



April 11, 2024

Prof. Tomoya Okobata

Special Rapporteur on Contemporary Forms of Slavery

**Re: Request for input on contemporary forms of slavery as affecting currently and formerly incarcerated people**

Dear Special Rapporteur Tomoya Obokata,

The American Civil Liberties Union (ACLU) writes to provide input for the Special Rapporteur's thematic report to be submitted to the 57<sup>th</sup> Session of the Human Rights Council on current and formerly incarcerated people and contemporary forms of slavery. Drawing from primary research conducted by the ACLU and the University of Chicago Law School's Global Human Rights Clinic and detailed in greater length in our 2022 report, *Captive Labor: Exploitation of Incarcerated Workers*,<sup>1</sup> this submission provides information concerning the use of coerced prison labor in the United States, the exploitation and abuse of incarcerated workers, and offers recommendations to address these serious human rights violations.

Almost one million people are currently working while confined in U.S. prisons.<sup>2</sup> They often work in grueling, dangerous, and degrading conditions for little to no pay—often pennies per hour—and under threat of punishment, including solitary confinement, for refusing to work. U.S. law explicitly excludes incarcerated workers from the most universally recognized workplace protections, including minimum wage laws, workplace safety guarantees, and the constitutional prohibition against involuntary servitude. The U.S. prison labor system involves present-day involuntary servitude and results in systemic exploitation and abuse. Prison labor is also a legacy of chattel slavery, and racial inequities persist today.

## **I. Incarcerated People are Forced to Work in U.S. Prisons**

While some incarcerated people seek employment while incarcerated, the labor performed by many incarcerated workers in the U.S. is not truly voluntary. Voluntariness implies the right to have a say in what type of work one does and the right to refuse to work at all. Yet 76.7 percent of incarcerated workers surveyed by the Bureau of Justice Statistics reported that they are required to work.<sup>3</sup> Threats of punishment through solitary confinement, loss of family privileges or good time, or deprivation of access to basic necessities coerce underpaid or free labor from persons incarcerated in the U.S.<sup>4</sup> State and federal courts have upheld the practice of using prison-specific sanctions for refusing to work or instigating others to refuse work, thus

incarcerated workers often have no recourse to challenge their forced labor.<sup>5</sup> Prison systems across the United States have developed forms of coercion that strip away most or all choices, forcing incarcerated people to work exploitative jobs that they would rarely choose for themselves. Additionally, incarcerated workers are excluded from workplace health, safety, and wage protections that free workers are guaranteed in the U.S., in violation of international standards regarding the use of prison labor.<sup>6</sup>

Mandatory work requirements for incarcerated people are common in most U.S. prisons. In the federal prison system, all “sentenced inmates who are physically and mentally able to work are required to participate in the work program.”<sup>7</sup> The 13th Amendment to the U.S. Constitution, which generally protects against slavery and involuntary servitude, explicitly excludes from its reach those held in confinement due to a criminal conviction.<sup>8</sup> U.S. courts have construed this exception broadly, granting prison administrations unfettered discretion to set prison labor conditions and requirements.<sup>9</sup> People incarcerated in federal prisons can be disciplined for “refusal to work or accept program assignment,” “unexcused absence from work or a program,” and “failure to perform work as directed.”<sup>10</sup>

Compulsory prison labor systems are likewise present in many state prison systems.<sup>11</sup> States such as Alabama, Colorado, Nebraska, Oregon, Tennessee, Utah, and Vermont have recently amended their state constitutions to abolish slavery without exception, but 16 state constitutions still contain language mirroring the 13th Amendment carve-out for incarcerated labor.<sup>12</sup> The constitution of Georgia, for example, states: “[t]here shall be no involuntary servitude within the State of Georgia *except as a punishment for crime after legal conviction thereof*.”<sup>13</sup> California’s constitution contains almost identical language.<sup>14</sup>

Incarcerated people who refuse to work or are unable to work are threatened with punishment. In state and federal prisons, refusal to work can result in disciplinary or administrative segregation—which often is a form of solitary confinement.<sup>15</sup> During this time, incarcerated persons may have most or all of their personal property taken away and are allowed out of their cells only for brief periods to shower and exercise, often at most only an hour a day or every other day, and the “exercise” is usually alone in a small, dog kennel-like enclosure. People incarcerated in federal prisons can be placed in solitary confinement for up to three months as punishment for work-related violations, and up to six months for “encouraging others to refuse to work, or [for] participat[ing] in a work stoppage.”<sup>16</sup>

There are numerous examples of incarcerated persons experiencing severe punishment for refusing to work. Missouri requires incarcerated people to work unless they present proof of inability.<sup>17</sup> In Florida, the Inmate Orientation Handbook explicitly informs incarcerated individuals that “[they] do not have the option to refuse work assignments.”<sup>18</sup> If they try to, they are severely punished: 60 days of disciplinary confinement and the reduction of 90 days of good time toward their sentence.<sup>19</sup> In Oregon, because of a ballot measure passed in 1994, the state constitution mandates that all incarcerated people are required to work a minimum of 40 hours per week.<sup>20</sup> Those who refuse to comply with Oregon’s work requirement may be punished; for instance, workers incarcerated in Oregon state prisons who refused to work shifts at the height of

the COVID-19 pandemic reported they were threatened with transfer to more crowded, higher-security units and loss of honor housing, benefits, and privileges.<sup>21</sup>

In Texas, all incarcerated people who are able to work are required to do so, and those who refuse to work can be confined to their cell; stripped of their personal property; lose good time credits; and lose access to commissary, recreation, visitation, and personal telephone calls.<sup>22</sup> A refusal to work while incarcerated in Tennessee can lead to solitary confinement.<sup>23</sup> Workers incarcerated in Illinois report that refusing to work means the loss of recreation time, phone privileges, and warm food.<sup>24</sup> An incarcerated person asserting their right to refuse work in Connecticut could lose their place in a community release program.<sup>25</sup>

In California, when incarcerated people refuse to accept or perform a work assignment, they lose all access to family visits, phone calls (except during emergencies), recreational or entertainment activities, and all personal packages.<sup>26</sup> They may face “disciplinary detention or confinement” (solitary confinement) for a period of 10 days. During this time, they have their personal property taken away, are allowed out of their cells for exercise for only one hour per day, five days a week, and lose all privileges, including access to personal nonemergency telephone calls.<sup>27</sup> In more serious cases, confinement and loss of privileges may become prolonged or permanent.<sup>28</sup> Refusing to work in California can also lead to a “115” write-up,<sup>29</sup> a serious rule violation that then can keep an individual from attaining parole.<sup>30</sup>

In Louisiana, if an incarcerated person refuses to work, fails to perform their assigned jobs with “reasonable speed and efficiency,” or does not answer during work roll calls, they can be placed in solitary confinement for up to 30 days for first offense and up to 180 days for a third offense, although in practice people are placed in confinement for indefinite periods of time for these work offenses.<sup>31</sup>

Those who refuse to work also typically lose all privileges, including access to personal telephone calls, family visitation, and access to the commissary to buy food and other basic necessities. If they refuse a work assignment, incarcerated people in federal and most state prisons additionally risk losing the opportunity to shorten their sentence through earned “good time,” effectively extending their incarceration.<sup>32</sup> In fact, a single instance of refusal can add a month back to a sentence in federal prisons.<sup>33</sup>

Not only is work compulsory in many state prisons, workers report that illness, injury, disability, or a physical inability to work often does not relieve them of work duties.

Incarcerated people, recognized as one of the populations most vulnerable to the COVID-19 virus, were on the front line of the pandemic response. Incarcerated workforces were widely used to meet the demands of protective equipment production early in the pandemic.<sup>34</sup> Incarcerated workers were tasked with manufacturing hand sanitizer, masks, medical gowns, face shields, and other personal protective equipment that they were then prohibited from using to protect themselves.<sup>35</sup> In at least five states (Michigan, Missouri, New York, Oregon, and Texas), incarcerated workers participated in frontline health roles that put them at high risk of contracting COVID-19.<sup>36</sup> Incarcerated people working in prison laundries in Oregon and Missouri were tasked with cleaning bedsheets, towels, and gowns from hospitals treating

COVID-19 patients.<sup>37</sup> In Texas, previously unpaid incarcerated workers were paid \$2 an hour to work in mobile morgues and transport bodies from the Medical Examiner’s Office in El Paso.<sup>38</sup> In New York, workers who were tasked with digging mass graves were transitioned from an hourly wage of \$0.65 to \$6. The Rikers Island jail offered personal protective equipment as a “privilege” to any incarcerated worker tasked with digging mass graves.<sup>39</sup>

