PUBLIC PROFITEERING OF PRISON LABOR*

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The demand for prison labor reform has echoed across generations of prison organizing. Despite the exhaustive attempts of incarcerated people to secure workplace protections for coerced and un(der)compensated prison labor, federal courts have almost universally refused to recognize incarcerated workers as "employees" deserving of rights. Courts have drawn a line between private and public interests and have determined that where an incarcerated person works for a public prison or agency, there is no cognizable employment relationship. This is so, they reason, because governments lack a pecuniary interest in prison labor and any profits harvested by the state can be absolved as a public good. This Article—the first to focus on the public profiteering of prison labor—examines these claims and explains why they are wrong.

An examination of history reveals that governments deliberately expanded carceral systems to re-subjugate newly-emancipated Black communities for the purpose of growing the state's profits. An understanding of modern prison labor is incomplete without recognizing this originating motivation. And governments remain uniquely positioned to benefit from prison labor in important ways that evade scrutiny. Today's understanding of prison labor often focuses on two categories: labor that operates the prison ("prison maintenance"), and labor that produces goods for sale ("prison industries"). But buried in this two-part framework is another overarching category that merits recognition: the reliance on incarcerated people to perform public works and government services (what I call "carceral public works"). This is an important form of exploitation to name—it is a reincarnation of the convict leasing and chain gangs that defined the post-Emancipation era, and it carries dangerous incentives for profiteering governments. As state actors have already proven, governments will remain galvanized to resist decarceral reforms so long as they can continue exploiting the labor they hold captive in public prisons.

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INTRODUCTION

In August 2021, Jailhouse Lawyers Speak ("JLS")—a collective of imprisoned organizers[1]—announced a nationwide call for "Shut'em Down Demonstrations" within and beyond prison walls.[2] JLS invited people to "[s]tep up in the spirit of abolition"[3] and join the ongoing movement to "end prison slavery,"[4] a demand that over forty organizations endorsed.[5] Incarcerated people[6] participated by engaging in work strikes, sit-ins, spending boycotts, and

1. *About Jailhouse Lawyers Speak*, IAMWE & JAILHOUSE LAWS. SPEAK, https://web.archive.org/web/20220601044234/http://www.iamweubuntu.com/about-jailhouse-lawyers-speak.html [https://perma.cc/LEZ7-6GSX].

2. *National Shutem Down Prison Strikes and Boycotts Call to Action: Freedom and Abolition*, JAILHOUSE LAWS. SPEAK (Aug. 12, 2021), https://jailhouselawyerspeak.wordpress.com/2021/08/12/national-shutem-down-prison-strikes-and-boycotts-call-to-action-freedom-and-abolition/ [https://perma.cc/XH9V-UZKD] [hereinafter *JLS Call to Action*].

3. Ella Fassler, *Incarcerated Organizers Call for Mass Actions in August To Abolish Prisons*, TRUTHOUT (Aug. 1, 2021), https://truthout.org/articles/incarcerated-organizers-call-for-mass-actions-in-august-to-abolish-prisons/ [https://perma.cc/V3E5-S2U5] (quoting Castle, a member of Jailhouse Lawyers Speak, who has been incarcerated for over thirty years and uses a pseudonym to minimize the risk of retaliation).

4. An "end to prison slavery" was the first of four demands. *See JLS Call to Action*, *supra* note 2. The second was the closure of jails and prisons, the third was the immediate closure of all private prisons, and the fourth was freeing all political prisoners in U.S. prisons. *Id.* Incarcerated people are not alone in defining prison labor as "prison slavery." *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 953 (2019) (adopting the phrase "prison slavery"); Alvaro Hasani, *'You Are Hereby Sentenced to a Term of . . . Enslavement?': Why Prisoners Cannot Be Exempt from Thirteenth Amendment Protection*, 18 BARRY L. REV. 273, 274 (2013) (same).

5. *See 2021 National Shut'em Down Demo*, JAILHOUSE LAWS. SPEAK, https://web.archive.org/web/20220601044233/http://www.iamweubuntu.com/shutemdown.html [https://perma.cc/MLQ4-2SX4].

6. I refer to the people confined in carceral institutions as "incarcerated people," a choice that emphasizes the humanity and dignity of people who are confined. To describe incarcerated people who labor in a prison, I use the phrase "incarcerated worker." Incarcerated people have long advocated for workplace rights and just compensation for their labor while confined, and I use this phrase to honor

hunger strikes.[7] At the same time, non-incarcerated allies held demonstrations in solidarity with incarcerated organizers. Across from the Men's Central Jail in Los Angeles County, rally speakers observed the carceral state's reliance on poverty and profit.[8] Next to Wisconsin's Green Bay Correctional Institution, community members chanted, "You are not forgotten, you are not alone."[9]

The demand for prison labor reform is not new. The history of prison labor traces the "cruel intersection" of race, exploitation, and incarceration,[10] and it sits "within a longer national tradition of anti-Black[11] nation-building and racist statecraft."[12] Echoes of this history persist in modern systems of prison labor, which are often characterized by absence: the absence of just compensation, workplace protections, and the power to unionize.[13] These

those efforts by identifying them as workers. *See supra* Introduction. It is meant to capture the dignity of their work and the aspirations of their advocacy, despite the various structures that refuse to recognize incarcerated people as "employees" or "workers." Many of the sources cited throughout this piece use other terms like "inmate" or "prisoner" to refer to incarcerated people. I omit this language from my citations where possible, but in some instances, I preserve the quotation of these terms to highlight the dehumanizing treatment of incarcerated people.

7. *See JLS Call to Action*, *supra* note 2.

8. *See* Michelle Maldonado, *Los Angeles Organizers Say 'Shut 'Em Down' at Prisoner Solidarity Rally*, LIBERATION NEWS (Sept. 7, 2021), https://www.liberationnews.org/los-angeles-organizers-say-shut-em-down-in-prisoner-solidarity-rally/ [https://perma.cc/R2CT-C3W8].

9. Isiah Holmes, *Prison Abolition Activists Join Nationwide Actions*, WIS. EXAMINER (Sept. 3, 2021, 6:30 AM), https://wisconsinexaminer.com/2021/09/03/prison-abolition-activists-join-nationwide-actions/ [https://perma.cc/PNC4-FXFQ].

10. *See* Goodwin, *supra* note 4, at 951.

11. I capitalize "Black" to acknowledge a racial, ethnic, and cultural identity. Many scholars and journalists follow this practice. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."); Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html [https://perma.cc/LK27-V2J2 (staff-uploaded, dark archive)] (capitalizing Black to describe a race and cultural group); Mike Laws, *Why We Capitalize 'Black' (and Not 'White')*, COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/9TGQ-ZNRU] (observing that capitalizing "Black" recognizes an ethnic identity and is a more inclusive and transnational description than "African American," which excludes Caribbean and Central or South American community members who may also identify as Black). Due to the historical affiliation of white supremacy with the capitalization of "white," I refer to this term in the lowercase. *See Explaining AP Style on Black and White*, ASSOCIATED PRESS (July 20, 2020), https://apnews.com/article/archive-race-and-ethnicity-9105661462 [https://perma.cc/ZAD3-4KT2 (dark archive)].

12. Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1581 (2019).

13. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/J6LJ-7M69] [hereinafter *How Much Do Incarcerated People Earn*] (identifying that wages for prison labor is on average fourteen cents to $1.41 per hour, with the exception of those states that provide no wages for prison labor); Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 26 (2019) (explaining that incarcerated workers "do not have the right to unionize" and generally do not receive workers' compensation).

systems are also defined by punishment. Labor can be required of anyone confined in the prison[14]—but even in the absence of statutory obligations, a refusal to work carries swift and severe penalties.[15]

The coerced, punitive, and un(der)compensated[16] conditions of prison labor have compelled many incarcerated people to urge reform.[17] In 1971, incarcerated organizer L.D. Barkley declared, "We are men! We are not beasts," and putting a "stop to slave labor" became one of the demands of the Attica prison uprising.[18] Forty-five years later, on the anniversary of this uprising, incarcerated organizers coordinated a nationwide strike. The manifesto of this 2016 strike announced, "We will not only demand the end to prison slavery, we will end it ourselves by ceasing to be slaves."[19] Over 24,000 people across as many as fifty prisons participated.[20] This effort inspired another nationwide

14. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-251(A) (Westlaw through legislation effective Sept. 24, 2022 of the Second Reg. Sess. of the 55th Leg.) (requiring "each able-bodied prisoner under commitment to the state department of corrections [to] engage in hard labor for not less than forty hours per week").

15. *See, e.g.*, Kevin Rashid Johnson, *Prison Labor Is Modern Slavery. I've Been Sent to Solitary for Speaking Out*, GUARDIAN (Aug. 23, 2018, 6:00 AM), https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike [https://perma.cc/DJ4L-YZXC] (outlining the retaliation he has been forced to experience for his advocacy while incarcerated); Whitney Benns, *American Slavery, Reinvented*, ATL. (Sept. 21, 2015), https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/ [https://perma.cc/UUQ8-7TPX (dark archive)] (identifying penalties like solitary confinement, loss of "good time" credits, and revocation of family visitation).

16. I use the term "un(der)compensated" to capture the differences in prison labor wages among prison systems: incarcerated people are at times undercompensated (in those states that do pay a wage, it averages between fourteen cents to $1.41 per hour), but they are also at times uncompensated. At least five states (Alabama, Arkansas, Florida, Georgia, and Texas) pay no wages for prison labor. *See How Much Do Incarcerated People Earn*, *supra* note 13.

17. By reform, I intend to capture the spirit of what abolitionist organizers and scholars have defined as a "non-reformist reform," which seeks to "reduce the power of an oppressive system" rather than maintaining that system. *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019).

18. A fuller excerpt of L.D. Barkley's statement is:

> We are men! We are not beasts, and we do not intend to be driven or beaten as such. The entire prison populace has set forth to change forever the ruthless brutalization and disregard for the lives of the prisoners here and throughout the United States. What has happened here is but the sound before the fury of those who are oppressed.

ATTICA (Cinda Firestone 1974).

19. *Announcement of Nationally Coordinated Prisoner Workstoppage for Sept. 9, 2016*, IWW INCARCERATED WORKERS ORG. COMM. BLOG (Apr. 1, 2016), https://iwoc.noblogs.org/post/2016/04/01/announcement-of-nationally-coordinated-prisoner-workstoppage-for-sept-9-2016/ [https://perma.cc/9DBC-8VND].

20. Nick Tabor, *The Improbable Story of How the National Prisoner Strike Came Together*, N.Y. MAG. (Aug. 23, 2018), https://nymag.com/intelligencer/2018/08/how-the-national-prisoner-strike-came-together.html [https://perma.cc/C4WY-432K (dark archive)]; *see* Ed Pilkington, *US Inmates Stage Nationwide Prison Labor Strike Over 'Modern Slavery*,' GUARDIAN (Aug. 21, 2018, 1:00 PM),

strike just two years later. Included in the list of ten demands was "[a]n immediate end to prison slavery" such that all incarcerated people would "be paid the prevailing wage in their state or territory for their labor."[21] During the three-week strike in 2018, an estimated 24,000 prisoners in over twenty-eight states refused to work.[22]

The strikes and demonstrations organized by incarcerated people are instructive. They unveil the realities of a system of labor that hides behind and beyond prison walls. And they focus attention on the distinctive nature of labor in public prisons: prisons owned and operated by state and federal governments. This is a stark departure from much of the conversation surrounding prison labor reform, which often centers the privatization of prisons or the privatized profits harvested from prison labor.[23] Such a focus is understandable given that private interests explicitly prioritize the accumulation of profit on the backs of low- or no-wage labor. Yet, the penal labor in public prisons is afflicted with many of the same abuses that are prevalent in private institutions. And governments are uniquely positioned to benefit from prison labor in important ways that evade scrutiny.

This Article contributes to this conversation by examining the public profiteering of prison labor.[24] It begins by considering a statutory bulwark for

https://www.theguardian.com/us-news/2018/aug/20/prison-labor-protest-america-jailhouse-lawyers-speak [https://perma.cc/5M78-A6G9].

21. Jailhouse Lawyers Speak (@JailLawSpeak), TWITTER (Apr. 24, 2018, 9:28 AM), https://twitter.com/JailLawSpeak/status/988771668670799872 [https://perma.cc/887M-MM3R].

22. Robert T. Chase, *Slaves of the State: Prison Uprisings and the Legacy of Attica*, BOS. REV. (Nov. 11, 2016), https://bostonreview.net/articles/robert-chase-attica/ [https://perma.cc/545P-TNKW].

23. *See generally* Vanessa Brimhall, Note, *The Truth About Private Prison Control in New Mexico*, 20 SEATTLE J. FOR SOC. JUST. 327 (2021) (arguing for a ban on contracts with private prisons); Ethan Heben, *Prisoners as "Quasi-Employees*," 31 U. FLA. J.L. & PUB. POL'Y 183, 184–85 (2021) (noting that the "private prison industry" in particular has "grown considerably in recent years" and that a new statutory regime should develop a "quasi-employee" status for incarcerated workers, "especially when working for private companies, due to the pecuniary aspects of their labor"); Cao, *supra* note 13, at 1 (examining the relationship between "big business" and prison labor in state and federal systems); Laura I Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579 [hereinafter *Cashing in on Convicts*] (examining the modern trend of privatized corrections and assessing the deleterious effects of monetizing criminal punishment); Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, From 1943 to Present*, 29 GEO. IMMIGR. L.J. 391 (2015) (identifying the private "security firms" that most frequently contract for immigration detention and discussing the one dollar per day "slaving wages" these firms provide to detained people); Alfred C. Aman, Jr. & Carol J. Greenhouse, *Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate Over Private Prisons*, 42 FORDHAM URB. L.J. 355 (2014) (discussing two models for reforming prisons through privatization); Lucas Anderson, Note, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009) (arguing for the abolition of private prison contracts).

