131 (4th Cir. 1993) (rejecting the prisoners’ claim by distinguishing the employee-employer relationship covered in the FLSA from the “custodial relationship” of incarcerated workers); *Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008) (noting that the 2nd, 3rd, 4th, 7th, 8th, 11th, and D.C. Circuits had all held that prisoners are not covered by the FLSA); *Bennett v. Frank*, 395 F.3d 409, 409–10 (7th Cir. 2005); *Villarreal v. Woodham*, 113 F.3d 202, 205–07 (11th Cir. 1997); *Gambetta v. Prison Rehab. Indus. & Diversified Enters.*, 112 F.3d 1119, 1124–25 (11th Cir. 1997); *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 687 (D.C. Cir. 1994); *Harker*, 990 F.2d at 133–36; *Vanskike*, 974 F.2d at 807–12; *Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320, 1324–27 (9th Cir. 1991). The Fifth circuit has developed a more nuanced posture, using the “economic reality” from the Supreme Court test in *Goldberg v. Whitaker House Coop.* to determine whether incarcerated workers are under an employer-employee relationship. See, e.g., *Henagan*, 595 F.3d at 620; *Watson v. Graves*, 909 F.2d 1549, 1553–56 (5th Cir. 1990) (holding that prisoners who had not been sentenced to hard labor and were employed by a private firm while on work release were “employees” of the private employer for the purposes of FLSA coverage). The “economic reality” test originates in the Supreme Court’s holding that “economic reality” should govern the determination of employer status under the FLSA. *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33, 81 S. Ct. 933, 936 (1961).

²¹⁶ Coleen Slevin, *Colorado Inmates Say State Is Violating Ban on Forced Work*, ASSOCIATED PRESS (Feb. 16, 2022); Lora Korpar, *Inmates Say Colorado Prison Added Time to Sentences When They Refused Work*, NEWSWEEK (Feb. 16, 2022).

²¹⁷ *Richard Lilgerose and Harold Mortis v. Jared Polis, Dean Williams, and Colorado Dep’t of Corrections*, Compl. filed Feb. 15, 2022, Dist. Ct. Denver Cty. Colorado, <https://towardsjustice.org/wp-content/uploads/2022/02/Amendment-A-litigation-Complaint-Stamped.pdf>.

²¹⁸ Jeremy Jojola, *Colorado Prisoners Written Up Hundreds of Times for Refusing to Work*, 9news (June 23, 2023), <https://www.9news.com/article/news/investigations/lawuit-prison-labor-colorado/73-030f145d-7414-433e-b2bc-7bb3e100ab0a>.

revive a case alleging that the prison's work program constituted forced labor.²¹⁹ In 2023, some of their claims, including their constitutional claims alleging forced labor were affirmed for dismissal, while other claims, including their FLSA claim, were allowed to move forward.²²⁰

IV. International Authorities Examining Forced Prison Labor

Core human rights instruments ratified by the United States, as well as other authoritative documents at the international level, provide a basic standard that prohibits dehumanizing and exploitative treatment undermining incarcerated people's human dignity. The conditions of labor inside U.S. prisons invoke protections under customary and treaty-based international laws against slavery, forced labor, as well as cruel, inhuman, and degrading treatment. The Universal Declaration of Human Rights, which is globally championed by the U.S., prohibits exploitative workplace practices,²²¹ as well as "cruel, inhuman or degrading treatment or punishment."²²² Importantly, these rights apply to all persons "without distinction of any kind" by virtue of their "inherent dignity."²²³ The International Covenant on Civil and Political Rights (ICCPR), which the U.S. has ratified, reinforces the applicability of these rights and protections in the context of incarceration. Specifically, it provides that "[a]ll persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person."²²⁴ The ICCPR also states that the essential aim of the criminal justice system "shall be their reformation and social rehabilitation."²²⁵ The Human Rights Committee, the authoritative U.N. body that interprets the ICCPR, has further stated that the ICCPR "imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty."²²⁶ While the ICCPR does allow for the sentencing of imprisoned individuals to "hard"

²¹⁹ Robert Iafolla, *Prison Labor Rights in Focus as 3rd Cir. Hears \$5-a-Day Pay Case*, Bloomberg Law (July 14, 2022), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X4CDS54G000000?bna_news_filter=daily-labor-report#jcite.