The prison system does not just coerce and exploit labor through overt punishment, but also through deprivation. While state taxes are used to fund some aspects of prisons, prisons increasingly contract with private companies for the provision of basic services. These private companies, in turn, charge incarcerated people for their services directly at grossly inflated rates. Some of these services are fundamental to normal human life: phone calls to family, medication, medical care, food, warm clothing, and basic hygiene products.<sup>40</sup> One study of three states found that the average person spent almost \$1,000 per year on basic necessities at the prison commissary.<sup>41</sup> The cost to an incarcerated person of their own incarceration can run over \$10,000 a year.<sup>42</sup>

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

Prison labor in the U.S. is designed to benefit primarily public entities that capitalize on a vulnerable population that is, at once, a captive labor force<sup>43</sup> and a captive consumer base.<sup>44</sup> State, local, and federal governments rely on incarcerated workers to maintain the prisons that confine them, bolster the economy, offset budget shortfalls, and produce goods and services.<sup>45</sup>

Incarcerated workers in U.S. prisons are often working for paltry wages or no wages at all and prisons deduct significant percentages of incarcerated workers’ paychecks. In the U.S., the average hourly pay for incarcerated workers is \$0.13-\$0.52 for non-industry jobs, and \$0.30-\$1.30 for jobs in state-owned correctional industries.<sup>46</sup> Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina, and Texas pay zero compensation to incarcerated people for the vast majority of work assignments. Across the U.S., as much as 80 percent is deducted from an incarcerated person’s paycheck for court-imposed fines, taxes, family support, restitution, and room and board, among other fees. West Virginia deducts 40 percent from incarcerated workers’ earnings to cover financial obligations such as restitution.<sup>47</sup> In Nevada, 80 percent of incarcerated workers’ wages were deducted until the state legislature passed a law that went into effect in July 2021, capping wage deductions at 50 percent.<sup>48</sup> In many states the majority of these deductions are to pay down the costs of incarceration. In Minnesota, 77 percent (\$3.48 million) of wages earned by incarcerated workers were deducted in fiscal year 2021, about two-thirds of which went to “cost of confinement.”<sup>49</sup> More than 60 percent of the deducted wages earned by incarcerated workers in the PIECP program from July 2020 to June 2021 went to room and board.<sup>50</sup>

### *i. Maintenance Work*

Federal and state governments offset budget shortfalls by forcing incarcerated laborers to work to maintain the very prisons that confine them.<sup>51</sup> Of the nation’s roughly 800,000 incarcerated laborers, more than 80 percent perform low-skilled maintenance labor for the

facilities in which they are held.<sup>52</sup> This maintenance labor allows prisons to significantly offset their operating costs. When incarcerated people serve as janitors, plumbers, electricians, and food servers—often involuntarily and typically for little or no pay—facilities are spared hiring outside market-rate laborers.<sup>53</sup> According to the Bureau of Justice Statistics, state governments spend nearly \$50 billion a year to keep over 1 million people in prisons (the U.S. spends over \$81 billion to run its corrections system—including prisons, jails, parole, and probation—that keeps nearly 2 million people behind bars).<sup>54</sup> More than two-thirds (68 percent) of state prison expenditures is spent on wages and benefits for the public sector staff who operate prisons and jails.<sup>55</sup> Payroll for state correctional staff alone totals over \$2 billion each month.<sup>56</sup>

Due to the explosive growth of the prison population since 1970, and despite a recent slight decline in incarceration rates in some states, U.S. prisons house more incarcerated people than they are designed to hold.<sup>57</sup> Thus, prisons struggling to operate on their state-provided budgets rely on incarcerated laborers to perform essential maintenance tasks, like cleaning prison yards and servicing police cars, to offset budget shortfalls.<sup>58</sup> This saves state governments billions of dollars a year in prison upkeep. One conservative 2004 estimate placed the nationwide value of these cost-saving services at about \$9 billion.<sup>59</sup> The use of prison labor not only saves correctional systems money but is what allows prisons to perpetuate themselves.<sup>60</sup> The more prisons use incarcerated labor, the more the prison system can expand without having to increase budgetary allocations from state and local governments.

## *ii. State Correctional Industries*

Prison labor not only saves federal and state governments money by funding their bloated prison systems, it also provides a cheap and compliant labor force in correctional industries, the state-owned businesses that produce goods sold to other state entities. State prison industries, or “correctional industries,” are state-owned corporations that produce goods, services, and commodities sold to other government agencies. The federal government and all states except Alaska operate their own correctional industries.<sup>61</sup> These industries are involved in a variety of production and services, such as sign and license plate manufacturing, meat and milk processing, optical and dental laboratories, and recycling and metal shops.<sup>62</sup> The federal industry program, known as UNICOR, likewise advertises an extensive product list.<sup>63</sup> A state agency that needs office chairs can contract with a prison to produce them. An office park with an asbestos problem can contract with a prison to remove it. A new governor can contract with a prison to print thousands of new letterheads.<sup>64</sup>

Many states require all state agencies, political units, and public institutions to purchase manufactured goods, including furniture, cleaning supplies, printed materials, and uniforms, from their state correctional industries.<sup>65</sup> Correctional industries programs are not limited to manufacturing, as states rely on incarcerated workers to provide a variety of services, such as data entry, repairing state-owned vehicles, and washing laundry for public hospitals and universities. For example, people incarcerated in New York and Oregon help staff the states’ Department of Motor Vehicles (DMV) call centers, fielding questions directed towards the department.<sup>66</sup>

The labor of incarcerated persons working in state prison industries generates significant wealth in the U.S. economy. In 2021 alone, incarcerated workers in state prison industries programs were estimated to produce more than \$2 billion in goods and commodities nationally.<sup>67</sup> The federal government’s UNICOR prison industries program reported \$404 million in net sales of goods and services produced by the 16,315 federally incarcerated workers employed in the program in 2021.<sup>68</sup>

### *iii. Public Work Assignments*

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

At least 41 state departments of correction have public works programs that employ incarcerated workers.<sup>69</sup> About 44 percent of public prisons nationwide assign incarcerated workers to work on public works assignments outside the prison.<sup>70</sup> In Florida, for instance, about 3,500 unpaid incarcerated workers work on state road crews and “community work squads,” required to provide labor for hundreds of state and municipal agencies and dozens of state colleges and nonprofits.<sup>71</sup> In North Carolina, nearly 1,000 incarcerated workers work on the state’s roads for the state Department of Transportation and on manual labor jobs for other state and local government agencies.<sup>72</sup> In Arizona, 1,083 incarcerated people work on public works crews for the Department of Transportation and other state, local, and county entities through intergovernmental agreements with the corrections department.<sup>73</sup> These workers logged more than 1.8 million hours of work for the community during fiscal year 2020.<sup>74</sup> In Washington state, about 1,000 people work in similar community work programs through which incarcerated workers work on stream clean-ups, land clearance, farming, and development of parks and recreation areas.<sup>75</sup> In Mississippi, each state prison provides incarcerated workers’ labor for free to local towns and municipalities.<sup>76</sup> In Arkansas, incarcerated people on “inmate work crews” logged nearly half a million hours in regional maintenance alone in 2020.<sup>77</sup>

Through such programs, incarcerated workers also perform critical work preparing for and responding to natural disasters, including sandbagging, supporting evacuations, clearing debris, and assisting with recovery and reconstruction after hurricanes, tornadoes, mudslides, or floods.<sup>78</sup> For example, in Florida, hundreds of unpaid incarcerated workers were tasked with picking up fallen trees and other debris after Hurricane Irma, and in Texas hundreds of unpaid incarcerated workers filled sandbags in preparation for Hurricane Harvey, forced to work in the storm’s path while people outside prisons were evacuated.<sup>79</sup> Incarcerated firefighters also fight wildfires in Arizona, California, Colorado, Georgia, Idaho, Montana, Nevada, New Mexico, North Carolina, Oregon, South Dakota, Tennessee, Washington, and Wyoming. For instance, Georgia’s incarcerated firefighter unit responds to over 3,000 calls annually, assisting with wildfires, structural fires, and motor vehicle accidents—all for zero pay.<sup>80</sup>

The Florida Department of Corrections estimates the value of the labor of the 3,500 unpaid incarcerated workers working on state road crews and community work squads to be about \$147.5 million over a five-year period.<sup>81</sup> “There’s no way we can take care of our facilities, our roads, our ditches, if we didn’t have inmate labor,” Warren Yeager, a former Gulf County, Florida, commissioner told the *Florida Times-Union*.<sup>82</sup> State governments also rely on incarcerated workers as a low-wage labor force to respond to a variety of disasters and emergencies throughout the country.<sup>83</sup> At least 30 states explicitly include incarcerated workers as a labor resource in their state-level emergency operations plans.<sup>84</sup>