24. Many others have identified the fact that state and federal governments profit from prison labor. *See, e.g.*, Goodwin, *supra* note 4, at 907, 970–75 (outlining the "[r]ise of [p]rivatized [p]risons" and acknowledging "recent attention to private prisons . . . that seek to maximize profits in relation to incarceration," but also concluding that states and the federal government profit from prison labor in

protecting the rights of workers, the 1938 Fair Labor Standards Act ("FLSA")—a piece of legislation that has been described as "the original anti-poverty law."[25] The FLSA becomes a lens to assess the federal courts' imprecise perceptions of the economic reality of incarcerated labor. Part I outlines the efforts made by incarcerated workers to avail themselves of the FLSA's protections,[26] most notably its minimum wage requirement,[27] and the federal courts' near-universal refusal to apply the Act to prison labor. This part pauses on a brief momentum of decisions that made tentative steps towards coverage and ends with a discussion of why and how the federal courts swiftly reversed course. In so doing, it considers the purported justifications for the denial of FLSA protections and focuses on one consistent rationale offered by the courts: although governments benefit from prison labor, any advantages do not amount to an "unfair windfall" that merits concern.

Part II illustrates why this impression is wrong. Section II.A provides a brief history of how, on the heels of Emancipation, governments sought to recapture enslaved labor through the criminalization and incarceration of newly freed Black communities. An understanding of modern forms of prison labor is incomplete without recognizing this history, which reveals that the original purpose of this labor system was to secure—and grow—the state's profits. Section II.B then describes the various ways that governments continue to profit from modern systems of prison labor, and it focuses on the state's reliance on this labor to perform (often hazardous) public works and government services—a reincarnation of the convict leasing and chain gang systems that defined this post-Emancipation period.

Part III then turns to one possible impact of this public profiteering. It identifies how state actors have attempted to thwart decarceral efforts to reduce the size and scope of the prison industrial complex so they can protect a captive pool of incarcerated workers they hope to reliably exploit. And it explains why

addition to private industries and private prisons); Laura I Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 622 [hereinafter *Bloody Lucre*] (investigating modern-day carceral labor practices and "finding that most inmate work is still designed to create revenues for both government agencies and private businesses"). My contribution is to expand on this observation by examining how a common judicial justification for this public profiteering—that any profits harvested by the state can be absolved as a public good—does not withstand scrutiny. And to do so, I turn my lens on one understudied use of modern prison labor. I analyze how governments rely on prison labor to fulfill necessary government services and public works, and I highlight how this public profiteering poses unique threats to decarceral movements.

25. Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIA. L. REV. 607, 607 (1972).

26. The FLSA's primary purpose was to provide a "minimum standard of living" necessary for a worker's well-being by "eliminat[ing], as rapidly as practicable, substandard labor conditions throughout the nation." *See* 29 U.S.C. § 202(a) (1988); Powell v. U.S. Cartridge Co., 339 U.S. 497, 509–10, 509 n.12 (1950), *cert. granted*, 338 U.S. 810 (1949).

27. 29 U.S.C. § 206(a).

the most common defense of public profiteering—that prison labor is a "public good" needed to offset the costs of incarceration—is an empty justification.

I. THE EVOLUTION AND DEVOLUTION OF AN INCARCERATED WORKER'S "ECONOMIC REALITY"

Incarcerated workers have attempted to enforce the protections of the Fair Labor Standards Act since its inception in 1938.[28] The threshold question confronted by their lawsuits is whether an incarcerated worker constitutes an "employee"[29] as defined by the Act. To answer this question, courts assess the "economic reality" of the alleged relationship to determine whether it qualifies as protected employment.[30] Outside the context of prison labor, courts have noted the "striking breadth" of the Act's construction of employment,[31] which provides "the broadest definition of 'employ' that has ever been included in any one act."[32] It has therefore "long been understood" that Congress intended to design the Act with expansive protections.[33] But with a few notable exceptions, federal courts have almost universally refused to apply the FLSA to prison labor.

In the years following the passage of the FLSA, courts focused primarily on the worker's status of incarceration to deny coverage. These courts determined that because an incarcerated worker was ultimately controlled and governed by prison officials, it was clear that the worker's labor "belonged to" the state and could not qualify as employment for FLSA purposes.[34] This was so even if a for-profit entity entered into a contract with a public prison to use (and benefit from) an incarcerated workforce—these courts reasoned that it was

28. *See infra* Part I.

29. The definition of an "employee" under the FLSA is a bit circular—it is defined as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). In 1974, amendments to the FLSA extended coverage of the minimum wage to state employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, sec. 6, § 203(e), 88 Stat. 58, 58–59 (codified as amended at 29 U.S.C. § 203(e)(2)(C) (1974)). To "[e]mploy" is further defined as "to suffer or permit to work." 29 U.S.C. § 203(g).

30. *See* Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961) (holding that a determination of whether an employment relationship exists under the FLSA should be based on the "economic reality" of the employment situation), *cert. granted*, 364 U.S. 861 (1960).

31. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992), *cert. granted*, 502 U.S. 905 (1991).

32. Zheng v. Liberty Apparel Co., Inc., 355 F.3d 61, 69 (2d Cir. 2003) (alteration in original) (quoting United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945)).

33. *See* Doyle v. City of New York, 91 F. Supp. 3d 480, 483 (S.D.N.Y. 2015).

34. *See* Huntley v. Gunn Furniture Co., 79 F. Supp. 110, 112–13 (W.D. Mich. 1948); Alexander v. Sara, Inc., 721 F.2d 149, 149–50 (5th Cir. 1983) (per curiam); Hudgins v. Hart, 323 F. Supp. 898, 899 (E.D. La. 1971).

the prison, not the third-party for-profit entity, that had final control over the means and manner of the incarcerated worker's performance.[35]

In 1984, the Second Circuit introduced a new framework for assessing the viability of these claims. In the late 1970s, Fishkill Correctional Facility (a New York state prison) and a local community college created a collaborative educational program whereby the college offered courses to imprisoned people while also hiring incarcerated workers as teaching assistants to supplement its regular staff.[36] Louis Carter was an incarcerated teaching assistant who conducted tutorial classes in business math within the prison. He filed a pro se complaint against the college arguing that he should be paid the same as the college's student tutors, who earned at least the federal minimum wage.[37]

The defendants responded by filing a motion to dismiss the complaint for failure to state a claim.[38] The assigned magistrate judge considered the lineage of cases outlined above and determined that the college's control over Carter was "subject to the ultimate control of prison administrators."[39] Because the incarcerated teaching assistants "retained their status as inmates," the magistrate concluded they could not constitute employees of the college.[40] A footnote contained the additional assessment that it was "unlikely" that "Congress intended the FLSA's minimum wage protection [to] be extended to prisoners."[41] The magistrate then issued a report and recommendation to dismiss the complaint, which the district judge adopted.[42]

The Second Circuit reversed and remanded. The court took great pains to emphasize that the FLSA is a "remedial" act "written in the broadest possible terms" to guarantee that its protections "would have the widest possible impact in the national economy."[43] The court also observed that the very nature of incarceration ensures that prison officials will likely retain "ultimate control" over an incarcerated worker, even if an outside entity had substantial control over—and financially benefitted from—an incarcerated workforce.[44] In such

35. *See Huntley*, 79 F. Supp. at 112–13; Sims v. Parke Davis & Co., 334 F. Supp. 774, 784–88 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971) (per curiam); *Hudgins*, 323 F. Supp. at 899. Some courts even reasoned that because congressional intent in enacting the FLSA was to protect the "general well-being of the worker in American industry," the coverage of incarcerated labor could not have been "legislatively contemplated." *Alexander*, 721 F.2d at 149–50; *see also Sims*, 334 F. Supp. at 787 (explaining that Congress likely did not intend the FLSA to cover "convicted criminals"); Wentworth v. Solem, 548 F.2d 773, 774–75 (8th Cir. 1977) (per curiam) (expressing doubt that Congress intended the FLSA to cover "convicts working in state prison industries").

36. *See* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 10 (2d Cir. 1984).

37. *See id.* at 11.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 12.

43. *See id.*

44. *See id.* at 12–14.

instances, the court reasoned that it would run counter to both the statute's breadth and underlying intent to permit an outside employer to "escape compliance" with the FLSA solely because the level of control it wielded over the incarcerated worker, though substantial, could occasionally be overridden by the prison.[45]

Critical to the Second Circuit's reasoning was that the "category of prisoners" was absent from the "extensive list" of workers who are statutorily excluded from coverage.[46] The court warned that continuing to allow outside employers to avoid compliance based on the prison's "ultimate control" would have the practical effect of imposing "an absolute preclusion of FLSA coverage for prisoners," and it rejected any bright-line rule of exemption for incarcerated workers.[47] Instead, it held that a full inquiry into the worker's particularized economic reality was necessary and that an incarcerated worker "may be entitled under the law to receive minimum wage from an outside employer, depending on how many typical employer prerogatives are exercised over the [worker] by the outside employer, and to what extent."[48]

To evaluate an incarcerated worker's economic reality, the *Carter* court cited a four-part test previously established by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*.[49] The *Bonnette* test focused primarily on the question of control: it asked whether the employer (1) had the power to hire or fire the employee, (2) supervised and controlled conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.[50] Although *Bonnette* addressed coverage of "chore workers" in a state welfare program, the *Carter* court described the *Bonnette* factors as a "refined" iteration of the "'economic reality' test" and introduced it into the realm of incarcerated employment.[51] Applying the *Bonnette* test, the *Carter* court suggested (without deciding) that because the community college determined the conditions of employment and made the initial proposal to hire incarcerated workers, the teaching assistantships may have qualified.[52]

45. *See id.*

46. *See id.* at 13.

47. *See id.* at 12–13. The Second Circuit explained

> [i]t would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act. Congress must be presumed to be aware of and to approve of the use by the courts of the economic reality test, which involves a case-by-case factual analysis.

Id. at 13.

48. *Id.* at 14.

49. *Id.* at 12.

50. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

51. *See* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984).

52. *See id.* at 15.

Six years later, the Fifth Circuit followed the roadmap first articulated by *Carter*. At issue in *Watson v. Graves*[53] was a work release program at the Livingston Parish Jail (a public jail) whereby incarcerated workers who gained "trusty status" were assigned to outside private individuals or entities, including a construction company operated by the sheriff's daughter and son-in-law ("the Jarreaus").[54] The Fifth Circuit agreed that a worker's status of incarceration did not foreclose inquiry into FLSA coverage and that the four *Bonnette* factors were relevant to determining the worker's true "economic reality."[55] Applying those four factors led to the determination that the Jarreaus constituted employers: they selected the incarcerated workers assigned to them and also determined the workers' hours, projects, and scope of work without oversight from prison officials.[56] Although the sheriff "set" the rate of pay and had the technical power to overrule the Jarreaus' employment decisions, the *Watson* court noted that such "superficial facts do not preclude application of [the Act]" given that the economic reality of this employment scheme produced a "'captive' pool of workers" paid only "token wages" that the Jarreaus could abuse to gain competitive advantage in the marketplace.[57]

Although *Carter* and *Watson* reflected a departure from the federal courts' traditional approach to incarcerated workers' FLSA claims, the opinions took care to limit the scope and impact of their holdings. *Carter* emphasized that its permissive holding was limited to "outside employer[s]" and suggested that any labor directed solely by the prison would not constitute protectable employment.[58] *Watson* similarly indicated that its holding was limited to incarcerated workers who work, without a sentence of hard labor, for private contractors beyond the prison's walls.[59] The cases that followed adopted a similar line in the sand: prison labor that occurred *inside* the institution, whether for the prison itself or for the benefit of an outside for-profit entity, did not constitute an employer-employee relationship.[60] But central to their analysis was the *Bonnette* test, which focused primarily on the employer's degree of control.

In 1992, the Ninth Circuit introduced a transformative expansion of coverage. It held in *Hale v. Arizona* ("*Hale I*")[61] that incarcerated workers laboring inside the Arizona state prison for the institution's prison industry

53. 909 F.2d 1549 (5th Cir. 1990).
54. *See id.* at 1551.
55. *See id.* at 1554.
56. *See id.* at 1554–55.
57. *See id.* at 1555.
58. *See* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12–14 (2d Cir. 1984).
59. *See* Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990).
60. Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1331 (9th Cir. 1991).
61. 967 F.2d 1356 (9th Cir. 1992).

were entitled to the federal minimum wage.[62] These were workers who were statutorily forced to "engage in hard labor for not less than forty hours per week"[63] while on prison grounds under the supervision of prison officials[64]—the very type of workers carved out of consideration by the *Watson* and *Carter* courts. The Ninth Circuit's determination that "Congress did not intend automatically to exclude inmate employees from the protections of the Act"[65] followed the approach first articulated by *Carter* and *Watson*. And like *Carter* and *Watson*, the *Hale I* court utilized the *Bonnette* factors to guide its analysis of the incarcerated worker's "economic reality."[66] But its subsequent analytical step—applying those factors to conclude that an incarcerated worker laboring for and within the prison *did* constitute an employee under the FLSA[67]—reflected an important departure from the narrow holdings envisioned by these earlier cases. The Ninth Circuit concluded in *Hale I* that the high degree of control exercised by prison officials "made it more, not less, likely" that an incarcerated worker was an employee.[68] This decision significantly expanded the scope of coverage of the FLSA for incarcerated workers.

But the backlash was swift. Just one year after *Hale I* was announced, the Seventh Circuit intervened in the growing consensus developed by *Carter*, *Watson*, and *Hale I*. At issue in *Vanskike v. Peters*[69] was the FLSA claim of a pro se incarcerated worker who had been forced to labor within the Stateville Correctional Center (a state prison) as a janitor, kitchen worker, gallery worker, and knit shop piece-line worker.[70] The Seventh Circuit "d[id] not question" the conclusions of *Carter*, *Watson*, and *Hale I* that incarcerated workers were not categorically exempted from FLSA coverage.[71] However, it rejected Vanskike's assertion that he qualified as an employee under the FLSA.[72]

As a threshold matter, the Seventh Circuit rejected the application of the *Bonnette* factors in determining the economic reality of an incarcerated worker.[73]

62. *Id.* at 1359.

63. *Id.* (quoting ARIZ. REV. STAT. ANN. § 31-251 (1991)).

64. *See id.* at 1360 (identifying two categories of workers due to consolidated appeals: those that produced a wide variety of goods, from pork meat to license plates, and those who labored as clerks or office managers for businesses operated by incarcerated workers).

65. *Id.* at 1364.

66. *Id.*

67. *Id.* at 1367. In *Hale I*, the Ninth Circuit easily determined that the four *Bonnette* factors were satisfied. *Id.* at 1366. It analyzed three additional considerations: (1) the risk of unfair competition posed by the workers, (2) whether the employer and employee could exercise discretion in the relationship, and (3) whether wages were exchanged for labor. *Id.* Here, too, the *Hale I* court found the factors satisfied. *Id.*

68. *Id.* at 1363 (citing Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 128 (9th Cir. 1988)).