²²⁰ William Burrell, Jr., et al v. Tom Staff, et al, Docket No. 21-02846 (3d Cir. Oct 05, 2021), Court Docket, <https://www.bloomberglaw.com/product/blaw/document/X2GNHLM76F83VR5VDSE14U023R>.

²²¹ United Nations General Assembly Resolution 217 (III) A, Universal Declaration of Human Rights (UDHR), art. 23 (Dec. 10, 1948) ("Everyone has the right to work, to free choice of employment, to just and favourable conditions of work....Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity...").

²²² UDHR, art. 5. This provision has been codified in International Covenant on Civil and Political Rights (ICCPR) art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 and the Convention Against Torture (CAT) art. 16, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

²²³ UDHR, Preamble, art. 2.

²²⁴ ICCPR, art. 10(1).

²²⁵ ICCPR, art. 10(3).

²²⁶ United Nations Human Rights Committee, General Comment No. 21: Art. 10, para. 3 (Apr. 10, 1992).

labor, it does not allow for that labor to be exacted under exploitative circumstances that violate basic tenets of human dignity.²²⁷

The Committee on Economic, Social and Cultural Rights, the authoritative U.N. body that interprets the International Covenant on Economic, Social and Cultural Rights, which the U.S. has signed but not ratified, has explicitly stated that forced or compulsory prison labor violates states' obligation to respect prisoners' right to work. The committee said states "are under the obligation to *respect* the right to work by...prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons...including prisoners."²²⁸

The U.N. Basic Principles for the Treatment of Prisoners, adopted by U.N. General Assembly in 1990, sets forth that "Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families."²²⁹ The Nelson Mandela Rules, adopted in 2015 by the United Nations General Assembly, set forth the international community's contemporary standards on prisoners' rights and the role of labor in detention facilities.²³⁰ The earlier Standard Minimum Rules for the Treatment of Prisoners, before the 2015 revision, contained a requirement for all prisoners to work; however, in the version of rules that applies today, the emphasis is on the need for work in prison to be *voluntary* and for the purposes of rehabilitation.²³¹

²²⁷ The Human Rights Committee has never addressed ICCPR article 8(3)(b) in its jurisprudence or general comments. However, the American Convention on Human Rights, which contains a similar provision in article 6, excludes hard labor when imposed as punishment by a competent court. The European Convention on Human Rights excludes "any work required to be done in the ordinary course of detention." Art. 4(3)(a). The European Court of Human Rights does evaluate any difference in legal protections and entitlements granted to prisoners under the non-discrimination provisions (Article 14) of the Charter. See *Stummer v. Austria*, App. No. 37452/02, Eur. Ct. H.R. (Jul. 7, 2011).

²²⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 18, *The Right to Work*, adopted Nov. 24, 2005, UN Doc E/C.12/GC/18 (Feb. 6, 2006) para 23.

²²⁹ G.A. Res. 45/111, Basic Principles for the Treatment of Prisoners, ¶ 8 (Dec. 14, 1990).

²³⁰ The Mandela Rules seek to ensure that the criminal justice system does not "aggravate the suffering inherent" in being "cut[] off...from the outside world" and deprived of "the right of self-determination." G.A. Res. 70/175, UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N. Doc. A/Res/70/175, at Rule 3 (Jan. 8, 2016).

²³¹ Nelson Mandela Rules, Rule 96 states: "sentenced prisoners shall have the opportunity to work and/or to actively participate in their rehabilitation" and "sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day." Rule 97 states that "[p]rison labour must not be of an afflictive nature" and "prisoners shall not be held in slavery or servitude." Rule 98 states that "[s]o far as possible the work provided shall be such as will maintain or increase the prisoners' ability to earn an honest living after release" and that "[p]risoners shall be able to choose the type of work they wish to perform." With respect to working conditions, Rule 101 provides that the "precautions laid down to protect the safety and health of free workers shall be equally observed in prisons." The same Rule also requires adoption of relevant provisions in order to "indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than

Several international bodies have expressed concern about the poor conditions and discriminatory nature of prison labor in the U.S. In 2022, the Committee on the Elimination of Racial Discrimination recommended that the U.S. review its laws, policies, and practice related to prison labor to bring them into “full compliance with . . . [the International Convention on the Elimination of All Forms of Racial Discrimination] and other international obligations and standards, including the Nelson Mandela Rules.”²³²