#### *iv. Labor for the Private Sector*

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

Private companies continue to employ incarcerated workers, benefitting from their labor without adequate compensation. For example, Arizona Correctional Industries has a private labor contract program that allows private companies headquartered in Arizona to directly employ incarcerated workers outside of the Prison Industry Enhancement Certification Program. As of February 2022, 974 incarcerated people employed by Arizona Correctional Industries work for outside employers through labor contracts.<sup>85</sup> The average wage in these non-PIECP positions is typically \$3 to \$4 per hour—far less than the prevailing wage legally required by the PIECP program.<sup>86</sup>

Arizona Correctional Industries’ best customer in fiscal year 2020 was Hickman’s Egg Ranch / Hickman’s Family Farms, which paid more than \$7 million to the state prison industries program that year for labor contracts to employ incarcerated workers, outside PIECP, who were paid \$4.25 to \$5.25 an hour to care for chickens, provide farm maintenance, and package eggs.<sup>87</sup> Taylor Farms, North America’s largest supplier of salads and fresh-cut vegetables, paid over \$2.2 million to Arizona’s prison industries program for labor contracts to employ incarcerated workers to cut and package fruit and vegetables for the company.<sup>88</sup>

Even when employed through PIECP, incarcerated workers experience exploitation. While PIECP is intended to offer job training at prevailing wages to incarcerated persons, private companies continually reap the benefits of cheap incarcerated labor while circumventing the requirements of PIECP without consequence. Through PIECP, private companies can contract with correctional institutions to employ prison workers to produce goods, either at production workshops within prisons or offsite. Today, 4,860 incarcerated workers nationwide are employed in PIECP to produce goods authorized for sale in interstate commerce on behalf of private corporations.<sup>89</sup> Although private corporations participating in this program are required to adhere to some minimal labor standards, which include paying incarcerated workers the “prevailing

wage,” they enjoy significant benefits and cost-savings from employing this captive labor force.<sup>90</sup>

The private sector’s involvement in prison labor extends beyond directly contracting incarcerated labor, but also through purchasing cheap goods and services from prison industries. The products, goods, and services, that incarcerated workers create are a significant part of the U.S. economy. Colorado Correctional Industries, for example, sold goods and services to around 100 private companies, which generated more than \$6.2 million in revenue for the state correctional industries program in 2020.<sup>91</sup> Utah Correctional Industries sold goods and services to almost a thousand private companies.<sup>92</sup> These products are then sold by private companies to consumers who may be unaware they originated with prison labor.

### **III. Incarcerated Workers Labor in Dangerous Work Conditions and Suffer Preventable Injuries**

Incarcerated people sometimes work in dangerous industrial settings or other hazardous conditions that would be closely regulated by federal workplace health and safety regulations if they were not incarcerated. Sixty-four percent of incarcerated workers surveyed by the ACLU said they felt concerned about their safety while working.<sup>93</sup> Our research found that incarcerated workers with minimal experience or training are assigned work in unsafe conditions and without protective gear that would be standard in workplaces outside prisons.

Unsurprisingly, this leads to injuries. Incarcerated workers have been burned with chemicals, maimed, or killed on the job. Although lack of data related to workplace conditions and injuries in prisons makes it difficult to know the full extent of injuries and deaths, injury logs generated by the California Prison Industry Authority show that incarcerated workers reported more than 600 injuries over a four-year period, including body parts strained, crushed, lacerated, or amputated.<sup>94</sup>

In numerous cases the ACLU documented nationwide, injuries could have been prevented with proper training, machine guarding mechanisms, or personal protective equipment. Incarcerated workers report receiving inadequate training on how to handle hazardous chemicals,<sup>95</sup> operate dangerous equipment with cutting blades, clean biohazardous materials like excrement and blood,<sup>96</sup> and use dangerous kitchen equipment.<sup>97</sup> In fact, almost 70 percent of currently incarcerated workers who participated in an ACLU survey indicated that they received *no* formal job training.<sup>98</sup> The systematic failure to adequately train incarcerated workers has resulted in serious injuries and deaths.

Workers report injuries that would have been prevented had they been provided standard protective equipment. An incarcerated worker tasked with repairing a damaged sewage line after thousands of pounds of sewage flooded a Michigan state prison said he had to wade through excrement without adequate protective gear such as a respirator or protective suit.<sup>99</sup> As he opened and cleaned backed up vents, sewage shot out, and he subsequently tested positive for hepatitis C.<sup>100</sup> An incarcerated worker tasked with removing asbestos from a hot steam pipe in a New York state prison sustained a first degree burn because he was not provided with a high temperature glove.<sup>101</sup> Repeated injuries caused by objects becoming lodged in incarcerated



workers' eyes while using industrial grinders in California could have been prevented if they had proper safety goggles or visors.<sup>102</sup>

The conditions of work can be inherently dangerous. Incarcerated workers are employed at dangerous meat, poultry, and egg processing plants, where lack of adequate training or safety procedures has led to dozens of documented injuries and at least one death of incarcerated workers.<sup>103</sup> Incarcerated workers have suffered injuries and amputations from sewing and cutting machinery while working in garment factories.<sup>104</sup> Incarcerated workers have been severely injured—even paralyzed and killed—by falling trees and tree limbs while cutting down trees on community work crews and in forestry and firefighting jobs.<sup>105</sup> In California, where research has shown that incarcerated workers were more likely to be injured than professional firefighters, at least four incarcerated firefighters have been killed while fighting wildfires, and more than 1,000 required hospital care during a five-year period.<sup>106</sup> Even work in industrial-scale prison kitchens and laundries can be dangerous because it involves huge industrial equipment that carries mechanical and electrical safety risks as well as risk of burns, lacerations, and exposure to hazardous chemicals.

Incarcerated workers endure brutal temperatures with inadequate water or breaks, while working outdoors and inside facilities without air conditioning. Incarcerated firefighters have been sickened and killed by heat exposure during routine training exercises in California.<sup>107</sup> Formerly incarcerated agricultural workers at Louisiana's Angola prison report witnessing other farm workers collapse from exhaustion or dehydration while working in the fields on hot days.<sup>108</sup> In Texas, an incarcerated man working as a dog trainer died of severe hyperthermia; he had been wearing a 75-pound fight suit on a hot day and collapsed while training attack dogs to catch escaped prisoners.<sup>109</sup>

Workers have also been exposed to dangerous toxins on the job. Incarcerated workers perform asbestos abatement in New York, Pennsylvania, Ohio, and Utah through each state's correctional industries program. An incarcerated man working at the electrical shop of a federal prison in Illinois filed suit after his supervisor ordered him to crush fluorescent bulbs containing mercury in an unventilated room. When he asked for a face mask, he was told that he was "shit out of luck."<sup>110</sup> Incarcerated workers employed at a battery manufacturing factory in Georgia were exposed to dangerous levels of lead,<sup>111</sup> and incarcerated workers employed in the federal prisons' UNICOR electronics-waste recycling program who disassembled and recycled computer parts were exposed to poisonous metals, causing serious health problems.<sup>112</sup>

When incarcerated workers are hurt on the job, they may be denied medical care or receive substandard care. In North Carolina, four incarcerated workers with severe chemical burns received nothing more than diaper rash ointment for their injuries.<sup>113</sup> In Georgia, a kitchen worker had his leg amputated due to improper medical care of a wound he sustained from slipping and falling while working in the prison kitchen.<sup>114</sup> In Colorado, an incarcerated worker assigned to a sawmill was told by a supervisor to reach into a conveyor belt area to dislodge a piece of wood. A blade sliced through her helmet and straight into her skull, nearly decapitating her.<sup>115</sup> Instead of being rushed to the emergency room, a shift commander ordered her back to

the prison infirmary with two feminine hygiene pads on her wound because the sawmill had no first aid kit. She later developed an antibiotic-resistant staph infection.<sup>116</sup>

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

Incarcerated labor has a long and problematic history in the U.S., inherently tied to racial oppression. The roots of modern-day labor programs can be traced to the end of the Civil War and the passage of the 13th Amendment to the Constitution in 1865. The 13th Amendment outlawed slavery and involuntary servitude, “except as a punishment for crime whereof the party shall have been duly convicted.”<sup>117</sup> Given this gaping loophole, states turned to incarcerated labor as a means of partially replacing chattel slavery and the free labor force slavery provided.

The U.S.’s legacy of slavery and racism is inseparable from our modern system of racial oppression—mass incarceration—where people of color, particularly Black people, are disproportionately incarcerated and subjected to forced prison labor. Some of the racism of prison labor is explicit, such as the use of modern-day penal plantations,<sup>118</sup> where predominantly Black incarcerated workers are forced to do agricultural work, sometimes on the sites of former slave plantations and producing the same crops grown by enslaved people. Other forms of racism are more covert, such as discriminatory prison work assignments, where incarcerated persons of color are assigned to lower wage work and work assignments that will not improve their job prospects outside of prison. In August 2022, the U.N. Committee on the Elimination of Racial Discrimination has expressed concerns “about reports indicating that the overrepresentation of racial and ethnic minorities in prison results in high proportions of convicted inmates from these minorities being subjected to prison labour without just and favourable remuneration or other basic labour protections.”