69. 974 F.2d 806 (7th Cir. 1992).

70. *Id.* at 806.

71. *Id.* at 808.

72. *Id.*

73. *Id.*

It noted that a "literal application" of the *Bonnette* factors would have yielded the straightforward result of having all four factors weigh in favor of an employment relationship.[74] But it then dismissed the *Bonnette* test as "presuppos[ing] a free labor situation" that was absent in the carceral context, particularly where the Department of Corrections exercised "nearly total" control over the incarcerated worker.[75]

In lieu of *Bonnette*, the Seventh Circuit adopted an abstract constellation of reasons for denying FLSA coverage to Vanskike. It argued there was "no indication" that the Department of Corrections had a pecuniary (rather than rehabilitative or penological) interest in the incarcerated labor.[76] Citing the Thirteenth Amendment's permission to condemn convicted people to indentured servitude, the Seventh Circuit also asserted that the relationship between the prison and the incarcerated worker was "far different" than traditional employment relationships because incarcerated labor "belong[ed] to the institution."[77]

The Seventh Circuit also undermined the reasoning adopted by the Ninth Circuit in *Hale I* that low- or no-wage incarcerated labor raises the specter of unfair advantage in the marketplace. It acknowledged that if unfair competition is found where state prisons sell goods produced by no- or low-wage incarcerated labor, then it must also be found where prisons wield incarcerated labor to perform tasks internal to the prison (such as sweeping the floor or washing dishes) because it replaces someone who would have been "*hired* to do the job—someone who would have to be paid at least [the minimum wage]."[78] The Seventh Circuit then acknowledged that "carried to its logical conclusion, prisoners must be paid minimum wage for anything they do in prison that can be considered 'work.'"[79]

The court refused to apply the FLSA in this way. It reasoned that a structure of unfair competition benefiting governments is less concerning than one that benefited a private entity: "[W]hile the latter amounts to an unfair windfall, the former may be seen as simply paying the costs of public goods—including the costs of incarceration (as the Illinois statute expressly provides)."[80] It therefore concluded that, although the unfair competition rationale

74. *See id.* at 809.

75. *Id.*

76. *Id.* at 809. The court claimed that when incarcerated workers labor within the prison, they do so "for purposes of training and rehabilitation" and "as part of their sentences of incarceration." *Id.* at 810. The court also argued there was no need to further the FLSA's purpose of ensuring a "minimum standard of living" because in prisons, an incarcerated worker's "basic needs are met . . . irrespective of their ability to pay." *Id.*

77. *Id.* at 809.

78. *Id.* at 811.

79. *Id.*

80. *Id.* at 811–12.

motivating FLSA coverage "triggers some concerns in the context of prison labor," it "does not call for application of the minimum wage" where an incarcerated worker labors for a prison.[81]

Following the Seventh Circuit's opinion in *Vanskike*, the Ninth Circuit gathered an en banc panel to reopen the questions invoked by *Hale I*. There, too, it refused to adopt the state's position that the FLSA categorically excluded all labor of any incarcerated worker.[82] But it took the extraordinary position of reversing the majority panel's decision in *Hale I*. Despite the circuit's prior use of the *Bonnette* test—one the Ninth Circuit had itself designed to assess the economic reality of workers—the en banc decision ("*Hale II*") joined the Seventh Circuit in determining that the *Bonnette* factors "are not a useful framework in the case of prisoners who work for a prison-structured program because they have to."[83]

The en banc court stated that "[c]onvicted criminals do not have the right freely to sell their labor," and it concluded that because the laborer's "economic reality . . . lies in the relationship between prison and prisoner," the labor is "penological" and "not pecuniary."[84] The fact that the labor was forced—that it was statutorily required of incarcerated people—was especially persuasive to the en banc panel.[85] This hard-time obligation meant that "their labor belonged to the institution" and therefore could not invoke an employee-employer relationship entitled to the minimum wage.[86] And the court reasoned that imposing a minimum wage would "jeopardize" the labor programs "structured by and for prisons," which it believed to be a step too far.[87]

Vanskike and *Hale II* marked a renewed tide of judicial decisions narrowing the FLSA protections afforded to incarcerated workers. In the years immediately following *Hale II*, a unanimous consensus of circuit courts determined that the FLSA did not extend to incarcerated workers laboring within a public prison.[88] They, like *Vanskike* and *Hale II*, rejected the *Bonnette*

81. *Id.* at 812.

82. Hale v. Arizona (*Hale II*), 993 F.2d 1387, 1392 (9th Cir. 1993) (en banc).

83. *Id.* at 1394.

84. *Id.* at 1394–95.

85. *Id.* at 1395.

86. *Id.* The en banc panel also agreed with the state that "the problem of substandard living conditions, which is the primary concern of the FLSA, does not apply to prisoners, for whom clothing, shelter, and food are provided by the prison." *Id.* at 1396.

87. *Id.* at 1398. The court also argued that prison labor "occup[ies] idle prisoners, reduce[s] disciplinary problems, nurture[s] a sense of responsibility, and provide[s] valuable skills and job training." *Id.*

88. *See generally* Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (incarcerated person who worked at nonprofit prison print shop not covered by FLSA), *cert. denied*, 510 U.S. 886 (1993); Franks v. Okla. State Indus., 7 F.3d 971 (10th Cir. 1993) (determining, without oral argument, that the FLSA does not extend to incarcerated people working in prison); Henthorn v. Dep't of Navy, 29 F.3d 682 (D.C. Cir. 1994); McMaster v. Minnesota, 30 F.3d 976, 980 (8th Cir. 1994) ("We hold that inmates such as the present plaintiffs, who are required to work as part of their sentences and

test when considering the economic reality of incarcerated labor.[89] Some even went so far as to reject an individualized inquiry of each circumstance, and to instead adopt a categorical determination that incarcerated workers who are forced to labor during their incarceration,[90] or who labor for a public prison,[91] cannot fall within the protections of the FLSA.

And the Ninth Circuit was not alone in reversing course. In 1996, both the Second Circuit and the Fifth Circuit—the first two courts of appeals to open the door to expanding FLSA coverage for incarcerated workers—departed from their earlier opinions. In *Danneskjold v. Hausrath*,[92] the Second Circuit explicitly "reexamine[d]" *Carter* and rejected the four-part *Bonnette* test when considering whether the FLSA applied to incarcerated labor.[93] Adopting the broad principles outlined above,[94] the Second Circuit ultimately held that the FLSA does not apply to incarcerated workers when their labor "provides services to the [public] prison, whether or not the work is voluntary, whether it is performed inside or outside the prison, and whether or not a private contractor is involved."[95] The Fifth Circuit made similar overtures in *Reimonenq v. Foti*,[96] where the court rejected both the application of *Bonnette* and the "economic reality" analytical framework more generally as "unserviceable[] and consequently inapplicable[] in the jailer-inmate context."[97]

The federal courts' decision to stray from *Bonnette* is instructive. The very courts that declined to apply this test acknowledged that, under *Bonnette*'s guidelines, incarcerated workers would categorically constitute employees under the FLSA.[98] There is no question that the state exercises "nearly total" control over an incarcerated worker.[99] But this is where the newfound inquiry

perform labor within a correctional facility as part of a state-run prison industries program are not 'employees' . . . within the meaning of the Fair Labor Standards Act"); Morgan v. MacDonald, 41 F.3d 1291 (9th Cir. 1994) (noting an incarcerated person who worked at a Nevada state prison's education center as a computer "trouble-shooter" was not an employee under the FLSA).

89. *See, e.g.*, *Henthorn*, 29 F.3d at 686 (adopting its own factors to determine an incarcerated worker's "economic reality"). *See generally McMaster*, 30 F.3d at 976 (presenting no reference to the *Bonnette* factors or test).

90. *Henthorn*, 29 F.3d at 686; *Morgan*, 41 F.3d at 1293; *McMaster*, 30 F.3d at 980.

91. *Harker*, 990 F.2d at 135.

92. 82 F.3d 37 (2d Cir. 1996).

93. *Id.* at 40–41.

94. *Id.* at 42–43.

95. *Id.* at 39.

96. 72 F.3d 472 (5th Cir. 1996).

97. *Id.* at 475; *see also id.* at 475 n.3 (dismissing the language in *Watson v. Graves* observing that "[t]his court must apply the economic realities test to each individual or entity alleged to be an employer" as nonprecedential "dicta").

98. *See* Danneskjold v. Hausrath, 82 F.3d 37, 41 (2d Cir. 1996) (characterizing this result as "radical"); Reimonenq v. Foti, 72 F.3d 472, 475 (5th Cir. 1996); Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) (noting that a "literal application of the *Bonnette* factors" demonstrate that the Department of Corrections has sufficient supervision or control over the incarcerated worker).

99. *Vanskike*, 974 F.2d at 809–10.

turns on its head: instead of asking whether there is *enough* control over an individual to classify them as an employee (as the *Bonnette* factors attempt to discern), the courts began to argue that the state wields "too much control" to categorize the relationship as employment.[100] They therefore rejected *Bonnette* as a framework that is not "useful . . . in the case of prisoners who work for a prison-structured program because they have to."[101]

It is difficult to pinpoint the precise reasons for this judicial turnabout. The opinions themselves make no mention of extrajudicial pressures or considerations that may have contributed to these decisions—but the broader scope of history is revealing. Between 1980 and 1990, the prison population in the United States doubled.[102] By 2000, it quadrupled.[103] And as prison populations surged, state and local governments confronted fiscal crises: a majority of the nation's municipalities faced a budget deficit in the early 1990s, and federal aid to states was cut by seventy-eight billion dollars between 1982 and 1992.[104] This unsurprisingly led to a resurgence of public and legislative support for the public profiteering of prison labor. During this era, over eighty percent of Americans agreed that incarcerated people should be "ke[pt] . . . busy" through public work projects and should have a portion of their wages withheld.[105] Over fifty-five percent of Americans viewed prison labor "positively."[106] Even Congress, which had decades earlier instituted a ban on the open-market sale of prison-made goods, created an exception to that prohibition and reauthorized private partnerships to contract prison labor within state prisons.[107]

This historical context illuminates the post-*Hale I* decisions. An undercurrent in these decisions is a preoccupation with the costs of incarceration—a concern that is explained by the unique confluence of the budget deficits, accelerating incarceration rates, and shifting public opinion that marked this era. The courts recognized that under the theory advanced by incarcerated workers (and reinforced by the *Bonnette* test), states would be forced to pay the "minimum wage for anything [that incarcerated people] do in prison that can be considered 'work.'"[108] But they also worried that imposing a

100. *Id.* at 810.

101. Hale v. Arizona (*Hale II*), 993 F.2d 1387, 1394 (9th Cir. 1993) (en banc).

102. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 688 (1993).

103. Fox Butterfield, *Study Finds Big Increase in Black Men as Inmates Since 1980*, N.Y. TIMES (Aug. 28, 2002), https://www.nytimes.com/2002/08/28/us/study-finds-big-increase-in-black-men-as-inmates-since-1980.html [https:/perma.cc/CJ9H-WWXK (dark archive)].

104. *See* Sturm, *supra* note 102, at 691 & n.229.

105. Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1057 n.43 (2011).

106. *Id.*

107. *See infra* Part II.B.

108. Vanskike v. Peters, 974 F.2d 806, 811 (7th Cir. 1992).

minimum wage for all the various forms of prison labor would "jeopardize" the prison's labor programs[109] and preclude the state from capitalizing on un(der)compensated labor.[110]

The post-*Hale I* decisions ensured that this would not come to pass. One reading of these opinions is that, dissatisfied by the labor protections resulting from a straightforward application of the *Bonnette* factors, the courts eschewed the test and developed abstract justifications to reach their desired result. The courts were no longer concerned by the conditions of the work nor the employer's degree of control over the worker. Instead, the central focus became the worker's status as a person incarcerated in a public prison. The courts recognized—and protected—the government's intent to rely on prison labor to subsidize the costs of incarceration.[111] And to ensure that this government advantage was not likened to private profit, the courts concluded (with minimal analysis) that using prison labor to "simply pay[] the costs of public goods" did not "amount[] to an unfair windfall"[112] that would merit concern.

As Part II outlines, this reasoning fails to grapple with the realities of prison labor or the public profiteering that can be, and often is, harvested from it.

II. HOW THE PUBLIC PROFITEERS

To define prison labor as a nonpecuniary enterprise is to ignore the well-documented history of incarceration as a profit-driven industry. Much has been written about the history of the modern prison industrial complex, which is rooted in systems of enslaved and exploited labor.[113] In the aftermath of Emancipation, governments redefined carceral systems to re-subjugate Black communities into a new form of slavery through peonage and prison labor. There is a wealth of scholarship that collectively constructs this historical narrative, and Section II.A begins by summarizing this established history.

109. *See* Hale v. Arizona (*Hale II*), 993 F.2d 1387, 1398 (9th Cir. 1993) (en banc).

110. *See Vanskike*, 974 F.2d at 811–12.

111. *Id.* Section II.B outlines the types of forced or un(der)compensated labor that prison systems use to offset the costs of incarceration. This includes "prison industries," the production and sale of goods, and "carceral public works," the reliance on prison labor to fulfill government services—including the maintenance of the prison itself.

112. *Id.*

113. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (detailing the post-Emancipation persistence of neoslavery that thrived from the aftermath of the Civil War through the dawn of World War II); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996) (detailing the history of Mississippi's Parchman State Penitentiary); Goodwin, *supra* note 4, at 922–53 (discussing the "history preserving slavery," including the reimagination of slavery through Black Codes, convict leasing, and peonage); *Bloody Lucre*, *supra* note 24, at 613–15 (tracing the history of early colonial and American incarceration as well as post-Civil War carceral labor).

The private exploitation of prison labor is often the central villain in this cited scholarship. But equally important to surface are the profits manipulated by state and local governments following the abolition of slavery—such public profiteering was also by design. Section II.A therefore ends by concentrating our lens on the state's financial motivations, a profiteering that carves a through-line to the present. And as Section II.B outlines, public profiteering continues in modern systems of prison labor that rely on a captive and un(der)compensated workforce to fulfill needed government services.