The ILO itself has also issued recommendations that the U.S. bring its prison labor practices in line with international standards. In 2004, the ILO published a report on forced labor and expressed concern about low wages and lack of protections for workers incarcerated in the U.S., as well as the contracting of incarcerated workers to private prisons.²³³ It also published its first direct request for information on the use of prison labor in privately-owned prisons.²³⁴ In 2005, the CEACR first drew the connection between the disproportionate incarceration of people of color, and thus the racial discrimination inherent in the U.S. use of forced prison labor.²³⁵ In 2006, the CEACR asked for direct statistical evidence on the extent that racial discrimination influences racially disparate sentencing.²³⁶ Over the years, the CEACR continued to make comments on the racial disparities inherent in the U.S. prison labor system.²³⁷ As recently as 2022, the CEACR made a direct request that the U.S. continue to provide

those extended by law to free workers.” Rule 102 provides that working hours “shall leave one rest day a week and sufficient time for education and other activities required as part of the treatment and rehabilitation of prisoners.” Finally, Rule 103 stipulates that “[t]here shall be a system of equitable remuneration of the work of prisoners.”

²³² United Nations Committee on the Elimination of All Forms of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reports of the U.S. of America*, CERD/C/USA/CO/10-12 (Sept. 21, 2022).

²³³ International Labour Organization, *Report of the Director-General Stopping Forced Labour*, Report I(B), 1, 59 ¶¶ 190, 192 (2004), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_088490.pdf.

²³⁴ International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, Direct Request, Adopted 2004, Published 93rd ILC Session (2005), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2236595,102871,United%20States%20of%20America,2004 (citing the U.S. Department of Justice Bureau of Justice Statistics Bulletin of November 2004).

²³⁵ International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, Direct Request, Adopted 2005, Published 95th ILC session (2006), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2250307,102871,United%20States%20of%20America,2005.

²³⁶ International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, Direct Request, Adopted 2006, Published 96th ILC Session (2007), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2269560,102871,United%20States%20of%20America,2006.

²³⁷ *See Slavery is Not a Metaphor*, 67 UCLA L. Rev. 1504, 1527-1533 (2021).

information on the measures taken “to identify and reduce racial and ethnic disparities in the criminal justice system to ensure that punishment involving compulsory labour is not meted out more severely to certain racial and ethnic groups.”²³⁸ The ILO also published an extensive report on forced labor, and noted its concerns regarding the use of forced labor as a means of racial discrimination in the U.S.²³⁹

More generally, the ILO has addressed prison labor in multiple contexts. In 2012, the ILO noted that contracting prison labor with private companies is not in violation of the ILO conventions as long as certain guidelines and safeguards are met.²⁴⁰ It expanded on this in 2015 with a handbook on combating forced labor in the workplace for employers. It recommended that prison workers can only be hired by private businesses on a voluntary basis, and that “conditions with regard to wages, benefits and occupational safety and health should be comparable to conditions for free workers.”²⁴¹ Additionally, it noted that incarcerated people should not be subject to pressure or the threat of penalty to work, including the loss of rights or privileges.²⁴²

In 2016, the ILO published a comprehensive report on prison labor in Mongolia and found that its practices regarding the compulsory private employment of incarcerated people were not in line with Convention No. 29.²⁴³ In particular, the ILO’s investigation revealed that people incarcerated in Mongolia were largely not signing employment contracts for the work they carried out and experiencing threats and punishment for failure to perform work.²⁴⁴ For work perceived as both voluntary and compulsory, incarcerated people often did not receive wages or overtime pay for their labor.²⁴⁵ The ILO recommended that Mongolia prohibit compulsory work at the disposal of private companies, and promulgate national standards for private employment of incarcerated

²³⁸ International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, Direct Request, Adopted 2020, Published 109th ILC session (2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4046585,102871).

²³⁹ International Labour Organization, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, (Sept. 2022), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_854733.pdf.

²⁴⁰ International Labour Organization, *Giving Globalization a Human Face*, 1, 123 ¶291 (2012), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf.

²⁴¹ International Labour Organization, *Combating Forced Labour: Employers’ Frequently Asked Questions*, 1,4, (2015), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_099624.pdf.

²⁴² *Id.* at 16.

²⁴³ International Labour Organization, *Prison Labour and Employment Conditions of Convicts in Mongolia*, i, ix (2016), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_497510.pdf.