Incarcerated workers have extremely limited avenues for relief for the racial discrimination they experience behind bars. Title VII of the Civil Rights Acts, which protects employees from employment discrimination, does not indicate if its protections extend to incarcerated workers.<sup>119</sup> As such, certain federal Circuit courts exclude incarcerated workers from Title VII protection.<sup>120</sup>

#### **V. Incarcerated Workers are Excluded from Basic Workplace Protections and U.S. Courts Have Largely Failed to Provide Redress and Accountability for Forced Labor and Workplace Abuses**

Although the issue of forced prison labor has been examined by U.S. courts and legislatures, incarcerated people have largely been excluded from legislation intended to protect workers, and unable to find relief from the poor conditions that they are subjected to inside prisons. The main U.S. federal statute that sets minimum standards and safeguards for health and safety in the workplace, the Occupational Safety and Health Act (OSHA), excludes most incarcerated workers—namely, those who work in state correctional facilities—from its coverage.<sup>121</sup> Moreover, many health and safety workplace statutes at the state level do the same, resulting in gaps in protections for most incarcerated workers.<sup>122</sup> Other federal statutes, such as the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964, and the National Labor Relations Act (NLRA), contain standards that aim to protect the physical and mental

health of workers, albeit indirectly, by providing for minimum wage, overtime pay, protection from discrimination, and the right to collectively bargain for improved work conditions—but the vast majority of incarcerated workers are excluded from these too.<sup>123</sup> Such exclusion perpetuates exploitative and discriminatory incarceration system with severe implications for the basic safety, bodily integrity, and mental health of workers in prison.

The U.S. Constitution provides little workplace protection for prison workers. Although the Supreme Court in *Farmer v. Brennan* explained that “prison officials must...take reasonable measures to guarantee the safety of the inmates,”<sup>124</sup> the court’s “deliberate indifference” test makes incarcerated workers’ access to remedies based on an Eighth Amendment cruel and unusual punishment claim difficult. Under this standard, it is not enough for an incarcerated worker to establish the presence of unsafe working conditions by showing an absence of safety equipment, a lack of training in safety procedures, a pattern of similar injuries, or even the violation of state or federal safety regulations.<sup>125</sup> Instead, an incarcerated worker must meet the much higher burden of proving that the prison official “knew of a substantial risk of serious injury and did nothing to protect [the incarcerated person].”<sup>126</sup> This standard makes proving a constitutional violation related to the conditions of forced labor particularly difficult—if not impossible—for most incarcerated workers.

There are two formal channels through which an incarcerated person can nominally access redress and accountability for their forced labor and mistreatment in the workplace: internal prison grievance procedures and external lawsuits (through the judicial system). However, the two channels are inextricably linked in such a way that effective remedy and justice for incarcerated workers is often impossible to achieve. In many cases, incarcerated workers cannot even reach the courtroom to advocate for better treatment in violation of their basic human rights under ratified treaties including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The Prison Litigation Reform Act (PLRA) of 1996 erected nearly insurmountable barriers to accessing relief through federal courts, and many states have subsequently enacted laws that similarly restrict prisoners’ access to state courts.<sup>127</sup> One of the most devastating features of the PLRA is its requirement that incarcerated people exhaust administrative remedies within correctional facilities before they bring suit in court—a requirement that has been used to dismiss countless lawsuits filed by incarcerated people seeking the protection of the courts against dangerous or unhealthy conditions of confinement.<sup>128</sup>

Meanwhile, the few administrative remedies available inside prisons tend to be burdensome. Grievance procedures vary, but generally they require that incarcerated individuals submit written complaints to a correctional official, followed by appeals to higher authorities such as a warden.<sup>129</sup> Often these steps must be carried out within strict deadlines, which can be unreasonable for full-time incarcerated workers to meet. For example, in Georgia, the deadline for filing a grievance is 10 calendar days.<sup>130</sup> In California, a person in prison has 30 calendar days from the date of the incident to submit a 602-grievance form and 30 days to appeal any denial.<sup>131</sup> Although 30 days may sound like plenty of time, prison grievance procedures can be

so complicated and opaque that even a team of 10 qualified lawyers needed 18 months to decipher Illinois' procedures.<sup>132</sup>

Moreover, while incarcerated people must adhere to established timelines, prison authorities face little or no consequences if they simply neglect to address those grievances.<sup>133</sup> Beyond the sheer complexity and ineffectiveness of the grievance system, incarcerated people are further discouraged from pursuing complaints due to the threat of retaliation by correctional officers, who otherwise face little accountability for their actions.<sup>134</sup>

The U.S. judicial system has largely failed to offer relief to incarcerated workers. In 2010, a federal court ruled that “prisoners have no enforceable right to be paid for their work under the Constitution.”<sup>135</sup> Higher courts have held repeatedly that the Fair Labor Standards Act, which establishes basic worker protections such as minimum wage, overtime pay, and recordkeeping requirements, does not protect workers in prison.<sup>136</sup> Courts have reasoned that incarcerated people working full-time for the state are not employees but wards, and are thus not guaranteed any “standard of living” like free workers.<sup>137</sup> This leaves incarcerated people with the responsibilities, anxieties, and dangers of full-time employment without the basic labor protections or wages needed to sustain them.

## **VI. Recommendations**

Across the nation, incarcerated workers are coerced to work behind bars, receive little, if any compensation for their labor, are excluded from fundamental workplace protections, and have no meaningful avenues to challenge these conditions. The labor that incarcerated persons are subjected to is forced, coercive, and exploitative.

Prison labor needs to be voluntary, with adequate protections from exploitation and discrimination to ensure the human rights and dignity of incarcerated workers. The following recommendations, if enacted, would help ameliorate the exploitative conditions of workers in U.S. correctional institutions to ensure that these conditions are brought in step with international human rights law and the ILO's fundamental Conventions.

Four key recommendations would help bring the U.S. in line with international labor and human rights standards and protect incarcerated workers from forced labor:

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

health and safety administrations monitor conditions in all workplaces inside prisons, and provide adequate personal protective and safety equipment to incarcerated workers.

***Recommendations to eliminate forced prison labor:***

- Repeal the federal Thirteenth Amendment's exclusion clause and state constitutional clauses that allow forced labor as a punishment for a crime.
- Ensure that all work in prisons is fully voluntary by eliminating any laws and policies enabling forced labor and that punish incarcerated people who are unable or unwilling to work.
- Adopt legislation and regulations providing incarcerated workers in all prisons with the same labor protections afforded to other U.S. workers including minimum wage, overtime pay, health and safety standards, unionization and collective bargaining, and protection from discrimination and retaliation.
- Initiate oversight investigations into federal and state prisons to eliminate forced labor of incarcerated people, discriminatory pay and allocation of work assignments, unsafe and inhumane conditions, violations of federal disability rights laws, and related practices.

***Specific agency recommendations:***

*To the President and the Executive Office of the President:*

- Establish a Commission by executive order to (1) study the need to abolish the Thirteenth Amendment's exclusion allowing forced labor as punishment for a crime and to (2) bring federal and state prison labor programs in line with relevant international law to address the widespread problem of prison labor abuses in the US.
- Encourage Congress to pass the Combating Workplace Discrimination in Correctional Facilities Act, the Correctional Facilities Occupational Safety and Health Act, the Ensuring Work Opportunities in Correctional Facilities Act, and the Fair Wages for Incarcerated Workers Act, a package of bicameral bills to address unfair and abusive labor practices in US correctional facilities.
- Encourage Congress to pass the Abolition Amendment, pending bicameral legislation that would repeal the exception clause of the 13th Amendment to the U.S. Constitution allowing slavery and involuntary servitude to be used as punishment for a criminal conviction

*To the U.S. Bureau of Prisons:*

- Ensure that all work in prisons is fully voluntary by eliminating any rules, policies, and procedures enabling forced labor or imposing disciplinary measures for work-related infractions such as refusal to work or failure to complete work in a satisfactory manner.
- Ensure incarcerated workers who seek exemptions from work duties are granted such exemptions when they are unable to carry out their assigned jobs due to illness, injury, disability, or other physical or mental limitations.

- Adopt policies protecting against arbitrary decision-making in work assignments with a right to review; and guaranteeing all workers' rights, including fair wages (guaranteeing the higher of federal or state minimum wage), fair treatment (including non-discrimination), workplace safety and health, and fair conditions of work for people engaged in prison labor.

- Expand and invest in prison work programs that provide incarcerated workers with marketable skills and training that will help them to find employment after release. Programs should provide opportunities for advancement, certifications of completed training and work performance achievements, and employment-based recommendation letters from supervisors. Programs should provide vocational training in professions that are forecast for job growth.

*To the U.S. Department of Labor:*

- Issue a regulation granting the Occupational Safety and Health Administration ("OSHA") jurisdiction over the labor conditions of all workers incarcerated in federal, state, and local prisons.