A. *The Roots and Legacies of Prison Labor Profiteering*

The end of the Civil War inspired newfound efforts by emancipated Black people to vindicate their rights. In 1868, hundreds of formerly enslaved people filed lawsuits against white landowners demanding they be paid wages for the prior season's work.[114] Others prospectively sought wages, humane treatment, or separate lodging for the upcoming season.[115] But the backlash was swift. White landowners found such efforts to be "insolent"[116] and did what they could to resist these calls for change. They burned down courthouses, including all the legal documents the buildings contained.[117] And they peddled false narratives to fabricate fear. The end of the Civil War ushered a newfound degree of violence by returning white soldiers, especially against those who had doubted the war.[118] But landowners baselessly blamed this violence on Freedmen to support the need for repressive legal measures.[119] Such laws were required, industry owners also warned, to combat imagined threats of "unthrift" or "idleness" that would follow Emancipation.[120] They asserted that "stringent laws" would properly "control" Freedmen and "require them to fulfill their contracts of labour on the farms."[121]

114. BLACKMON, *supra* note 113, at 19.

115. *Id.* at 27.

116. *Id.* at 26–27. Even the Freedmen's Bureau and northern military commanders encouraged formerly-enslaved people to enter into labor contracts with white landowners, which—in practice—restored the subjugated state of slavery. *Id.* at 27; Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 650 (1982) (noting that the Freedmen's Bureau and the Union army "generally tried to keep the freedmen working on the land of their former owners" and even went so far as to require freedmen to sign labor contracts or be arrested for vagrancy). There is a suggestion that "the Freedmen's Bureau was so incompetent in rendering effective assistance to Blacks that some perceived it to be the 'reenslavement agency operating in the interests of planters.'" Goodwin, *supra* note 4, at 936.

117. BLACKMON, *supra* note 113, at 19.

118. *See id.* at 25–26.

119. *See id.* at 70.

120. *Id.* at 73.

121. *Id.* at 53.

The desire to recapture formerly-enslaved workers was transparent.[122] Desire transformed to decree, and governments swiftly passed new legislation, collectively known as Black Codes, that "exhaustive[ly]" criminalized Black life.[123] Creating a new system of subjugating Black communities was considered "an acceptable—even essential" solution that could not have been more explicit.[124]

These new laws "impute[d] crime to color"[125] and were "aimed with 'almost surgical precision' at black freemen."[126] It became unlawful for Black people to speak loudly in the presence of a white woman, eavesdrop, ride on empty freight train cars, obstruct the passage of people on sidewalks, enter town limits without special permission from an employer, preach, or hold a public meeting.[127] A majority of southern states outlawed "vagrancy," an offense with a definition so vague that it allowed the arrest of nearly any formerly-enslaved person without the protection of a white landowner.[128]

Black Codes also created criminal penalties for refusing to submit to a life of indentured servitude.[129] It became illegal to leave employment without a discharge paper from one's employer, to change employers without the employer's permission, or to refuse the renewal of a labor contract.[130] Orphans of freed people, or the children of Black people "deemed inadequate parents," were forcibly "apprenticed" to their former masters.[131] Even in the absence of criminal penalties, Freedmen were often killed or tortured if they refused to sign oppressive labor contracts.[132] The efficacy of this system was facilitated by

122. *See, e.g.*, OSHINSKY, *supra* note 113, at 20 ("Their aim was to control the labor supply . . . and to ensure the superior position of whites in southern life."); Roberts, *supra* note 17, at 30 ("Criminal punishment was a chief way the southern states nullified the Reconstruction Amendments, reinstated the white power regime, and made free blacks vulnerable to labor exploitation and disenfranchisement."); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1188 (2015) ("[C]riminal law enforcement functioned as the primary mechanism for the continued subordination of African Americans for profit [after the Civil War]."); Goodwin, *supra* note 4, at 937 ("The newly enacted Black Codes responded to the demands of white southerners, who were keen to maintain their economic exploitation of Black labor.").

123. *See* Goodwin, *supra* note 4, at 937; *see also* Roberts, *supra* note 17, at 30 (these new criminal laws were "modeled after the slave codes, which prohibited their freedom of movement, contract, and family life").

124. BLACKMON, *supra* note 113, at 53.

125. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 30 (2003) (quoting Frederick Douglass).

126. Cecil J. Hunt, II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. BALT. L. REV. 313, 326 (2020) (quoting N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016)).

127. BLACKMON, *supra* note 113, at 7.

128. *See id.* at 53; OSHINSKY, *supra* note 113, at 21; Goodwin, *supra* note 4, at 938.

129. *See* Schmidt, *supra* note 116, at 650.

130. BLACKMON, *supra* note 113, at 53.

131. *Id.*; *see* Goodwin, *supra* note 4, at 949–50.

132. BLACKMON, *supra* note 113, at 27.

the Thirteenth Amendment, which permitted slavery and involuntary servitude as punishment for a convicted crime.[133]

Black Codes widened the spigots of the criminal punishment system, and new structures ensured that people were unable to escape once arrested. A conviction, even one for a "minor infraction," resulted in an exorbitant fine.[134] This system then levied an additional charge for each act in the so-called judicial process of county courts: courts collected fees for serving subpoenas, foreclosing on delinquent loans, arresting someone, and transporting them after their arrest.[135] Additional fees were further imposed for costs owed to each person involved in the prosecution, including the sheriff, the clerk, jurors, judges, lawyers, and witnesses.[136]

The Black people swept into this system were inevitably unable to pay the levied fines and fees. A white landowner could pay in their stead and become entitled to that person's indentured labor until the debt was repaid.[137] Private companies could also pay to "lease" the incarcerated person for the duration of their sentence.[138] By empowering this structure, "the law substituted the unconstitutional system of chattel slavery with a legal system of peonage."[139] And the practice of leasing incarcerated people became "a fixture of southern life."[140]

Local criminal courts were "little more than 'conveyor belts' supplying convicts to industries."[141] Arrests surged, not as acts of crime increased, but due to the needs of buyers of labor.[142] Reflecting on this system decades later, W.E.B. DuBois stated: "It was the policy of the state to keep the [Black] laborer

133. *See* Rodriguez, *supra* note 12, at 1581 ("Commonly valorized as the decree that abolished plantation slavery, the Thirteenth Amendment in fact refurbished a fundamental (racial) power relation mediated by the racist state by recodifying the terms of bodily capture and subjection (that is, enslavement by the state).").

134. BLACKMON, *supra* note 113, at 108–09.

135. *Id.* at 306.

136. *Id.* at 108–09; OSHINSKY, *supra* note 113, at 77.

137. *See* OSHINSKY, *supra* note 113, at 21; Goodwin, *supra* note 4, at 937–38; Schmidt, *supra* note 116, at 650.

138. BLACKMON, *supra* note 113, at 108–09; Roberts, *supra* note 17, at 32 (describing this system as one that "constituted 'slavery by another name,' but also was so violent that it was 'worse than slavery'").

139. Roberts, *supra* note 17, at 32.

140. BLACKMON, *supra* note 113, at 34.

141. Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 357 (1998).

142. BLACKMON, *supra* note 113, at 65–66; OSHINSKY, *supra* note 113, at 77 ("Their numbers ebbed and flowed according to the labor needs of the coal companies and the revenue needs of the counties and the state."); Garvey, *supra* note 141, at 357 (describing it as not uncommon for "the supply of convicts to track the labor demands of industry").

poor . . . to make him a surplus labor reservoir and to force him into peonage and unpaid toil."[143]

The criminal punishment system was expanded to create captive pools of laborers subjugated to conditions of slavery from which they had purportedly been emancipated, and it did so in at least two ways. First, it empowered landowners, sheriffs, and local officials to leverage unchecked powers of arrest and conviction against coerced laborers. This was done without regard to culpability or innocence.[144] False accusations became "a potent weapon in the hands of white employers who sought to bend [B]lack[] [Americans] to their bidding."[145]

Second, the system created a self-sustaining pool of incarcerated labor that local governments could exploit. States and counties leased their prisoners to private lumber yards, coal and iron mines, sawmills, brick and textile factories, turpentine camps, cotton fields, sugarcane plantations, and railroad companies.[146] Black Codes were "an accepted and defended mode of punishment and profit,"[147] and the Lease[148]—the system of seizing and leasing Black people for their labor—"became an entrenched feature of southern penalty."[149]

It is important to note that southern states were not alone in this profit-making scheme.[150] Black Codes also proliferated in northern states—the Black Codes in Illinois, for example, "were among the most notorious and cruel in the country."[151] And the northern states' efforts to profit from prison labor preceded the abolition of slavery: as early as 1807, Massachusetts began contracting the labor of the incarcerated to offset the costs of incarceration and accrue a "financially secure foundation" for the prison system and, by extension, the state.[152] New York began to sell its prison labor in the 1820s, and other states—including Connecticut, Ohio, Indiana, and Illinois—soon joined the fray.[153]

143. Schmidt, *supra* note 116, at 653 (quoting W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 696 (1939)).

144. Roberts, *supra* note 17, at 33–34.

145. Schmidt, *supra* note 116, at 653.

146. BLACKMON, *supra* note 113, at 52, 74, 92, 94, 287–88, 331–32; OSHINSKY, *supra* note 113, at 36, 60; Garvey, *supra* note 141, at 356.

147. Goodwin, *supra* note 4, at 941 (quoting William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, *in* CONVICTS, COAL, AND THE BANNER MINE TRAGEDY 29 (1998)).

148. BLACKMON, *supra* note 113, at 121.

149. Garvey, *supra* note 141, at 354–55.

150. *See* Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 957 (2016) (discussing the history of prison labor in Philadelphia and New York); Garvey, *supra* note 141, at 347–53 (describing prison labor and profit in the North).

151. Goodwin, *supra* note 4, at 939.

152. Garvey, *supra* note 141, at 352.

153. *Id.*

When conflicts arose between profit and prison labor reform, prison systems emphasized the interests of "monetary return."[154]

In the south, the "work camps" to which people were leased reflected "the most atrocious aspects of antebellum bondage."[155] The work itself was dangerous—people were at risk of drowning, being buried alive in landslides, or being blown apart by dynamite.[156] But the camps were also incredibly punitive. The use of torture like dog mauling, waterboarding, or intense flogging was common.[157] The mortality rate was "staggering" and could approach fifty percent.[158] In one prison mine, a health inspector asked how a sovereign state could send her citizens to a prison where "a large number are condemned to die."[159] As one person recalled from his experience in the Eureka Prison Mines in northern Alabama, "Day after day we looked death in the face & was afraid to speak."[160]

Exploitation was also rampant within the work camps themselves. Convicted people were charged two dollars a week for their food and shelter—a third of their supposed wages.[161] They were also forced to buy their own food and clothes from a commissary, and they were charged usurious interest rates on the salary advances used to pay for the goods.[162] It was frequent practice for the entity benefiting from this forced labor to claim that the worker had incurred additional debts for such necessities, and to then hold them indefinitely until the debts were fulfilled.[163]

Thousands of Black people were imprisoned in work camps for Black Code violations, or for no crime at all.[164] In one 1898 report of incarcerated people at a prison mine, the largest category of charges was "not given"—"[n]o one even

154. *Id.*

155. BLACKMON, *supra* note 113, at 52; Garvey, *supra* note 141, at 357 (recognizing that the Lease "may have invited even greater physical abuse than did slavery"); DAVIS, *supra* note 125, at 32 (observing that scholars studying the convict leasing system have concluded that "in many important respects, convict leasing was far worse than slavery").

156. *See* OSHINSKY, *supra* note 113, at 59.

157. BLACKMON, *supra* note 113, at 71, 91, 347.

158. *Id.* at 57; Schmidt, *supra* note 116, at 651.

159. BLACKMON, *supra* note 113, at 109.

160. OSHINSKY, *supra* note 113, at 78–79.

161. BLACKMON, *supra* note 113, at 152.

162. *Id.* at 174.

163. *Id.* at 68; OSHINSKY, *supra* note 113, at 16 ("At the year's end, however, the field hands received no wages because Marse Bill had charged them dearly for rent and supplies."); Hunt, *supra* note 126, at 330 (describing a system of deducting leasing costs from wages so that few convicted people were ever able to pay off their debts and or advocate for their release).

164. *See* BLACKMON, *supra* note 113, at 99–100. And it was not only men—Black children and teenagers were also sent to these forced labor camps. *See id.* at 97, 143. State penal codes did not distinguish between adults and youth. *See* OSHINSKY, *supra* note 113, at 46–47. At least one in four convicted people was a minor, a percentage that did not diminish over time. *See id.*

bothered to invent a legal basis for their enslavement."[165] A local businessman in Florida admitted around this time that it was "possible to send a [Black person] to prison on almost any pretext."[166] By 1885, 138 prisons had leased over 38,000 incarcerated people, whose forced labor was valued at $28.8 million that year alone.[167]

Having established this historical foundation, it is important to note the unique ways that state and local governments benefitted from this captive labor, especially after a civil war devastated their economies.[168] The Black Codes were motivated by a desire to uphold white supremacy, but this system was also considered "an inherently practical method" of funding government services."[169] Slavery had been the bedrock that shaped coal mines, furnaces, and railroads—enslaved people constructed nearly all early sites of industry,[170] and they also performed much of the specialized labor upon which these industries relied.[171] After the Civil War, it remained the same—incarcerated labor became integral to repairing broken infrastructure. Convicted workers rebuilt coal mines and iron furnaces, built levees, cleared swampland, ploughed fields, and laid railroad tracks.[172] Through coerced and subjugated labor, states increased the material production of goods and quickly became the foremost producers of iron, steel, and coal in the world.[173]

Local citizens also praised the practice of convict leasing for "contributing much to the revenues of the county, instead of being an expense."[174] Indeed, convict leasing added millions in revenue to devastated state and local coffers.[175] Take, for example, the state of Alabama. In 1882, Alabama collected $50,000 in revenue from the sale of convict leasing, equal to approximately $860,000 in modern currency.[176] By the mid-1880s, Alabama began leasing to industrialists

165. BLACKMON, *supra* note 113, at 112.

166. OSHINSKY, *supra* note 113, at 72; *see also* Schmidt, *supra* note 116, at 651 (describing the convict-lease system as "a system of involuntary servitude" in which "persons are held to labor as convicts under those laws who have committed no crime" (quoting C. RUSSELL, REPORT ON PEONAGE 17 (1908))).

167. Cao, *supra* note 13, at 10.

168. BLACKMON, *supra* note 113, at 53; *see also* OSHINSKY, *supra* note 113, at 62 ("Convict leasing made money for the state while keeping taxes down."); Garvey, *supra* note 141, at 356 ("The lease system produced income for the lessees and the state alike."); Goodwin, *supra* note 4, at 944 (recognizing that convict leasing "generated significant profits for lessees and states"); *Cashing in on Convicts*, *supra* note 23, at 614 (recognizing that convict leasing created an "economic bonanza" for Southern prisons and jails).