²⁴⁴ *Id.* at x.

²⁴⁵ *Id.* at x-xi.

workers to specify wage levels, permitted wage deductions, social security, and occupational safety and health standards.²⁴⁶

V. Recommendations

The following recommendations, if enacted, would help ameliorate the exploitative conditions of work experienced by workers incarcerated in U.S. correctional institutions and ensure that these conditions are brought into step with the ILO's fundamental Conventions, including the Abolition of Forced Labour Convention No. 105. Prison labor must be truly voluntary, with adequate protections from exploitation and discrimination to ensure the human rights and dignity of incarcerated workers. We call on the Committee of Experts to recommend that the United States:

End Forced Labor, Without Exceptions

Repeal federal and state constitutional clauses excluding incarcerated people from bans on slavery and forced labor.

- Congress should pass legislation repealing the exception clause of the 13th Amendment to the U.S. Constitution allowing slavery and involuntary servitude to be used as punishment for a criminal conviction, and states should ratify the constitutional amendment.
- The legislatures and voters of the 15 states whose constitutions contain language mirroring the 13th Amendment exclusion of incarcerated people (Arkansas, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, North Carolina, North Dakota, Ohio, and Wisconsin) should pass legislation and approve voter referendums removing these exception clauses from their state constitutions.
- The legislatures and voters of states whose constitutions do not categorically ban slavery and forced labor (such as Florida, New York, New Jersey, and Texas, among others) should pass legislation and approve voter referendums to amend their constitutions to ban slavery and forced labor with no exceptions.

Ensure that all work in prisons is fully voluntary by eliminating any laws and policies that require forced labor or impose adverse consequences on incarcerated workers who are unable or unwilling to work.

- State departments of corrections and the Federal Bureau of Prisons should eliminate rules, policies, and procedures that impose disciplinary measures for work-related infractions such as refusal to work or failure to complete work in a satisfactory manner.

²⁴⁶ *Id.* at xii.

- Ban the use of disciplinary segregation/solitary confinement for work-related infractions.
- Eliminate policies that negatively impact good time, other reductions of sentence, parole eligibility, or otherwise extend a person's incarceration for refusal to work and other work-related infractions.
- Prison authorities should ensure incarcerated workers who seek exemptions from work duties are granted such exemptions when they are unable to carry out their assigned jobs due to illness, injury, disability, or other physical or mental limitations.

End Arbitrary and Discriminatory Allocation of Jobs

Adopt laws and policies to ensure work assignments are not allocated or taken away in an arbitrary or discriminatory manner and take incarcerated people's preferences into account when selecting job assignments.

- State departments of corrections and the Federal Bureau of Prisons should adopt policies that require prison officials to take incarcerated individuals' preferences into account when selecting job assignments and programming, setting their workload, and before making changes to or taking away their jobs.
- Prison authorities should permit incarcerated individuals to choose education, vocational, or rehabilitation programming in lieu of work assignments and require equitable pay for those enrolled in such programs.
- State departments of corrections and the Federal Bureau of Prisons should adopt policies ensuring that incarcerated workers' work assignments are not changed or taken away arbitrarily and provide a meaningful process for incarcerated workers to appeal decisions about their work assignments.
- Correctional institutions should adopt and implement robust measures to eliminate discrimination, racial profiling, sexual harassment and abuse, and arbitrary decision-making by prison officials responsible for allocating job assignments and supervising incarcerated workers on the job.
- Congress should enact legislation that ensures that all incarcerated workers are protected under Title VII of the Civil Rights Act of 1964 and that requires that any grievances related to discrimination in job allocation and treatment are responded to in an efficient and impartial manner by prison authorities.

Guarantee Incarcerated Workers the Standard Labor Protections Available to Other Workers in the United States

Amend federal and state laws to ensure that incarcerated workers enjoy the standard labor protections available to other workers in the U.S. with regard to minimum wages, overtime pay, health and safety standards, unionization and collective bargaining, and protection from discrimination and retaliation, among other protections.