- Initiate rulemaking or, at a minimum, issue guidance to establish authoritatively that the Fair Labor Standards Act (FLSA) applies to all incarcerated workers. As a part of this process, update the Field Operations Handbook to clarify that all incarcerated workers are employees for FLSA purposes.

- Investigate wage and hour violations related to incarcerated work and bring enforcement actions to ensure compliance with the FLSA.

*To the National Labor Relations Board:*

- Declare that incarcerated people are employees who are eligible to join a union.

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<sup>1</sup> American Civil Liberties Union and University of Chicago Global Human Rights Clinic, "Captive Labor: Exploitation of Incarcerated Workers," June, 2022, [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf).

<sup>2</sup> American Civil Liberties Union and University of Chicago Global Human Rights Clinic, "Captive Labor: Exploitation of Incarcerated Workers," June, 2022, [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf).

<sup>3</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, Survey of Prison Inmates, U.S., 2016. Inter-university Consortium for Political and Social Research [distributor], (Sept. 2021), <https://doi.org/10.3886/ICPSR37692.v4>. This figure is based on ACLU analysis of the published raw survey data.

<sup>4</sup> See, e.g., *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) ("Any unjustified refusal to follow the established work regime is an invitation to sanctions."). See also U.S. Dep't of Justice, Federal Bureau of Prisons, *Inmate Work and Performance Pay*, § 545.20 (Oct. 1, 2008), [https://www.onlabor.org/wp-content/uploads/2015/05/5251\\_006.pdf](https://www.onlabor.org/wp-content/uploads/2015/05/5251_006.pdf).

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

<sup>6</sup> See Special Action Programme to Combat Forced Labour, *Combatting Forced Labour: A Handbook for Employers & Business 2 Employers' Frequently Asked Questions*, International Labour Organization (2015).

<sup>7</sup> 28 C.F.R. § 545.20(a)(2) (2020).

<sup>8</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the U.S., or any place subject to their jurisdiction”).

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

<sup>10</sup> See U.S. Dep’t of Justice, Bureau of Justice Statistics, *Data Collected Under the First Step Act, 2019*, at 12 (Mar. 2020), <https://bjs.ojp.gov/content/pub/pdf/dcfssa19.pdf>.

<sup>11</sup> E.g., La. R.S. 15:832(A); Ca. Penal § 2700; Fla. Stat. § 946.002(1)(A) (2019); Mo. Ann. Stat. § 217.337 (West 2020); Ga. Comp. R. & Regs. 125-3-2.04(c) (2021); Wash. Admin. Code § 137-25-30 (2019); N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2(B)(5)(iii) (2020).

<sup>12</sup> These states are Arkansas, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Ohio, and Wisconsin.

<sup>13</sup> Ga. Const. art. 1, § XXII (emphasis added).

<sup>14</sup> Ca. Const. art. 1, § VI.

<sup>15</sup> *Fallis v. U.S.*, 263 F. Supp. 780 (M.D. Pa. 1967).

<sup>16</sup> 28 C.F.R. § 541.3 (2020).

<sup>17</sup> Mo. Ann. Stat. § 217.337 (West 2020).

<sup>18</sup> Florida Department of Corrections, *Inmate Orientation Guide Reception Center Processing* (2016) at 8, <http://www.dc.state.fl.us/pub/files/inmateorientationhandbook.pdf>.

<sup>19</sup> Fla. Admin. Code R33-601.314, <https://www.law.umich.edu/special/polycycleclearinghouse/documents/florida%20inmate%20code%20of%20conduct.pdf>.

<sup>20</sup> Oregon Constitution Art. 1 § 41; and Ballotpedia Oregon State Prison Inmates Required to Work Full Time, Measure 17 (1994), [https://ballotpedia.org/Oregon\\_State\\_Prison\\_Inmates\\_Required\\_to\\_Work\\_Full Time\\_Measure\\_17\\_\(1994\)](https://ballotpedia.org/Oregon_State_Prison_Inmates_Required_to_Work_Full_Time_Measure_17_(1994)).

<sup>21</sup> Jason Wilson, *Inmate Details Alarming Conditions at Oregon Prison Amid Coronavirus Pandemic*, THE GUARDIAN (April 12, 2020); Tess Riski, *Oregon Hospitals Rely on Prison Labor to Do Their Laundry During the Pandemic*, WILAMETTE WEEK (April 22, 2020).

<sup>22</sup> Tex. Pub. L. § 497.099(a); Texas Department of Criminal Justice, *Disciplinary Rules and Procedures for Offenders, Correctional Institutions Division* (Aug. 2019) at 23.

<sup>23</sup> Tenn. Admin. Code § 41-2-120(a)

<sup>24</sup> Written survey response by [Name withheld to preserve anonymity, at survey respondent’s request], incarcerated at Centralia Correctional Center, IL (on file with authors).

<sup>25</sup> *Administrative Directive 10.1: Inmate Assignment and Pay Plan*, ST. OF CONN. DEP’T OF CORR., 4(a) (2015), <https://portal.ct.gov/-/media/doc/pdf/ad/ad1001pdf.pdf?la=en>.

<sup>26</sup> Cal. Code Regs. tit. 15, § 3044(f) (2018).

<sup>27</sup> Cal. Code Regs. tit. 15, §§ 3315(f)(5)(d) (2020), 3331(b) (2017).

<sup>28</sup> Cal. Code Regs. tit. 15, §§ 3315(g) (2020), 3044(5)–(6) (2018).

<sup>29</sup> Interview with N’ashid Abdul Latif, former hospice worker in California Medical Facility prison (Dec. 16, 2020) (on file with authors).

<sup>30</sup> Cal. Code Regs. tit. 15, §§ 2281(c), 2402(c), 2422(c), 2432(c).

<sup>31</sup> Vera Institute of Justice, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Louisiana Department of Public Safety and Corrections, and Progress Toward Implementation* (May 2019), <https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative->



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<sup>32</sup> 28 C.F.R. § 541.3 (2020).

<sup>33</sup> See 28 C.F.R. § 541.3 (2020).

<sup>34</sup> Rachel Ellis, *Prison Labor in a Pandemic*, 19 CONTEXTS: SOC. FOR THE PUB. 66 (Dec. 14, 2020), <https://journals.sagepub.com/doi/full/10.1177/1536504220977950>.

<sup>35</sup> Rachel Ellis, *Prison Labor in a Pandemic*, 19 CONTEXTS: SOC. FOR THE PUB. 66 (Dec. 14, 2020), <https://journals.sagepub.com/doi/full/10.1177/1536504220977950>.

<sup>36</sup> Marjorie Segule, Katherine LeMasters, Meghan Peterson et al., *Incarcerated Workers: Overlooked as Essential Workers*, BMC PUBLIC HEALTH 22, 506 (Mar. 2022), <https://doi.org/10.1186/s12889-022-12886-7>.

<sup>36</sup> Tess Riski, *Oregon Hospitals Rely on Prison Labor to Do Their Laundry During the Pandemic*, WILLAMETTE WEEK (Apr. 22, 2020), <https://www.wweek.com/news/2020/04/22/oregon-hospitals-rely-on-prison-labor-to-do-their-laundry-during-the-pandemic/>; Marissane Lewis-Thompson, *Missouri Inmates Clean Hospital Laundry*, ST. LOUIS PUBLIC RADIO (Apr. 29, 2020), <https://news.stlpublicradio.org/health-science-environment/2020-04-29/missouri-inmates-clean-hospital-laundry>.

<sup>37</sup> Tess Riski, *Oregon Hospitals Rely on Prison Labor to Do Their Laundry During the Pandemic*, WILLAMETTE WEEK (Apr. 22, 2020), <https://www.wweek.com/news/2020/04/22/oregon-hospitals-rely-on-prison-labor-to-do-their-laundry-during-the-pandemic/>; Marissane Lewis-Thompson, *Missouri Inmates Clean Hospital Laundry*, ST. LOUIS PUBLIC RADIO (Apr. 29, 2020), <https://news.stlpublicradio.org/health-science-environment/2020-04-29/missouri-inmates-clean-hospital-laundry>.

<sup>38</sup> Alana Rocha, *Incarcerated Texans Enlisted to Work in County Morgue as COVID-19 Deaths Overwhelm El Paso*, TEXAS TRIBUNE (Nov. 15, 2020), <https://www.texastribune.org/2020/11/15/coronavirus-texas-el-paso-inmates-morgue-deaths/>.

<sup>39</sup> Ryan Grim, *Rikers Island Prisoners Are Being Offered PPE and \$6 an Hour to Dig Mass Graves*, THE INTERCEPT (Mar. 31, 2020), <https://theintercept.com/2020/03/31/rikers-island-coronavirus-mass-graves/>.