169. BLACKMON, *supra* note 113, at 53.

170. *Id.* at 47.

171. *Id.*

172. *Id.* at 90; OSHINSKY, *supra* note 113, at 36, 44.

173. *See* OSHINSKY, *supra* note 113, at 76 ("By 1910, [Alabama] was the sixth largest coal producer in the nation.").

174. BLACKMON, *supra* note 113, at 56.

175. OSHINSKY, *supra* note 113, at 57.

176. BLACKMON, *supra* note 113, at 73.

in other states.[177] By the end of 1890, in modern currency, this new form of slavery had generated nearly four million dollars for the state of Alabama over two years.[178] In 1908, journalist Ray Stannard Baker reported that the state's large number of arrests "lies in the fact that the state and the counties make a profit out of their prison system."[179]

The revenue was so great that counties chose to prosecute people accused of felonies (a conviction for which the person would enter the state criminal system) on misdemeanor charges so they would remain in the local system.[180] County prisoners eventually surpassed the number of people pressed into forced labor by the state.[181]

Even after convict leasing was abolished, states continued to reshape the contours of coerced prison labor—public exploitation of this labor did not end. Although states were no longer leasing to private corporations, the practice of convict leasing by county sheriffs continued unabated[182] and even increased.[183] And states began to operate penal labor camps without a privatized middleman. Tennessee abolished convict leasing in 1896, but by 1904, state profits from incarcerated labor in Tennessee grew to almost $200,000 per year.[184] After constructing the "Parchman farm," a state penitentiary on acres of plantations in the Yazoo Delta, the state of Mississippi received a net revenue of $825,000 from the prison in a single year.[185]

Soon, interstate roads were needed to accommodate the then-latest technological advancement: the automobile.[186] As part of this "good roads movement," states turned to a captive pool of incarcerated workers.[187] A new iteration of prison labor—the "chain gang"—emerged.[188] This name reflected

177. Goodwin, *supra* note 4, at 944–45.

178. BLACKMON, *supra* note 113, at 100.

179. Schmidt, *supra* note 116, at 652. It is important to note that following conviction and incarceration, state and local governments profited from more than the person's labor. In Tennessee, for example, incarcerated people were laying rack and mining coal—but the state also collected their urine and sold it to local tanneries by the barrel. OSHINSKY, *supra* note 113, at 58. When incarcerated people died, the state sold their unclaimed bodies to medical schools for student practice. *Id.*

180. BLACKMON, *supra* note 113, at 65.

181. *Id.* at 65. People convicted of felony offenses were sent to prison systems controlled by the state government, whereas people convicted of misdemeanor offenses remained in the local county carceral system. County officials therefore "downgraded" a person's prosecution to retain control over that person post-conviction. *See id.*

182. *Id.* at 352.

183. OSHINSKY, *supra* note 113, at 73–74.

184. *Id.* at 82.

185. *Id.* at vii, 1. This figure of revenue (from 1918) totaled almost half of the state's entire budget for public education. *Id.* at 155. Politicians began calling the prison the "best prison" in America and as fertile and productive as the "Valley of the Nile." *Id.*

186. Garvey, *supra* note 141, at 365.

187. *Id.*

188. *Id.*

the shackles that bound incarcerated people while they ate, slept, and labored outdoors to build these roads.[189] Just like the convict leasing that preceded it, "chain gangs" were characterized by "barbarous[] treat[ment]."[190]

This continued profiteering of incarcerated labor was intentional. Those who supported the abolition of convict leasing hoped that the state would find more efficient ways of exploiting prison labor for public profit. In Georgia, for example, newspaper editorials argued that incarcerated people should be "taken out of private hands" and "put to work" improving state infrastructure, including its "desperately inferior roads."[191] In a 1922 report, a state prison inspector wrote that Alabama's "jails are money-making machines" for the state.[192] That year, total arrests in Alabama nearly reached 25,000, driven partly by new prohibition laws.[193] By 1927, total arrests in Alabama was over 37,000.[194]

It is clear from this history that the state's intent in creating (and growing) prison labor is inextricably tied to exploitation and profit. Private industries surely benefited—but the primary architects and profiteers of this coerced labor were state and local governments. Governments intentionally created a criminal punishment system to recapture a captive workforce, and they expanded that system to sustain their profits. Bare treasuries became full. Government services were created and then funded. State infrastructure was built and improved. Public works projects were quickly and efficiently fulfilled. And by manufacturing "criminals" to subjugate newly-emancipated Black communities, these governments paved a more palatable framework for rationalizing this exploitative system.[195] These were not laborers, enslaved people, or indentured servants deserving of rights or liberation—they became "prisoners who deserved punishment."[196]

189. *See* Schmidt, *supra* note 116, at 652.

190. *Id.* at 653 (quoting a report issued in 1877 by the U.S. Commission of Labor). The chain gang has reemerged in recent history; Alabama reinstated use of chain gangs in 1995 under then-Governor Fob James. It prompted pro se and class action litigation alike, and the state agreed in 1996 to permanently ban the practice. *A Look Back: Historic SPLC Lawsuit Ended Barbaric Prison Practices*, S. POVERTY L. CTR. (Dec. 21, 2009), https://www.splcenter.org/news/2009/12/21/look-back-historic-splc-lawsuit-ended-barbaric-prison-practices [https://perma.cc/G6KP-RDET].

191. *See* BLACKMON, *supra* note 113, at 351.

192. *Id.* at 367.

193. *Id.*

194. *Id.*

195. Goodwin, *supra* note 4, at 944.

196. *Id.*

This history outlines a relationship between racial capitalism,[197] prison labor, and public profiteering that persists today.[198]

B. *The Modern Reincarnation: Carceral Public Works*

When analyzing modern prison labor in public prisons, legal scholarship focuses on two primary categories of labor.[199] The first category is what I call "prison maintenance," wherein the prison manages the production of labor while also consuming its output.[200] Through this labor, incarcerated workers "contribute directly to prison operations" by, among other tasks, cooking meals, cleaning facilities, or doing laundry.[201]

The second category of labor is encompassed by "prison industries"—prison labor programs that produce goods or services sold to other government agencies or to the private sector.[202] These programs are most commonly

197. By racial capitalism, I identify a reality in which "capital accumulation and labor expropriation in the United States have always relied on a racial hierarchy and the deep inequalities that hierarchy produces." Roberts, *supra* note 17, at n.60; *see also* CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (Univ. of N.C. Press 2000) (1983) (explaining how "racialism . . . inevitably permeate[d] the social structures emergent from capitalism").

198. *See* Goodwin, *supra* note 4, at 962 ("The strong connection between race, slavery, and the prison economy is unmistakable.").

199. *See* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868–70 (2008) (identifying two general forms of prison labor: "prison industries" and "prison housework"); Heben, *supra* note 23, at 187 (adopting Zatz's construction of two general categories of prison labor); Fink, *supra* note 150, at 961 (same); J.S. Welsh, Note, *Sex Discrimination in Prison: Title VII Protections for America's Incarcerated*, 42 HARV. J.L. & GENDER 477, 481 (2019) (same). I interrogate this traditional division and categorization of prison labor and uplift a broader category, "carceral public works," that encompasses all the ways in which prison labor is used to fulfill government services and public works (including, but not limited to, "prison housework"). I am not alone in offering an alternative framework for understanding modern prison labor. Andrea C. Armstrong identifies five categories: work assisting in the "safe and secure operation of the prison itself," nonessential work that "benefits and is for the prison," work assignments that "provide skills or education" for rehabilitative or reentry purposes, work within a state-run "correctional industry" program, and work for private corporations. Andrea C. Armstrong, *Beyond the 13th Amendment—Captive Labor*, 82 OHIO ST. L.J. 1039, 1040–42 (2021). Laura I Appleman offers a different framework for understanding modern prison labor profiteering—she offers four primary categories of labor, including "cleaning up natural disasters," market goods manufacturing, "food harvest and production," and "state-run 'independent' correctional industries." *Bloody Lucre*, *supra* note 24, at 658–71. Both Armstrong and Appleman's frameworks offer important nuance and depth. Armstrong's categories insightfully recognize the varied ways that prisons benefit from prison labor, and Appleman's categories make critical insights into the intertwined nature of the private and public profit derived from prison labor. But my focus in this Article is to highlight the unique and understudied ways that state and federal governments profiteer from prison labor, and I offer one specific lens—"carceral public works"—to further understand this public profiteering. *See infra* Section II.B.

200. Zatz, *supra* note 199, at 870 (describing this category as "prison housework"). I choose to use the phrase "prison maintenance" to highlight the ways in which this prison labor actively preserves and upholds the prison industrial complex.

201. *Id.*

202. *Id.* at 869.

managed by the state department of corrections operating the prison system, but they are occasionally contracted to a third-party firm for operation.[203] Though the 1935 Ashurst-Sumners Act prohibits the sale of prison-made goods in interstate commerce,[204] restrictions on these purchases have relaxed in recent decades[205]—and government purchasers have always been exempted from such limits.[206]

Prison industry programs are described as the "highest-profile" form of public prison labor,[207] likely because of their connections to private interests. In the majority of prison industry programs, incarcerated workers produce or harvest goods—ranging from denim jeans, office furniture, military and police gear, dairy products, uniforms, grains, and livestock[208]—that are sold to government agencies or, less frequently, to private industries.[209] Certain qualifying companies are even allowed to sell prison-made goods on the open market, free from the existing federal ban on the interstate sale of such goods.[210] The same programs also permit private companies to contract for incarcerated workers, who will then contribute labor to the company.[211]

For both prison maintenance and prison industry labor, the state benefits by withholding just compensation for the work. According to a 2017 study, incarcerated workers receive on average fourteen cents to $1.41 per hour—if they are paid at all.[212] And they are generally ineligible for workers'

203. *Id.* at 869–70.

204. The pressure for federal interventions grew with the onset of the Great Depression. Garvey, *supra* note 141, at 365. In 1935, the Ashurst-Sumners Act made it a federal crime to knowingly transport prison-made goods into a state that prohibited their sale. *Id.* at 367. In 1940, Congress amended the Act to make the interstate transportation and sale of prison-made goods a federal crime, no matter what state law provided. *Id.*

205. For example, the Prison Industry Enhancement Act of 1979 ("PIE") permits private firms to use prison labor under certain circumstances, and it further permits certified firms to sell prison-made goods on the open market. Garvey, *supra* note 141, at 371–72. The Prison Industries Act can also be read to create a "critical loophole" where restrictions do not apply so long as prison-made goods are not shipped across state lines. Cao, *supra* note 13, at 27. References to "prison industries" include both state correctional industries and PIE programs.

206. Zatz, *supra* note 199, at 869. Notably, there is no restriction on selling U.S. prison-made goods outside the United States. *See* Cao, *supra* note 13, at 22 ("Selling U.S. prison-made goods outside the United States is not prohibited."). There has also long been an exception for agricultural goods. *See* 18 U.S.C. § 1761(b); H. Claire Brown, *How Corporations Buy—and Sell—Food Made with Prison Labor*, COUNTER (May 18, 2021, 11:38 AM), https://thecounter.org/how-corporations-buy-and-sell-food-made-with-prison-labor/ [https://perma.cc/6NZ7-MDAT].

207. Zatz, *supra* note 199, at 869.

208. Brown, *supra* note 206; Cao, *supra* note 13, at 21–22; Goodwin, *supra* note 4, at 964–65.

209. *See* Cao, *supra* note 13, at 22–23.

210. Garvey, *supra* note 141, at 372.

211. *See generally* Brown, *supra* note 206 (describing how various companies contract with prisons to supply agricultural products like eggs, milk, and fish).

212. *How Much Do Incarcerated People Earn*, *supra* note 13 (identifying that wages for prison labor average fourteen cents to $1.41 per hour, with the exception of those states that provide no wages for prison labor).

compensation or other benefits normally provided to employees.[213] Consider the discrepancy between these wages and the sales made from prison industries, which can exceed $200 million dollars a year.[214] This focus on profit to the state is, at times, explicit. Texas, for example, acknowledges that one of the purposes of its prison industry is to "reduce department costs" by selling products "on a for-profit basis to the public" or to state agencies.[215]

It is more difficult to quantify the savings accrued to the state through its reliance on prison maintenance work. But as the Seventh Circuit acknowledged in *Vanskike v. Peters*, forcing incarcerated people to perform these tasks replaces the employment of people who would otherwise have been "hired to do the job—someone who would have to be paid at least [the minimum wage]."[216] Cecil J. Hunt, II has estimated that prisons "save[] hundreds of millions of dollars each year on [such] labor costs."[217]

For those incarcerated workers who are contracted to work directly for private employers while confined in a public prison (which comprise a much less significant portion of the incarcerated workforce),[218] the wage structure is different. These workers are statutorily eligible to earn wages that are "not less than th[ose] paid for work of a similar nature in the locality in which the work is performed."[219] But even then, the state benefits from these higher earnings.

213. Incarcerated workers do not receive the workplace benefits that other recognized employees are permitted to access. *See* Cao, *supra* note 13, at 26 (explaining "inmates do not have the right to unionize" and incarcerated workers generally do not receive workers' compensation); Coupar v. U.S. Dep't of Lab., 105 F.3d 1263, 1264 (9th Cir. 1997) (incarcerated worker not entitled to whistleblower provisions of the Clean Air Act and the Toxic Substances Control Act); Alexander v. Ortiz, 807 F. App'x 198, 200 (3d Cir. 2020) (refusing to extend *Bivens* remedy to an incarcerated worker because "the prison workplace context is a special factor" favoring preclusion).

214. For the fiscal year 2019, California's prison industry totaled $249,961,931 in sales. This was followed by Washington ($113,260,594), North Carolina ($92,500,000), Pennsylvania ($80,688,000), Texas ($76,745,560), Florida ($69,524,370), Colorado ($68,871,011), New York ($63,557,000), Maryland ($52,457,137), and Arizona ($47,974,027). *See* MD. CORR. CTRS., ANNUAL REPORT FY 2020, at 3 (2020).

215. TEX. GOV'T. CODE ANN. § 497.002(a)(2) (Westlaw through the end of the 2021 Reg. and Called Sesss. of the 87th Leg.). The "About Us" section of the Texas Correctional Industries' website also states that TCI "benefits the state of Texas by providing cost savings" to the state. *About Us*, TEX. CORR. INDUS., https://tci.tdcj.texas.gov/info/about/default.aspx [https://perma.ccA8KD-TJP9].