- Congress should clarify the meaning of “employee” in all labor-related legislation (including the Fair Labor Standards Act, the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, and the Occupational Safety and Health Act) to explicitly include incarcerated workers within that definition.
- State legislatures should similarly clarify the meaning of “employee” in all labor-related legislation, including state minimum wage laws, union legislation and collective bargaining laws, health and safety laws, sexual harassment and anti-discrimination laws, to explicitly include incarcerated workers within that definition.
- Congress should enact further legal protections for incarcerated workers considering their particular vulnerabilities as a captive labor force, such as anti-retaliation protections for incarcerated workers who report unsafe working conditions to relevant authorities.

Raise Incarcerated Workers’ Wages and Eliminate or Limit Wage Deductions

Ensure incarcerated workers are paid prevailing wages no less than the minimum wage of the state where they work and eliminate or limit wage deductions.

- Congress should amend the Fair Labor Standards Act to include incarcerated workers or otherwise pass legislation ensuring that workers in federal prisons are paid prevailing wages no less than the minimum wage of the state where they work or the federal minimum wage, whichever is higher.
- State legislatures should pass legislation ensuring that workers in prisons receive the prevailing wages in the states or territories where they work, no less than the minimum wage of the state where they work.
- Until incarcerated workers are paid the state minimum wage, states and the federal government may phase in the wage increase, starting with a wage of no less than half of the state minimum wage.
- Congress, state legislatures, the Federal Bureau of Prisons, and state departments of corrections should adopt policies eliminating or limiting wage deductions to no more than 20 percent of incarcerated workers’ wages, solely to be used to cover legal obligations such as child support. Cease all deductions for room and board, costs of incarceration, prison capital

improvement or construction funds, to support prison industries, or to otherwise sustain and expand incarceration.

- Private companies that employ incarcerated workers or otherwise benefit from their labor should ensure that workers are paid prevailing wages for their labor even if employers are not PIECP-certified. Private employers should ensure that wage deductions are limited to no more than 20 percent of workers' wages.

Protect Incarcerated Workers from Injuries and Hazards

Amend occupational health and safety and workers' compensation laws that exclude most incarcerated workers from their coverage, ensure federal and state occupational health and safety administrations monitor conditions in all workplaces inside prisons, and provide adequate personal protective and safety equipment to incarcerated workers.

- Congress should amend the Occupational Safety and Health Act to include correctional institutions operated by state and local governments as employers under the law.
- The U.S. Department of Labor should issue a regulation granting the Occupational Safety and Health Administration jurisdiction over the labor conditions of all workers incarcerated in federal, state, and local prisons.
- State legislatures should amend state occupational health and safety and workers' compensation laws to include incarcerated workers.
- Federal, state, and local governments should ensure that their respective occupational health and safety administrations conduct routine and comprehensive inspections of all workplaces inside prisons and should make the results of these investigations public.
- Prison authorities should ensure that all incarcerated workers receive adequate personal protective equipment and safety equipment to minimize risks and exposure to hazards that cause workplace injuries and illnesses.

Permit Incarcerated Workers to Join Labor Unions

Recognize incarcerated people's right to associate and permit incarcerated workers to form labor unions and bargain collectively so that workers can negotiate improved working conditions for themselves.

- Prison authorities including state departments of corrections, the Federal Bureau of Prisons, and prison administrators should allow incarcerated workers to organize and form or join labor unions, meet regularly, and form collective bargaining units.

- The National Labor Relations Board should declare that incarcerated people are employees who are eligible to join a union.
- State public employee relations boards should declare that incarcerated workers who are employed by the state are public employees who are eligible to join a union.
- State legislatures should amend public employee collective bargaining statutes to include incarcerated workers employed by the state in their definition of “public employee” and to permit the association of incarcerated public employees to engage in collective bargaining.
- Existing labor unions, including public sector unions, should endorse the right of incarcerated workers to join a union.

Ensure Incarcerated Workers Have Access to Redress

Ensure that incarcerated workers have adequate and speedy access to redress when their rights are violated.

- Congress should repeal the Prison Litigation Reform Act so that incarcerated individuals have equal access to judicial and broader administrative agency (beyond state departments of corrections) avenues for redress when their rights are violated. State legislatures should repeal similar legislation.
- Correctional institutions should eliminate burdensome administrative barriers, such as strict timelines and fees, from internal grievance processes.
- Correctional institutions should ensure that complaints regarding unsafe conditions and abusive staff treatment are processed and addressed by correctional administrators in a timely fashion.
- The federal and state governments should recognize and implement the right of incarcerated individuals to receive workers’ compensation when they are injured or killed on the job.