<sup>40</sup> See Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative, (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>; Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Center for Justice (2005), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration>.

<sup>41</sup> Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative, (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

<sup>42</sup> Ella Baker Center for Human Rights, *Who Pays: The True Costs of Incarceration on Families* (Sept. 2015), <http://whopaysreport.org/who-pays-full-report/>; FWD.us and Cornell University, *Every Second: The Impact of the Incarceration Crisis on America's Families* 10 (Dec. 2018), <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf>.

<sup>43</sup> 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>.

<sup>44</sup> Prison Policy Initiative, *The Company Store: A Deeper Look at Prison Commissaries*, by Stephen Raher (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>; Brennan Center For Justice, *Charging Inmates Perpetuates Mass Incarceration*, by Lauren-Brooke Eisen (2005), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration>.

<sup>45</sup> Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

<sup>46</sup> The American Civil Liberties Union and the Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor: Exploitation of Incarcerated Workers*, (June 2022).

<sup>47</sup> West Virginia Division of Corrections, Policy Directive 111.06, *Financial Responsibility Program for Inmates* (Nov. 1, 2014), FOIA response document (on file with authors).

<sup>48</sup> Nevada Senate Bill 22, <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7197/Overview>; Nev. Rev. S. 209.247; Sean Golonka, *Inmate Advocates and Family Members Seek to Lower Deductions from Offender Accounts*, NEVADA INDEPENDENT (Mar. 4, 2021), <https://thenevadaindependent.com/article/inmate-advocates-and-family-members-seek-to-lower-deductions-from-offender-accounts>; Dana Gentry, *Cannizzaro Challenges Prison Director on Inmate Money Seizures*, NEVADA CURRENT (Mar. 4, 2021), <https://www.nevadacurrent.com/blog/cannizzaro-challenges-prison-director-on-inmate-money-seizures/>; Michael Lyle, *NDOC Hasn't Implemented Law Capping Deductions on Inmate Bank Accounts*, NEVADA CURRENT (July 12, 2021),



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<https://www.nevadacurrent.com/2021/07/12/ndoc-hasnt-implemented-law-capping-deductions-on-inmate-bank-accounts/>.

<sup>49</sup> Filiberto Nolasco Gomez, *An Update on Prison Labor in Minnesota*, WORKDAY MINNESOTA (Jan. 5, 2022), <https://workdayminnesota.org/an-update-on-prison-labor-in-minnesota/>.

<sup>50</sup> Over a one-year period from July 1, 2020 to June 30, 2021, deductions from the wages of workers in the PIECP program totaled \$22,545,080, of which \$13,631,910 was paid to room and board. *Id.*

<sup>51</sup> Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

<sup>52</sup> 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>.

<sup>53</sup> See, e.g., Fla. Stat. § 946.002; Ark. Stat. § 12-30-401; La. Rev. Stat. § 15:870.

<sup>54</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Justice Expenditures and Employment in the U.S., 2017* (July 2021) at 5-6, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf>; U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2020—Statistical Tables* (Dec. 2021) at 7, <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>; Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2022*, by Wendy Sawyer and Peter Wagner (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

<sup>55</sup> Vera Institute of Justice, *The Price of Prisons: Examining State Spending Trends, 2010-2015* (May 2017) at 9, <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>. See also John Pfaff, *The Incalculable Costs of Mass Incarceration*, THE APPEAL (Sept. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration/>; Prison Policy Initiative, *Following the Money of Mass Incarceration* (Feb. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

<sup>56</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Justice Expenditures and Employment in the U.S., 2017* (July 2021) at 8, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Asatar Bair, *An Economic Analysis of Prison Labor in the U.S.*, PhD diss., University of Massachusetts Amherst (2004) at 194.

<sup>60</sup> Interview with Bruce Reilly, deputy director, VOTE, in New Orleans, LA, May 14, 2019 (on file with authors).

<sup>61</sup> Alaska's legislature repealed the state's prison industries program in 2005.

<sup>62</sup> See, e.g., Illinois Department of Corrections, *ICI Criteria for Inmate Assignment by Function*, FOIA response document (on file with authors); Michigan Department of Corrections, *Appendix D – Available Work Assignments – Michigan State Industries (MSI)*, FOIA response document (on file with authors).

<sup>63</sup> See UNICOR, *Product Lines*, [https://www.unicor.gov/publications/corporate/CATMC4505\\_C.pdf](https://www.unicor.gov/publications/corporate/CATMC4505_C.pdf).

<sup>64</sup> See generally, National Correctional Industries Association, *Online Buyers' Guide*, <https://my.nationalcia.org/buyers-guide?reload=timezone>

<sup>65</sup> See, e.g., Wis. Stat. § 303.01 Va. Code Ann. § 53.1-59; see also Ill. Comp. Stat. 5/3-12-7 (2010). See also Illinois Correctional Industries, *FAQ: Frequently Asked Questions (2015)* <http://www.icicatalog.illinois.gov/documents/faq.pdf>.

<sup>66</sup> Otak, *Coffee Creek Correctional Facility* (2020), <https://www.otak.com/about/projects/coffee-creek-correctional-facility/>; Todd Clear, Michael Riesig, & George Cole, *American Corrections* (Boston: Cengage Learning, 2019).

<sup>67</sup> According to the National Correctional Industries Association (NCIA), the value of saleable goods and services produced by incarcerated workers in prison industries programs nationwide totaled \$2,089,022,613 in 2021.

Telephone interview with Wil Heslop, interim executive director, NCIA, Nov. 18, 2021, citing 2021 NCIA Directory.

<sup>68</sup> U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Prison Industries, Inc. (UNICOR), *Fiscal Year 2021 Annual Management Report* (Nov. 12, 2021), [https://www.unicor.gov/publications/reports/FY2021\\_AnnualMgmtReport.pdf](https://www.unicor.gov/publications/reports/FY2021_AnnualMgmtReport.pdf). See also UNICOR, *FY 2021 FPI Sales by 4-Digit FSC Code and Customer* (2021), <https://www.unicor.gov/publications/reports/FY21AnnualSalesReport.pdf> (reporting that net sales totaled nearly \$543 million).

<sup>69</sup> These states are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