216. 974 F.2d 806, 811 (7th Cir. 1992).

217. Hunt, *supra* note 126, at 333 (quoting 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 [https://perma.cc/3MXH-59FU].

218. *See* Garvey, *supra* note 141, at 374 (describing the PIE program as "only a blip on the screen of prison labor" because it employed only .18% of the total state prison population).

219. 18 U.S.C. § 1761(c)(1). But it is important to note that some prison industries will use the demarcation of "training periods" to circumvent the "prevailing wage" requirement, sometimes for up to two years. *See* Cao, *supra* note 13, at 28. There is also a loophole in the federal PIE legislation that exempts companies from paying the prevailing wage when the work is designated as a "service" rather than a "job." Sadhbh Walshe, *How US Prison Labour Pads Corporate Profits at Taxpayers' Expense*, GUARDIAN (July 6, 2012, 10:30 AM),

Up to eighty percent of the wage is deducted for various costs and fees, including so-called "room and board" expenses to offset the costs of incarceration as well as payments to a state's victim compensation fund (even if the individual worker's underlying conviction was a victimless crime).[220] In Iowa, for example, only 19.9% of the wages were given to the incarcerated workers—over thirty-four percent went to the state's general fund and to the Department of Corrections, over fifteen percent was paid to taxes, and about twenty-seven percent was given to the state's victim compensation fund.[221]

When assessing these two traditionally recognized categories of labor, it is clear that the state accrues benefits from prison labor. In a system where the state governs both the source and assets of prison labor, savings to the state are functionally equivalent to profits. But there is a nuance lost when we limit our analysis to these two categories. As shown above, state and local governments deliberately expanded the criminal punishment system to create a captive pool of laborers to perform critical public works and infrastructure needs. Today, many government services continue to rely on the backs of low- or no-wage prison labor—what I call "carceral public works."[222]

https://www.theguardian.com/commentisfree/2012/jul/06/prison-labor-pads-corporate-profits-taxpayers-expense [https://perma.cc/VD8H-BEVR (dark archive)].

220. 18 U.S.C. § 1761(c)(1).

221. IOWA PRISON INDUS., FY2020 ANNUAL REPORT 5 (2021).

222. This is not the first instance that prison labor has been analyzed through a public-works lens in legal scholarship. Stephen P. Garvey identified a "public-works" system of prison labor, which he defined as a system "in which prisoners work on public projects" that "is a variant of the state-use system." Garvey, *supra* note 141, at 344. A "state-use system" is one where "the state is responsible for overseeing the production process, and the sale of prison-made goods is limited to state markets." *Id.* at 344–45; *see also* Amy L. Riederer, Note, *Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor*, 43 VAL. U. L. REV. 1425, 1459 (2009) (identifying a model of prison labor called "the public-works-and-ways model," wherein "prisoners labor for the benefit of the state only on public projects, primarily by building roads"). However, these discussions limited the "public-works model" to historical chain-gangs and did not assess how modern governments continue to rely on incarcerated labor, in a variety of forms, to fulfill their public project needs. *See* Garvey, *supra* note 141, at 345 & n.22; Riederer, *supra*, at 1459 n.151. Regarding this focus on modern prison labor, other scholars have recognized that state governments rely on incarcerated labor to perform public works. *See* Jonathan M. Cowen, *One Nation's "Gulag" Is Another Nation's "Factory Within a Fence": Prison-Labor in the People's Republic of China and the United States of America*, 12 UCLA PAC. BASIN L.J. 190, 211 (1993) (identifying Massachusetts and California as two states that have "recently begun to try out the 'chain gang' concept anew" by using incarcerated people to "build and maintain public works"); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1185 ("[T]hen as now, state and local governments used convict labor to perform public work, such as street sweeping and landscape maintenance."); *Bloody Lucre*, *supra* note 24, at 658–64 (noting that state governments, in addition to and alongside private industries, rely on prison labor during disasters or public emergencies). This Article's contribution is to name "carceral public works" as a framework for understanding public profiteering separate from private industry, and to investigate the unique and dangerous incentives that this profiteering creates for state governments to sustain their hold on captive labor pools in public prisons.

This classification of prison labor identifies a third category of prison labor that overlaps with the existing framework. Prison maintenance, on which the state relies to operate its public prisons, is certainly one subcategory of carceral public works. But incarcerated workers do much more than labor inside a prison to sustain its operations.

For one, they provide critical support in times of crisis. Incarcerated people are burdened with a wide range of emergency responses. They assist in providing relief or preventing "natural or man-made disasters."[223] They are on the frontlines defending their cities from wildfires,[224] hurricanes,[225] or blizzards.[226] They conduct search and rescue operations and respond to medical emergencies in people's homes.[227] They are even tasked with responding to viral outbreaks. When the avian flu threatened community infection, incarcerated workers euthanized hundreds of thousands of turkeys to prevent a possible spread of the disease.[228] And it is important to recognize that for the past two years, imprisoned people have been uncelebrated soldiers in the fight against

223. COLO. REV. STAT. § 17-24-124(1) (LEXIS through all legislation from the 2022 Reg. Sess.).

224. California is perhaps the state best known for relying on incarcerated firefighters, but other states also use incarcerated labor to fight fires and help prevent and suppress forest fires. *See Work Crews*, WASH. STATE DEP'T CORRS., https://www.doc.wa.gov/corrections/programs/work-crews.htm#types [https://perma.cc/7VDB-9HJ5]; Matt Reynolds, *Former Inmates Are Battling Legal Barriers To Work as Firefighters*, ABA J. (June 1, 2021, 1:50 AM), https://www.abajournal.com/magazine/article/former-inmates-are-battling-legal-barriers-to-full-time-work-as-firefighters [https://perma.cc/BL26-EGEB (staff-uploaded, dark archive)] (noting that "several other states" besides California use incarcerated firefighters, including Arizona, Oregon, Texas, and Virginia).

225. Many local jurisdictions have relied on incarcerated people to help protect their cities or towns from the ravages of a hurricane. *See* Madison Pauly, *Detainees in Lafourche Filled Sandbags To Save Property. When the Town Evacuated, They Were Kept Jailed*, MOTHER JONES (Sept. 1, 2021), https://www.motherjones.com/crime-justice/2021/09/detainees-ida-lafourche-sandbags-evacuation-louisiana/ [https://perma.cc/3KFL-67M2] (Hurricane Ida); *SC Inmates Filling Sandbags for Hurricane Irma*, WLTX (Sept. 6, 2017, 10:03 PM), https://www.wltx.com/article/weather/irma/sc-inmates-filling-sandbags-for-hurricane-irma/101-471808941 [https://perma.cc/BF28-CF5J] (Hurricane Irma); *Hurricane Dorian: Sandbag Locations in Palm Coast, Bunnell, Flagler Beach and the County*, FLAGERLIVE.COM (Aug. 30, 2019), https://flaglerlive.com/142529/hurricane-dorian-sandbag-locations-palm-coast-flagler/ [https://perma.cc/AJ7T-4V9H] (Hurricane Dorian).

226. Eric Levenson, *Low on Resources, Boston Turns to Prison Labor To Shovel Snow*, BOSTON.COM (Feb. 17, 2015), https://www.boston.com/news/local-news/2015/02/17/low-on-resources-boston-turns-to-prison-labor-to-shovel-snow/ [https://perma.cc/CE5T-NC2P]; WASH. STATE DEP'T CORRS., *supra* note 224; *see also* GA. COMP. R. & REGS. 125-3-5.04(b)–(c) (2022) (noting that "[i]n emergency situations . . . incarcerated people 'may be required to work in inclement weather,' which is defined 'as weather in which there is rain or in which the temperature is below twenty-eight (28) degrees Fahrenheit'").

227. Joey Lautrup, *'Only as Valuable as What You Save the State.' Formerly Incarcerated Firefighters in California Speak Out on What Needs To Change*, TIME (Sept. 4, 2020, 4:45 PM), https://time.com/5886291/california-firefighter-prison-labor/ [https://perma.cc/CE5T-NC2P].

228. Rick Callahan, *400,000 Birds Euthanized in Indiana Flu Outbreak*, INDYSTAR (Jan. 20, 2016, 9:01 AM), https://www.indystar.com/story/news/2016/01/20/chicken-flocks-euthanized-indiana-bird-flu-outbreak/79051416/ [https://perma.cc/A42G-SUGC].

the COVID-19 pandemic. With the world in crisis, these unsung frontline workers manufactured hand sanitizer and protective gear, washed the hazardous laundry of overwhelmed hospitals, and dug mass graves for the pandemic's victims.[229]

The dangers of providing such emergency relief can be profound.[230] These dangers are magnified by the number of states that expect incarcerated people to perform such essential public works: at least thirty states expressly designate emergency responses to incarcerated workers.[231] And some states even explicitly acknowledge their profiteering. A handful of states statutorily define their incarcerated population as "a labor pool" for accomplishing various emergency responses.[232]

But incarcerated people also support a much broader category of public works beyond emergency response.[233] They maintain public roads[234] and clean deer carcasses from state highways.[235] They tend to municipal graveyards.[236] They improve watersheds,[237] construct water supply facilities,[238] and don wetsuits to repair leaky public water tanks.[239] They construct hiking trails,[240]

229. *See* Emma Grey Ellis, *Covid-19's Toll on Prison Labor Doesn't Just Hurt Inmates*, WIRED (May 19, 2020, 2:07 PM), https://www.wired.com/story/covid-19-prison-labor/ [https://perma.cc/PT9P-QYPR].

230. *See, e.g.*, Abby Vesoulis, *Inmates Fighting California Wildfires Are More Likely To Get Hurt, Records Show*, TIME (Nov. 16, 2018, 7:40 PM), https://time.com/5457637/inmate-firefighters-injuries-death/ [https://perma.cc/5R5H-7UZB] (explaining that incarcerated firefighters are four times more likely than professional firefighters to incur object-induced injuries like dislocations and fractures, and are eight times more likely to be injured after inhaling smoke).

231. *See* J. Carlee Purdum, *Disaster Work Is Often Carried Out by Prisoners—Who Get Paid as Little as 14 Cents an Hour Despite Dangers*, CONVERSATION (Sept. 15, 2020, 7:54 AM), https://theconversation.com/disaster-work-is-often-carried-out-by-prisoners-who-get-paid-as-little-as-14-cents-an-hour-despite-dangers-145513 [https://perma.cc/7RFS-WY2K]. The risk of injury and death is not limited to emergency responses. *See, e.g.*, Chandra Bozelko & Ryan Lo, *Commentary: The Real Reason Prisoners Are Striking*, REUTERS (Sept. 6, 2018, 4:13 PM), https://www.reuters.com/article/us-bozelko-prison-commentary/commentary-the-real-reason-prisoners-are-striking-idUSKCN1LM2ZN [https://perma.cc/ZMA6-GLUH] (explaining that a motivation for the 2018 national prison strike was the unregulated and dangerous work conditions that incarcerated workers are forced to labor in).

232. COLO. REV. STAT. § 17-24-124(1) (LEXIS through all legislation from the 2022 Reg. Sess.).

233. *See* GA. COMP. R. & REGS. 125-3-5.03(1) (2022) (describing the work that can be assigned to an incarcerated person, including "work essential to the operation of the institution" and "support of public works").

234. *Id.* (describing the work that can be assigned to an incarcerated person, including "maintenance of public roads").

235. Robbie Brown & Kim Severson, *Enlisting Prison Labor To Close Budget Gaps*, N.Y. TIMES (Feb. 24, 2011), https://www.nytimes.com/2011/02/25/us/25inmates.html [https://perma.cc/GSL4-Y7ZJ (staff-uploaded, dark archive)].

236. Brown & Severson, *supra* note 235.

237. WASH. STATE DEP'T CORRS., *supra* note 224.

238. *Id.*

239. Brown & Severson, *supra* note 235.

240. Vesoulis, *supra* note 230.

reforest public lands,[241] and pick up litter and debris along streams and state highways.[242] They collect trash and recycling from their local communities.[243] They even answer the public hotline when residents call their local DMV.[244]

Here, too, the savings to the state are difficult to quantify in the aggregate—but we know the savings can be high. In 2021, the state of Oregon noted as a fiscal year highlight that prison labor staffing of the DMV contact center resulted in $2.2 million in savings to the state.[245] In 2015, the state of California saved about fifty million dollars per year relying on incarcerated firefighters.[246] Just two years later, those savings grew to $100 million per year.[247]

The state's reliance on carceral public works merits specialized attention. It echoes one of the original purposes of Black Codes, convict leasing, and chain gangs, which was to create a captive labor pool that the state could exploit to perform needed infrastructure or other public projects.[248] Scholars describe the

241. WASH. STATE DEP'T CORRS., *supra* note 224.

242. Vesoulis, *supra* note 230.

243. Defendants' Opposition to Plaintiffs' Motion for Further Enforcement Order at 4, Plata v. Brown, No. 4:01-cv-01351-JST (E.D. Cal. Sept. 30, 2014), ECF No. 2813 [hereinafter Defendants' Opposition in *Plata*].

244. *See* OR. CORR. ENTERS., ANNUAL REPORT 2020–2021, at 5 (2021).

245. *Id.*

246. Eli Hager, *Prisoners Who Fight Wildfire in California: An Insider's Look*, MARSHALL PROJECT (Aug. 20, 2015, 2:01 PM), https://www.themarshallproject.org/2015/08/19/prisoners-who-fight-wildfires-in-california-an-insider-s-look [https://perma.cc/S94K-RWE2].

247. Annika Neklason, *California Is Running Out of Inmates To Fight Its Fires*, ATL. (Dec. 7. 2017), https://www.theatlantic.com/politics/archive/2017/12/how-much-longer-will-inmates-fight-californias-wildfires/547628/ [https://perma.cc/K5Y7-3UB6].

248. Of course, the level of abject brutality that characterized these systems has not been reproduced in *identical* forms—we must draw analogies between the past and the present "with care," or else "they threaten to further erase our dimming collective memory" of the prior structures and their "brutal, unremitting violence." *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 62–64 (2012) (cautioning direct comparisons between the "new Jim Crow" of mass incarceration and the "old Jim Crow"). But it is important to recognize that prison conditions remain cruel, punitive, and inhumane—and mortality rates for incarcerated people remain high, a reminder that prisons are "death-making institutions." *See* Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL'Y INITIATIVE (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ [https://perma.cc/83UJ-AHBZ] (assessing latest data from 2018 regarding the thousands of people that die in state custody and quoting Mariame Kaba); Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe [https://perma.cc/RLJ8-YS4G] (describing the danger and violence of incarceration); Frank Tannenbaum, *Prison Cruelty*, ATL. (Apr. 1920), https://www.theatlantic.com/magazine/archive/1920/04/prison-cruelty/305502/ [https://perma.cc/6ZE4-TQ76] (describing how "cruelty has always marked prison administration" and "brutality is a constant factor" in prisons). Constitutional protections have failed to protect incarcerated people from the cruelty of their confinement. *See generally Leading Cases*, 108 HARV. L. REV. 139, 235 (1994) (concluding that "*Farmer v. Brennan* effectively leaves inhumane prison conditions without constitutional remedy"); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84

modern system of prison labor as a "state use" system in which the state is responsible for overseeing the production and sale of prison-made goods to state markets.[249] But this understanding of prison labor is too narrowly focused on *market goods*. Looking to the broader category of carceral public works highlights a more expansive portrait of exploitation and examines how the state *acquires and applies coerced labor*. This framework considers how the state (1) has created a criminalization system (disproportionately targeting people of color) in which people are assigned an inferior social value due solely to the fact of their incarceration, (2) sources the provision of government services from this captive population, (3) extracts economic value by un(der)compensating their labor, and (4) justifies this exploitation by reaffirming the devaluation of incarcerated people, painting the extracted economic value as a public good, and pointing to the provided government service as an additional public good. Seen through this lens, the state's profiteering could constitute "an unfair windfall" even where there is no private entity that benefits.[250]

The more the state comes to depend on prison labor to provide government and emergency services, the more it may rely on maintaining its prison populations to source this labor. This is one principal danger of such public profiteering—the state controls both the supply of captive labor (by determining what to criminalize and who to incarcerate) as well as the demand for this captive labor (by creating a system wherein governments and their agencies become the primary beneficiaries of incarcerated labor). As Part III outlines, it should therefore be no surprise that the state would use its purported need for carceral public works to resist decarceral efforts to reduce the size and scale of incarceration.

III. THE CONSEQUENCE OF WINDFALLS: GOVERNMENT RESISTANCE TO NECESSARY DECARCERAL REFORM

In the last fifty years, the incarcerated population in the United States "exploded from about 500,000 to more than two million."[251] The number of people confined in state prisons has increased by more than 600 percent.[252] The United States stands alone in its incarceration rates, which are higher than any

N.Y.U. L. REV. 881 (2009) (concluding that *Farmer v. Brennan* provides an inadequate standard for assessing cruel conditions of confinement).

249. *See* Garvey, *supra* note 141, at 344–45.

250. Vanskike v. Peters, 974 F.2d 806, 811–12 (7th Cir. 1992) (arguing that because "competition in the marketplace is not a dominant mode and profits are not the ultimate goal" of prison labor for the government, private advantage of prison labor "amounts to an unfair windfall" while government advantage does not).

251. Roberts, *supra* note 17, at 12.

252. CHRIS MAI & RAM SUBRAMANIAN, VERA INST., THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 4 (2017), https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends [https://perma.cc/3YAU-3GSP].

other government in the world.[253] Dorothy E. Roberts has observed that this "astounding amount of human confinement" is not a legitimate response to rising rates of crime—it is a deliberate choice to "maintain a racial capitalist order" by "legitimiz[ing] state violence against the nation's most disempowered people."[254] The criminal punishment system imposes a "vastly disparate impact, from arrest to incarceration" and beyond, on Black and Latinx Americans (as well as other communities of color).[255] For these reasons, Michele Goodwin has described the American prison system as a "market in policed bodies" that "operates as an open secret."[256]

It is against this backdrop that impacted people have long urged a reduction in, and even the abolition of, the carceral systems that plague this country. Scholars have also contributed to a growing literature decrying these systems to demand reform[257] and supporting impacted people's demands towards an abolitionist horizon.[258] Politicians on both sides of the political aisle

253. Roberts, *supra* note 17, at 12–13; Goodwin, *supra* note 4, at 957.

254. Roberts, *supra* note 17, at 14, 35 ("Prison expansion instead reflects a response to the needs of rising neoliberal racial capitalism that addresses growing socioeconomic inequality with punitive measures.").

255. Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 129–30 (2018).

256. Goodwin, *supra* note 4, at 957.

257. *See, e.g.*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (outlining scholarly critiques of the criminal system rooted in the language of "mass incarceration" and "overcriminalization"); Kristen Nelson & Jeanne Segil, *The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19*, 98 DENV. L. REV. 337 (2021) (describing the "scope of the problem of mass incarceration" and recommending broader reforms); Jonathan Simon, *Amnesty Now! Ending Prison Overcrowding Through a Categorical Use of the Pardon Power*, 70 U. MIA. L. REV. 444 (2016) (identifying bipartisan support "trumpeting the need to end mass incarceration" and recommending the use of amnesty as efficacious reform); Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669 (recommending a change to charging, detention, and sentencing practices for young adults as an important tool to reduce mass incarceration); Jonathan Simon, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT'G REP. 271 (2014) (describing mass incarceration as "a profound political and social catastrophe for the United States" and offering five strategies for the movement to end mass incarceration); Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from "Locking Up Our Own,"* 107 CALIF. L. REV. 1967 (2019) (offering lessons for those seeking criminal justice reform); Carl Takei *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PENN. J.L. SOC. CHANGE 125 (2017) (identifying bipartisan denouncement of mass incarceration and offering recommendations to avoid the resurgence of mass incarceration through privatization); Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343 (2011) (recommending that educational equity "join forces" with criminal and juvenile justice reform to dismantle mass incarceration).

258. A nonexhaustive sampling of recent contributions includes: Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213 (2021) (encouraging a movement away from the "progressive legal legitimation" of municipal courts and analyzing the problem of municipal courts through an "alternative critical abolitionist perspective"); Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351 (2021) (offering proposals that would reduce prison populations by more than ninety percent without any diminution in public safety); Amna A. Akbar, *An Abolitionist*

have even agreed that some measure of reform is needed to reduce the size and scale of imprisonment. But despite this burgeoning consensus, one possible consequence of enabling the public profiteering of prison labor is governmental resistance to reform. And state actors have already demonstrated that a reliance on prison labor can supplicate actions to preserve instead of reduce an existing prison population.

California provides an instructive example. In 2011, the Supreme Court ruled in *Brown v. Plata*[259] that medical and mental health neglect in California's state prisons—primarily caused by prison overcrowding—constituted a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[260] It affirmed the lower court's order to reduce the prison population from 200% to 137.5% of the prison system's design capacity within two years.[261] Then Governor Jerry Brown soon signed legislation for "realignment"—the transfer of people from the state prison system into fifty-eight county systems throughout the state.[262] But as of 2014, the state had not yet achieved the necessary reduction.[263]

At that time, one decarceral proposal offered by the incarcerated plaintiffs was to extend two-for-one credits (receiving two days credit for every single day served) to all state prisoners in minimum security custody. The state opposed.[264] The state argued that realignment had already "diminished" the number of incarcerated people who were eligible to volunteer as firefighters in the state's "fire camps."[265] Of those that remained, the state explained that it offered two-for-one credits to "incentivize participation" in the hazardous fire camps but there remained "a constant need for volunteers"[266] despite this motivation. According to the state, extending two-for-one credits would "severely impact" its fire-camp recruitment efforts, and it even went so far as to characterize the proposed reform as "a dangerous outcome" given the "difficult fire season[s]" and "severe drought[s]" that frequently impacted the state.[267] The court would eventually order the state to extend the credits, but

Horizon for (Police) Reform, 108 CALIF. L. REV. 1781 (2020) (arguing that a structural critique of police violence demands we take seriously an abolitionist horizon for reform projects); Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. 1040 (2021); McLeod, *supra* note 122; Roberts, *supra* note 17.

259. Brown v. Plata, 563 U.S. 493 (2011).

260. *Id.* at 501, 545.

261. *Id.* at 501–02, 510.

262. Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, HARV. L. & POL'Y REV. 327, 327 (2014).

263. *See* Order Granting in Part & Denying in Part Defendants' Request for Extension of December 31, 2013, Deadline at 2, Plata v. Brown, No. C01-1351 TEH (E.D. Cal. Feb. 10, 2014), ECF No. 2766 [hereinafter Order in *Plata*].

264. Defendants' Opposition in *Plata*, *supra* note 243, at 3–4.

265. *Id.* at 3.

266. *Id.* at 3–4.

267. *Id.*

only "to the extent such credits do not deplete participation in [the] fire camps."[268]

That the state would take such a position is unsurprising given that it is uniquely situated to profit from a labor pool it holds captive. There are approximately 3,100 incarcerated firefighters who collectively complete three million hours of poverty-wage work in a single year in California.[269] As noted above, the state accrues immense savings from its reliance on this incarcerated workforce,[270] who the state admits must undergo "strenuous physical activities and risk [of] injury."[271] As a former incarcerated firefighter reflected: "You are only as valuable as what you save the state. Not in the work that you do, or who you are as an individual."[272]

Louisiana provides another example of a similar type of resistance.[273] In 2017, Caddo Parish Sheriff Steve Prator publicly opposed the state's Justice Reinvestment Package, a series of bills passed earlier that year that could have reduced Louisiana's state prison population by ten percent.[274] It would have authorized the release of 1,400 incarcerated people throughout the state, of which only five would have been immediately released in the Sheriff's Parish.[275] In a press conference, Sheriff Prator argued that these reforms would release "the bad ones" as well as "some good ones that we use every day to wash cars, to change oil in the cars, to cook in the kitchen, to do all that where we save

268. Order in *Plata*, *supra* note 263, at 3.

269. Ray Levy Uyeda, *The Violent Contradiction of California's Reliance on Incarcerated Firefighters*, NEW REPUBLIC (Aug. 31, 2020), https://newrepublic.com/article/159164/violent-contradiction-californias-reliance-incarcerated-firefighters [https://perma.cc/T9RR-2UCW (dark archive)].

270. *See supra* Section II.B.

271. Defendants' Opposition in *Plata*, *supra* note 243, at 4.

272. Joey Lautrup, *'Only as Valuable as What You Save the State.' Formerly Incarcerated Firefighters in California Speak Out on What Needs To Change*, TIME at 02:25 (Sept. 4, 2020), https://time.com/5886291/california-firefighter-prison-labor/ [https://perma.cc/KT7F-4BRU (video on file with the North Carolina Law Review)].

273. Others have also identified the California and Louisiana examples that I highlight in this and the preceding paragraphs. *See Bloody Lucre*, *supra* note 24, at 661 (identifying the California Attorney General office's arguments against reducing the prison population because it would impact fire camp participation); Benjamin R. Syroka, Comment, *Unshackling the Chain Gang: Circumventing Partisan Arguments To Reduce Recidivism Rates Through Prison Labor*, 50 U. TOL. L. REV. 395, 411 (2019) (same); Goodwin, *supra* note 4, at 961 (identifying Sheriff Prator's "voiced public opposition" to Louisiana incarceration reforms). In this Article, I use these examples to demonstrate a systemic risk that governments will engage in the widespread practice of decarceral resistance to maintain control over the public profiteering of prison labor. I also contextualize these examples within a broader critique of the judicial justification of the public profiteering of prison labor. In other words, these are not isolated examples—they are illustrative demonstrations.

274. Sabastian Murdock & Hayley Miller, *Louisiana Sheriff Wants 'Good' Prisoners To Stay Jailed for Their Free Labor*, HUFFINGTON POST (Oct. 12, 2017, 1:58 PM), https://www.huffpost.com/entry/louisiana-sheriff-steve-prator-prisoners_n_59dfa0bee4b0fdad73b2ced [https://perma.cc/5HXD-BMXK].

275. *Id.*

money. Well, they're going to let them out—the ones that we use in work release programs."[276]

The state ultimately passed the Justice Reinvestment Package. But Sheriff Prator's dehumanizing words are reflective of the types of resistance that can generate when governments are empowered to benefit from prison labor. Arizona, too, has opposed decarceral efforts to continue leveraging minimum-security incarcerated workers for the state's benefit. During a Joint Legislative Budget Committee hearing in July 2022, Arizona Department of Corrections Director David Shinn defended the continued operation of the Florence West prison, a formerly-private prison that would be fully state-owned by October 2022.[277] The majority of people confined to Florence West are convicted of driving under the influence and are considered "low-level worker inmates."[278] To justify the prison's existence, Shinn argued that the Department of Corrections "does more than just incarcerate folks."[279] According to Shinn, forced prison labor provides "services . . . to city, county, [and] local jurisdictions[] that simply can't be quantified at a rate that most jurisdictions could ever afford," and if low-level incarcerated populations (like the people confined to Florence West) are "remove[d] . . . from that equation, things would collapse" in many jurisdictions.[280] He noted that in the 2021–2022 fiscal year, incarcerated firefighters provided more than 250,000 hours of service—and that "public work crews" separately provided more than 650,000 hours of prison labor statewide.[281] Even when confronted by legislative desire to close the prison due to the diminishing incarcerated population in the Arizona prison system, Shinn suggested that keeping prisons like Florence West open was a necessary act "to support Arizona."[282]

276. *Id.*

277. Jimmy Jenkins, *Arizona Communities Would 'Collapse' Without Cheap Prison Labor, Corrections Director Says*, AZCENTRAL (July 14, 2022, 2:28 PM), https://www.azcentral.com/story/news/local/arizona/2022/07/14/arizona-cities-would-collapse-without-prison-labor/10062910002/ [https://perma.cc/Z2CZ-6299]. The agenda issue concerned a request for proposal to solicit bids for private prison industries to operate and manage the state-owned prison. *See id.* I include this example because Arizona Department of Corrections Director Shinn's remarks speak to the state's desire to continue a publicly owned prison's operations primarily to leverage the carceral public works derived from its minimum-security state prisoners.

278. *Id.* (quoting state senator David Gowan).

279. *Id.*

280. *Id.*

281. *See* ARIZ. DEP'T OF CORR., REHABILITATION & REENTRY, CORRECTIONS AT A GLANCE: JUNE 2022, at 1 (2022), https://corrections.az.gov/reports-documents/reports/corrections-glance [https://perma.cc/LB26-K5PW]; *see also 07/14/2022 Joint Legislative Budget Committee*, ARIZ. STATE LEGIS., at 26:10 (July 14, 2022, 9:30 AM), https://www.azleg.gov/videoplayer/?clientID=6361162879&eventID=2022071005 [https://perma.cc/W6EY-4CKU (video on file with the North Carolina Law Review)].