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- <sup>70</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Census of State and Federal Adult Correctional Facilities, 2019 – Statistical Tables (Nov. 2021) at 3, 13, <https://bjs.ojp.gov/content/pub/pdf/csfac19st.pdf>. In 2005, the last year for which such data was made public, over half of these prisons were located in the South. Of 798 correctional facilities with public works programs in 2005, 447 were located in the South, 98 in the Northeast, 133 in the Midwest, and 120 in the West. U.S. Dep’t of Justice, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005 (Oct. 2008) at Appendix Table 16, <https://bjs.ojp.gov/content/pub/pdf/csfcf05.pdf>.
- <sup>71</sup> Ben Conark, *Work Forced: A Century Later, Unpaid Prison Labor Continues to Power Florida*, FLORIDA TIMES-UNION (May 26, 2019), <https://stories.usatodaynetwork.com/workforced/>.
- <sup>72</sup> North Carolina Department of Public Safety, *Fiscal Year 2019-2020 Annual Statistical Report* (2020) at 16-17, <https://files.nc.gov/ncdps/FY-2019-20-Annual-Statistical-Report.pdf>.
- <sup>73</sup> Arizona Department of Corrections Rehabilitation and Reentry, *Corrections at a Glance, February 2022* (Mar. 8, 2022), <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2022/cagfeb-22.pdf>.
- <sup>74</sup> Total hours logged by incarcerated workers on community labor through their work on fire crews, public sector work crews, and Arizona Department of Transportation work crews was 1,829,348 in FY 2020. Arizona Department of Corrections, *Corrections at a Glance, June 2020* <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2020/cagjune-20.pdf>.
- <sup>75</sup> Washington State Department of Corrections (WDOC), *Participation by Program Summary* (2020), <https://www.doc.wa.gov/docs/publications/reports/700-SR002-second-quarter.pdf>; WDOC, *Class IV Off-Site Work Crew*, Policy Document 700.400 (2019), <https://www.doc.wa.gov/information/policies/files/700400.pdf>.
- <sup>76</sup> Mississippi Department of Corrections, *Inmate Work Crews*, <https://www.mdcc.ms.gov/Institutions/Pages/Inmate-Work-Crews.aspx>.
- <sup>77</sup> Arkansas Division of Correction, *Annual Report Fiscal Year 2020* (2021) at 21, <https://doc.arkansas.gov/wp-content/uploads/2021/03/Division-of-Correction-FY20-Annual-Report-Board-of-Corrections-Approved-March-19-2021.pdf>.
- <sup>78</sup> J. Carlee Purdum and Michelle Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, RISK, HAZARDS & CRISIS IN PUBLIC POLICY (May 12, 2020).
- <sup>79</sup> Jessica Lipscomb, *Unpaid Florida Prisoners Being Used to Clean Up After Hurricane Irma*, MIAMI NEW TIMES (Sept. 28, 2017) <https://www.miaminewtimes.com/news/unpaid-florida-prison-inmates-being-used-on-hurricane-irma-cleanup-labor-crews-9701867>; Polly Mosendz, *When Do You Move Prisoners Out of a Storm’s Path?*, BLOOMBERG (Sept. 8, 2017), <https://www.bloomberg.com/news/articles/2017-09-08/when-do-you-move-prisoners-out-of-a-hurricane-s-path>.
- <sup>80</sup> Georgia Department of Corrections, *Fire Services and Life Safety*, <http://www.dcor.state.ga.us/Divisions/Facilities/FireServices>; Georgia Department of Corrections, *Fiscal Year 2020 Report* at 60, <http://www.dcor.state.ga.us/sites/default/files/sites/all/gdc/files/pdf/Research/Monthly/GDC%20FY2020%20Annual%20Report.pdf>; Georgia Department of Corrections, *2017 Fiscal Year Report* at 24, <http://www.dcor.state.ga.us/sites/default/files/sites/all/gdc/files/pdf/Research/Monthly/GDC%20FY2017%20Annual%20Report.pdf>; Erin Paige McGonigle, *First Responders, Second Priority: Georgia’s Inmate Firefighter Program and International Human Rights Standards*, 48 GEORGIA J. INTL. & COMP. L. 189 (Apr. 11, 2021), <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2471&context=gjicl>.
- <sup>81</sup> *Id.*
- <sup>82</sup> *Id.*
- <sup>83</sup> J. Carlee Purdum and Michelle Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, RISK, HAZARDS & CRISIS IN PUBLIC POLICY (May 12, 2020).
- <sup>84</sup> *Id.*
- <sup>85</sup> Arizona Department of Corrections Rehabilitation and Reentry, *Corrections at a Glance, February 2022* (Mar. 8, 2022), <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2022/cagfeb-22.pdf>; Arizona Correctional Industries, *Achieving Balance: 2020 Annual Report* (2021) at 21, [https://aci.az.gov/sites/default/files/ACI\\_AR\\_2020.pdf](https://aci.az.gov/sites/default/files/ACI_AR_2020.pdf).
- <sup>86</sup> Pioneer Institute, *Arizona Correctional Industries Partnering with Private Sector Companies*, (July 19, 2011), <http://bgc.pioneerinstitute.org/arizona-correctional-industries-partnering-with-private-sector-companies/>.
- <sup>87</sup> Arizona Correctional Industries, *Achieving Balance: 2020 Annual Report* (2021) at 21, [https://aci.az.gov/sites/default/files/ACI\\_AR\\_2020.pdf](https://aci.az.gov/sites/default/files/ACI_AR_2020.pdf); Arizona Auditor General, *Arizona Department of*

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*Corrections, Rehabilitation and Reentry, Capital Projects Funding and Department Finances, Performance Audit* (Oct. 2020) at 20-21, [https://www.azauditor.gov/sites/default/files/20-109\\_Report.pdf](https://www.azauditor.gov/sites/default/files/20-109_Report.pdf).

<sup>88</sup> *Id.*

<sup>89</sup> As of the second quarter of 2021 ending on June 30, 2021, 4,738 incarcerated workers were employed through PIECP. See, National Correctional Industries Association, *Prison Industry Enhancement Certification Program (PIECP) Certification & Cost Accounting Center Listing: Q2 2021 Certification Listing Report* (Dec. 2, 2021), <https://www.nationalcia.org/statistical-reports>, [https://4c99dc08-46a7-4bd9-b990-48103d668bb3.filesusr.com/ugd/569cf7\\_cf27cb77182443a69a2de109c9175110.pdf](https://4c99dc08-46a7-4bd9-b990-48103d668bb3.filesusr.com/ugd/569cf7_cf27cb77182443a69a2de109c9175110.pdf).

<sup>90</sup> See Bureau of Justice Assistance, *Prison Industry Enhancement Certification Program Brief* (2002).

<sup>91</sup> Colorado Department of Corrections, *Private Sector Customers*, FOIA response document (on file with authors); Colorado Correctional Industries, *Annual Report 2020* (July 2020) at 4, [https://www.coloradoci.com/bin-pdf/annualReport/07\\_2020\\_annrep.pdf](https://www.coloradoci.com/bin-pdf/annualReport/07_2020_annrep.pdf); Colorado Correctional Industries, *Partner Companies*, <https://www.coloradoci.com/bin-pdf/partnerCompanies.pdf>.

<sup>92</sup> Utah Department of Corrections (UCI), *UCI Public Customer Suppliers*, FOIA response document (on file with authors) (also listing customers).

<sup>93</sup> Data is calculated from the three-state survey conducted by the ACLU and the Global Human Rights Clinic.

<sup>94</sup> Spencer Woodman, *California Blames Incarcerated Workers for Unsafe Conditions and Amputations*, THE INTERCEPT (Dec. 28, 2016).

<sup>95</sup> Written survey response by [Name withheld to preserve anonymity, at survey respondent's request], incarcerated at Menard Corrections Center, IL (on file with authors).

<sup>96</sup> Written survey response by [Name withheld to preserve anonymity, at survey respondent's request], incarcerated at Stateville Correctional Center, IL (on file with authors).

<sup>97</sup> Written survey response by [Name withheld to preserve anonymity, at survey respondent's request], incarcerated at Lincoln Correctional Center in IL (on file with authors).

<sup>98</sup> Data is calculated from the three-state survey conducted by the ACLU and the Global Human Rights Clinic.

<sup>99</sup> Paul Egan, *Inmate Who Led Prison Sewage Cleanup Says He Now Has Hepatitis C*, DETROIT FREE PRESS (June 3, 2017), <https://www.freep.com/story/news/local/michigan/2017/06/04/hepatitis-c-inmate-glen-lilly/362663001/>.

<sup>100</sup> *Id.*

<sup>101</sup> *Brown v. State*, N.Y. Ct. Cl., Claim No. 125765, #2018-054-097 (Sept. 11, 2018).

<sup>102</sup> Spencer Woodman, *California Blames Incarcerated Workers for Unsafe Conditions and Amputations*, THE INTERCEPT (Dec. 28, 2016).

<sup>103</sup> See, e.g., Kristi Graunke and Will Tucker, *Why Incarcerated People At Poultry Plants Deserve Better*, MARSHALL PROJECT (Aug. 13, 2018), <https://www.themarshallproject.org/2018/08/13/why-incarcerated-poultry-workers-deserve-better>; Elizabeth Whitman, *More Arizona Inmates Report Serious Injuries While Working at Hickman's Egg Farm*, PHX. NEW TIMES (Oct. 4, 2019), <https://www.phoenixnewtimes.com/news/arizona-inmates-report-serious-injuries-hickmans-egg-farm-osh-11367976>; Southern Policy Law Center, *The Kill Line*, by Will Tucker (July 26, 2018), <https://www.splcenter.org/news/2018/07/26/kill-line>.

<sup>104</sup> See, e.g., Spencer Woodman, *California Blames Incarcerated Workers for Unsafe Conditions and Amputations*, THE INTERCEPT (Dec. 28, 2016).

<sup>105</sup> E.g., Rebecca Woolington, *Forest Grove Fire Crews Rescue Prison Inmate Injured in Tillamook State Forest*, OREGONIAN (Oct. 12, 2011), <https://www.oregonlive.com/forest-grove/2011/10/forest-grove-fire-crews-rescue.html>; AP, *Tree-Cutting Error May Have Caused Firefighter Death During Ferguson Fire*, ASSOCIATED PRESS (May 7, 2019), <https://ktla.com/news/local-news/tree-cutting-error-may-have-caused-firefighter-death-during-ferguson-fire-report/>; *Buckley v. Barbour County, Ala.*, 624 F. Supp. 2d (M.D. Ala. 2008); *Buckley v. Barbour County, Ala.*, 2010 WL 1993066 (M.D. Ala. 2010).

<sup>106</sup> Joseph Serna and Brittany Mejia, *Female Inmate Firefighter Dies Following Injury in Malibu Blaze*, L.A. TIMES (Feb. 26, 2016), <https://www.latimes.com/local/lanow/la-me-ln-female-inmate-firefighter-death-20160226-story.html>; Abby Vesoulis, *Inmates Fighting California Wildfires Are More Likely to Get Hurt, Records Show*, TIME (Nov. 16, 2018), <https://time.com/5457637/inmate-firefighters-injuries-death/>.

<sup>107</sup> Brian Edwards and Jacob Margolis, *California's Firefighters Keep Getting Injured While Training, And Some Have Died*, LAIST (Sept. 21, 2021), <https://laist.com/news/climate-environment/california-cal-firefighters-training-injuries-deaths>.