282. Jenkins, *supra* note 277.

These forms of state resistance are particularly concerning because initial reforms to reduce a prison population often begin with those incarcerated in the lowest security settings—the very labor pools that are easiest for a government to send beyond the prison's walls to fulfill needed public works. These are incarcerated people who are trusted to reenter communities or interact with the public, and whose labor provides a valuable (though un(der)compensated) service. Their labor demonstrates an *absence* of public safety concerns that would have justified their continued incarceration. And yet, these are the very people that state actors hope to continue to confine so they can "save money" from the fruits of exploited labor.[283]

This incentive is all the more nefarious when we consider that state actors have advertised carceral public works to grow the prison system in their state. In California, for example, the California Department of Corrections and Rehabilitation ("CDCR") advertised this exploitation as an asset to the towns where it hoped to construct new prisons. The CDCR included in its marketing materials the benefit of what it called "[d]onated labor": the labor of unpaid or undercompensated prisoners.[284] For those "towns and counties allied with prisons," the CDCR offered to "donate[]" the labor of its "lowest security" prisoners to perform public works such as "cleaning parks and other public spaces, sprucing up school buildings, and repairing public property."[285] These materials were intended to entice the town's residents to accept the state's plan to construct a prison within or near their town limits. When a prison ultimately opened, the CDCR's community resources manager would negotiate the use of these "lowest security" prisoners—what the CDCR referred to as "worker bees"—on these "city beautification projects."[286] By asserting that states receive no windfalls from prison labor and by absolving states of benefitting from prison labor, courts fail to account for the realities of public profiteering—and they ignore the incentives that will then motivate resistance to decarceral reform.

Such incentives may even grow more powerful over time. The COVID-19 pandemic has impacted us all, but its influence on state budgets has sounded alarms throughout the course of the pandemic. Scholars and practitioners have traced the "large shortfalls" in state budgets due to COVID-19's effects.[287] Simultaneously, we are seeing sustained levels of incarceration throughout our

283. *See id.*

284. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 149–51 (2007).

285. *Id.* at 151.

286. *Id.* at 168.

287. Elizabeth McNichol & Michael Leachman, *States Continue To Face Large Shortfalls Due to COVID-19 Effects*, CTR. ON BUDGET & POL'Y PRIORITIES (July 7, 2020), https://www.cbpp.org/research/state-budget-and-tax/states-continue-to-face-large-shortfalls-due-to-covid-19-effects [https://perma.cc/T8JL-F9RX].

nation's prisons.[288] Although the incarcerated population "dropped dramatically" in certain jurisdictions during the initial surge of the pandemic, even those populations have "already started rebounding toward pre-pandemic levels."[289] As states confront leaner revenue streams while attempting to maintain (or even increase) their prison populations, all while employees throughout government agencies require medical leave or resign, it may be that states become unprecedentedly reliant on carceral public works to maintain their government operations. As this reliance grows, so may the state's resistance to further reform.

This consequence of government profiteering exposes the deception of the "public good" justification that is often used to legitimize the public profiteering of prison labor. It is not just state governments that attempt to reframe the exploitation of prison labor as a vital cost-saving to the taxpayer.[290] Scholars have described the offset of incarceration costs as an "obvious benefit"[291] and have advocated for the expansion of prison labor systems to further benefit the state.[292] Courts have even described the "governmental advantage from the use of prisoner labor" as understandable, even necessary, because it "pa[ys] for the costs of public goods—including the costs of incarceration."[293]

Such defenses point to the "mounting costs" of incarceration as a reason to protect the abuses of prison labor.[294] And it is true that the price of incarceration today is "staggering"—incarceration comprises a large, growing portion of state budgets that often surpasses other public needs, like the costs

288. *See* Wendy Sawyer, *New Data: The Changes in Prisons, Jails, Probation, and Parole in the First Year of the Pandemic*, PRISON POL'Y INITIATIVE (Jan. 11, 2022), https://www.prisonpolicy.org/blog/2022/01/11/bjs_update/ [https://perma.cc/2ZAR-LRYS].

289. *Id.*

290. *Our Story*, IDAHO CORR. INDUS., http://ci.idaho.gov/ [https://perma.cc/EA7P-WUAK] (advertising prison labor as a desirable way to "reduce the tax burden of the correctional system"). And it is not only states that make such advertisements—the federal government, when advocating for the creation of its Federal Prison Industries in 1934, emphasized both a rehabilitative and pecuniary benefit of prison labor to overcome staunch resistance from the American Federation of Labor. Cao, *supra* note 13, at 14. That such labor would purportedly "lessen the burden on taxpayers" helped to justify Federal Prison Industries' creation. *Id.*

291. Brian Hauck, *Prison Labor*, 37 HARV. J. ON LEGIS. 279, 279 (2000).

292. *See, e.g.*, Garvey, *supra* note 141, at 393–94 (recommending a tax on prison labor to further reduce the costs of incarceration).

293. Vanskike v. Peters, 974 F.2d 806, 811–12 (7th Cir. 1992); *see also* Danneskjold v. Hausrath, 82 F.3d 37, 42–43 (2d Cir. 1996) (justifying the decision to not expand the FLSA to incarcerated workers in part because the labor program "is a method of seeing that prisoners bear a cost of their incarceration"); Harker v. State Use Indus., 990 F.2d 131, 134 (4th Cir. 1993) (recognizing that "governments have other uses for the fruits of prison labor besides the unfair maximization of profits in the marketplace . . . [such as] using the savings accrued from prison labor to offset some of the costs of incarceration").

294. *See* Gambetta v. Prison Rehab. Indus. & Diversified Enters., Inc., 112 F.3d 1119, 1124 (11th Cir. 1997).

of education.[295] In 1996, prisons in the United States cost roughly $27.6 billion to operate.[296] In 2015, the cost to operate prisons in forty-five states alone was just under forty-three billion dollars.[297]

But this reasoning is premised on an unspoken but dangerous assumption: that the high cost of incarceration is itself defensible. Incarceration costs are steep because the prison industrial complex has swollen to monstrous proportions. This reasoning accepts, without inquiry or support, that the size and scope of the modern carceral system should persist—dismissing out of hand a growing chorus of voices demanding reforms to reduce the systems of criminalization, policing, and incarceration that have disproportionately targeted communities of color.[298] Following the abolition of slavery, white residents urged the use of prison labor to offset the "expense" of the state's policing, judicial, and incarceration systems[299] without considering that the state had created those very systems to subjugate these laborers. Here, too, this reasoning takes for granted that the incarceration system *should* exist in its current form.

Notably, if the central reason for prison labor profiteering is the collectively high cost of incarceration, there is a different solution to the budget concerns: to reduce the size of the carceral system. At least one study has shown that "the surest—and safest—way to attain savings" is to close prisons, to reduce the size of the prison population while also downsizing the number of prison staff.[300] States that successfully implemented prison closures were successful in lessening the correctional burden on the taxpayer, and such efforts were even accompanied by a corresponding decrease in crime rates.[301] If a commitment to public safety is measured by reintegrating members of society while decreasing rates of crime, then such a commitment counsels in favor of prison closures, not prison conservation.

But instead, governments use the costs of incarceration to justify the continued exploitation of prison labor—and to protect their captive labor pools, they resist decarceral reforms that would safely and sustainably decrease their incarceration costs. This circular reasoning illustrates the superficial limits of the "public good" defense. Indeed, in no other context would the coerced nature

295. *See* Garvey, *supra* note 141, at 393 n.370.

296. *Id.* at 393.

297. MAI & SUBRAMANIAN, *supra* note 252, at 8. The Vera Institute conducted a study to measure the cost of prison operations nationwide, and forty-five states responded. *Id.* at 6. These forty-five states represented 1.29 million of the 1.33 million total people incarcerated in all fifty state prison systems. *Id.* at 4, 8. The total annual cost to incarcerate a person averaged $33,274, ranging from a low of $14,780 (in Alabama) to a high of $69,355 (in New York). *Id.* at 8.

298. *See supra* Part III.

299. BLACKMON, *supra* note 113, at 53.

300. MAI & SUBRAMANIAN, *supra* note 252, at 21.

301. *Id.* at 21.

of someone's labor justify the stripping of workplace rights—if anything, the absence of a "bargained-for exchange"[302] should emphasize the need for *more* labor protections. But by transforming people into "criminals," the state has constructed a captive labor pool that it can control and exploit at will. And by claiming that even the forced labor of a captive person "belongs to the state,"[303] governments have been empowered to rename labor exploitation as a public good worthy of judicial protection. The history of prison labor underlines why this would be a mistake.

Finally, it is important to clarify another critical flaw of the "public good" defense: it ignores the reality that incarcerated people and their loved ones are *already* shouldering much of the costs of their own incarceration. Nearly every state charges an incarcerated person for their confinement (what some advocates and scholars call "room and board" costs) or for the medical and dental costs they accrue while imprisoned.[304] And incarcerated individuals are also expected to pay exorbitant prices for their basic needs in prison, including food, personal care products, and communications to their communities on the outside.[305] This is not to mention all the additional fees accrued throughout the criminal punishment process, from arrest to court costs to post-release supervision.[306]

The expectation that incarcerated people, eighty to ninety percent of whom are indigent,[307] should be sanctioned with these financial penalties is a relatively recent phenomenon. In 1991, just twenty-five percent of prisoners reported being subject to court-ordered fines and sanctions; this grew to sixty-six percent by 2004.[308] The amount of the assigned fee has also risen over time.[309] Today, the fine for a felony conviction (not including any of the other possible fees outlined above) can be as high as $500,000.[310] And states have also

302. *See supra* Part I.

303. *See supra* Part I.

304. *See Is Charging Inmates To Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy [https://perma.cc/Y2F4-MPSH] (providing a map of states that permit charges for "room and board" or "medical fees").

305. *See* Thommaso Bardelli, Zach Gillespie & Thuy Linh Tu, *Blood from a Stone: How New York Prisons Force People To Pay for Their Own Incarceration*, PRISON POL'Y INITIATIVE (Oct. 27, 2021), https://www.prisonpolicy.org/blog/2021/10/27/ny_costs/ [https://perma.cc/N5WV-8ULD].

306. *See generally* Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, ATL. (July 5, 2016), https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/ [https://perma.cc/V6UT-CF7Y]; ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010).

307. Alec Karakatsanis, *The Punishment Bureaucracy: How To Think About "Criminal Justice Reform*," YALE L.J. F. 848, 850 (2019).

308. Semuels, *supra* note 306.

309. *See id.* (considering the "victim penalty assessment" in Washington state, which grew 1,900 percent between 1977 and 1996).

310. *Id.*

fabricated additional expenses to recoup costs—in Arizona, for example, there is now a "felony surcharge" that adds an additional eighty-three percent of the initial fine or fee to the total amount owed.[311]

Once incarcerated people are released from prison, many remain steeped in carceral debt. Just three years in a Florida prison can result in a "cost-of-incarceration" lien that totals $54,750.[312] When considering the universe of such debt, the Brennan Center estimates that ten million people owe more than fifty billion dollars as a result of these charges.[313] These insurmountable burdens "maintain an economic caste system" that "has the same societal impact as post-Civil War peonage."[314] And from all the wages withheld or taken from their forced labor while in prison, incarcerated people are provided no financial foundation to remedy their debt before they are released. Instead, the state will profiteer off the fruits of their labor—and it will use the profits and services realized from their labor to resist decarceral reforms. Assessed through this lens, such profiteering can be reasonably seen as an "unfair windfall."[315]

CONCLUSION

In any conversation surrounding prison labor, it is critical to center the voices and demands of those directly impacted. Incarcerated populations are not a monolith. Many define prison labor as "slave labor"[316] and have organized to end its coercion, or to fight for just compensation.[317] Others explain that volunteering for the most hazardous prison jobs, though it "risk[s] life and limb for a state that is caging them," nonetheless is "a rational" and "safe[] choice" given the violence, danger, and more severe restrictions of physically remaining in prison.[318] Others believe that calling prison labor a "form of slavery" is "unfair[] and even counterproductive" to needed reform.[319] They note that "[t]he risk of the slavery conversation" is an end to all labor programs, particularly those (like fire camps) that allow people to leave the physical

311. *Id.*

312. Tanzina Vega, *Costly Prison Fees Are Putting Inmates Deep in Debt*, CNN (Sept. 18, 2015, 2:51 PM), https://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/index.html [https://perma.cc/9AM3-786Y].

313. *Id.*

314. Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1607–08 (2015).

315. Vanskike v. Peters, 974 F.2d 806, 811–12 (7th Cir. 1992).

316. Johnson, *supra* note 15.

317. *See supra* Introduction.

318. Matthew Hahn, *Sending Us To Fight Fires Was Abusive. We Preferred it to Staying in Prison*, WASH. POST (Oct. 15, 2021, 6:55 AM), https://www.washingtonpost.com/outlook/prison-firefighter-california-exploit/2021/10/15/3310eccc-2c61-11ec-8ef6-3ca8fe943a92_story.html [https://perma.cc/E2PF-TX87 (dark archive)].

319. Chandra Bozelko, *Think Prison Labor Is a Form of Slavery? Think Again*, L.A. TIMES (Oct. 20, 2017, 4:00 A.M.), https://www.latimes.com/opinion/op-ed/la-oe-bozelko-prison-labor-20171020-story.html [https://perma.cc/Q7DV-PXBS].

confines of the prison, which they find offer "the most humane places to do time in the . . . prison system."[320]

But regardless of the epithet applied to prison labor, it is undeniable that it is "about as uneven an exchange as one could imagine."[321] It is for this reason that incarcerated people have organized demonstrations, hunger strikes, and work stoppages—why they have penned op-eds and spoken with national media despite great risk of retaliation. Their lived experiences reflect the true realities of their incarceration. And it is up to us to listen.

320. Hahn, *supra* note 318.

321. Chandra Bozelko & Ryan Lo, *As Prison Strikes Heat Up, Former Inmates Talk About Horrible State of Labor and Incarceration*, USA TODAY (Aug. 25, 2018, 1:27 AM), https://www.usatoday.com/story/opinion/policing/spotlight/2018/08/25/nationwide-prison-strikes-labor-inmates-policing-usa/1085896002/ [https://perma.cc/RMM3-98NT].