<sup>108</sup> Interview with Hakeen Sakur, New Orleans, LA, (Nov. 8, 2019) (on file with authors); Interview with Wayne Thomas, New Orleans, LA, (Nov. 8, 2019) (on file with authors).

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<sup>109</sup> Michael Barajas, *Death of Dog Trainer Highlights Strenuous Heat and Working Conditions at Texas Prisons*, TEXAS OBSERVER (July 2, 2019), <https://www.texasobserver.org/death-of-dog-trainer-highlights-strenuous-heat-and-working-conditions-inside-texas-prisons/>.

<sup>110</sup> *Vidlak v. Cox*, 786 F. App'x 62 (7th Cir. 2019).

<sup>111</sup> Liz Owens, *I-TEAM INVESTIGATION: Poisoned Or Prison?*, WRDW-TV (Apr. 18, 2019), <https://www.wrdw.com/content/news/US-Battery--508773711.html>; Liz Owens, *I-TEAM INVESTIGATION: OSHA Investigating Local Battery Maker*, WRDW-TV (Apr. 18, 2019), <https://www.wrdw.com/content/news/OSHA-investigating-local-battery-maker-498431392.html>.

<sup>112</sup> U.S. Dep't of Justice, Office of the Inspector General (OIG), *A Review of Federal Prison Industries' Electronic-Waste Recycling Program*, (2010), <https://oig.justice.gov/reports/BOP/o1010.pdf>.

<sup>113</sup> *Id.*

<sup>114</sup> *Tarver v. McLaughlin*, M.D. Ga., Case No. 5:14-CV-214-MTT-MSH (July 18, 2017); AP, *Georgia to Pay \$550,000 to Convicted Felon For Amputation*, ASSOC. PRESS (Sept. 23, 2017), <https://apnews.com/article/1a49ef1f1bfb4cd0b603fdbc41817287>.

<sup>115</sup> Robert Dalheim, *Inmate Sues Colorado Sawmill After Grave Saw Injury*, WOODWORKING NETWORK (Aug. 15, 2017), <https://www.woodworkingnetwork.com/news/woodworking-industry-news/inmate-sues-colorado-sawmill-after-grave-saw-injury>.

<sup>116</sup> Kirk Mitchell, *Inmate Sues Pueblo Sawmill, Colorado Prison Officials After Serious Injury*, DENVER POST (Aug. 14, 2017), <https://www.denverpost.com/2017/08/14/pueblo-sawmill-injury-colorado-prison-lawsuit/>.

<sup>117</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the U.S., or any place subject to their jurisdiction”).

<sup>118</sup> See, e.g., Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 835 (2012); Georgia Department of Corrections, *Food & Farm Services Fact Sheet* (Jan. 2015), [http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Fact\\_Sheets/Info\\_Sheets\\_Food\\_Services.pdf](http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Fact_Sheets/Info_Sheets_Food_Services.pdf); Tatum Isaacs, *Farmers Behind Bars: A Critical Analysis of Prison Farm Labor in Kentucky and Beyond*, KENTUCKY J. OF EQUINE, AGRICULTURE & NATURAL RESOURCES L. (2017), <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1177&context=kjeanrl>; Rob Goyanes, *The Secret History of Florida Prison Labor*, NEW TROPIC (Jan. 4, 2016), <https://thenewtropic.com/prison-labor-florida/>; Hannah O. Brown, Becca Burton, and Lyndsey Gilpin, *How Incarcerated People Powered the University of Florida's Agricultural Research Program*, SOUTHERLY, <https://southerlymag.org/powered-by-prisons/>.

<sup>119</sup> See Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1061-1063 (2011).

<sup>120</sup> See *id.* at 1068-1079.

<sup>121</sup> The vast majority of incarcerated workers labor within correctional institutions operated by state and local governments, which are not considered “employers” under OSHA. See 29 U.S.C. § 652(5)-(6) (“(5) The term ‘employer’ means a person engaged in a business affecting commerce who has employees, but does not include the U.S. (not including the U.S. Postal Service) or any State or political subdivision of a State. (6) The term ‘employee’ means an employee of an employer who is employed in a business of his employer which affects commerce.”). See also U.S. Department of Labor, OSHA, Standard Interpretations, *Clarification on whether an employer with multiple facilities needs a separate written ECP for each facility*, 1910.1030; 1960 (2011), <https://www.osha.gov/laws-regs/standardinterpretations/2011-12-13> (“Federal OSHA does not cover state or local government-operated prisons.”). See also OSHA, Standard Interpretations, *OSHA Does Not Have Jurisdiction Over State Employees or Inmates*, 1975.5 (1992), <https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1> (“The definition of an ‘employer’ under Section 3(5) of the Occupational Safety and Health Act specifically excludes a State or any political subdivision of a State from coverage under the OSHA Act. Therefore, OSHA does not have jurisdiction over the State of Colorado or its employees, including inmates in correctional institutions, either paid or nonpaid.”). However, according to an OSHA instruction from 1995, “when inmates are required to perform work similar to that outside of prisons, e.g., farming, industries, machine operations, etc., the applicable protections open to anyone else in similar situations should apply, including the right to file a report of hazards with appropriate safety and health officials.” See OSHA, Directives, *Federal Agency Safety and Health Programs With the Bureau of Prisons*, U.S. Department of Justice, Directive No.: FAP 01-00-002 (1995), <https://www.osha.gov/enforcement/directives/fap-01-00-002>.

<sup>122</sup> For example, Arizona Revised Statutes provide that in the employ of the state, the term “employment” does not apply to services performed by “inmate[s] of a custodial or penal institution.” See Ariz. Rev. Stat. Ann. § 23-615 (B)(6). The Michigan Supreme Court and Court of Appeals have held that there is no employer/employee relationship between incarcerated individuals and the state since the relationship is custodial and rehabilitative. See,



*Thompson v. Bronk*, 126 Mich 455, 456-457; 85 NW 1084 (1901); *Cadeau v. Boys' Vocational School*, 359 Mich 598, 608-609; 103 NW2d 443 (1960); *Green v. Department of Corrections*, 30 Mich App 648; 186 NW2d 792; aff'd 386 Mich 459; 192 NW2d 491 (1971); *Prisoners' Labor Union at Marquette v. Department of Corrections*, 61 Mich App 328; 336; 232 NW2d 699; lv den 394 Mich 843 (1975). New York state's Department of Labor Public Employee Safety and Health Field Operations Manual excludes incarcerated people from the definition of public employees, even though the Consolidated Laws of New York do not explicitly exclude them from the definition of employee. New York Department of Labor, *Public Employee Safety and Health Field Operations Manual* (2021), <https://dol.ny.gov/system/files/documents/2021/04/peshfom.pdf>; N.Y. Lab. Law § 27-a (McKinney). Virginia Occupational Safety & Health (VOSH) interpret the exclusion of incarcerated individuals as employees under the Virginia Minimum Wage Act, § 40.1-28.9 to extend to VOSH. However, it considers VOSH to be responsible for prisoners employed by a public employer in a work-release program. Virginia Department of Labor and Industry, Occupational Safety and Health Program, *Administrative Regulations Manual* (Sep. 21, 2006), [https://www.vaasphalt.org/wp-content/uploads/2012/10/DOLI\\_Admin\\_Regs\\_Manual\\_hitching\\_ride\\_on\\_paver\\_issue.pdf](https://www.vaasphalt.org/wp-content/uploads/2012/10/DOLI_Admin_Regs_Manual_hitching_ride_on_paver_issue.pdf). In California, unlike other states, Cal/OSHA may make recommendations to the Department of Corrections to improve the safety of the working conditions and work areas of state prisoners. Cal/OSHA may also conduct hearings and adopts special orders, rules, or regulations if the Department of Corrections fails to comply with recommendations. Cal. Code Regs. tit. 8, § 344.46.

<sup>123</sup> In the case of the Fair Labor Standards Act, there has been no specific guidance from Congress or the Supreme Court as to whether the language is meant to exclude incarcerated workers from its protections. However, most appellate courts have ruled that prison workers are excluded from the definition of “employee” in that Act, thereby excluding them from protection. Lang MJ, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers*, 5 U. Pa. J. Bus. L. 19 (2002); Renee Elaine Henson, *Picking Cotton for Pennies: An Exploration into the Law's Modern Endorsement of a Free-Prison Workforce*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 193, 200–01 (2018). See also Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 Colum. L. Rev. 1048, 1048–1089 (2011); Andre Montoya-Barthelemy, Letter to the Editor, *The Occupational Health of Prison Inmates: An Ignored Population and an Opportunity*, 61 J. of Occupational Envtl. Med. e74 (2019). In the case of the National Labor Relations Act, which protects the right of workers to engage in collective bargaining, there has also been little Congressional or Supreme Court guidance as to whether its protections include incarcerated workers. Given that the protections only apply to those who meet the specific legal definition of an “employee,” some lower courts have recognized incarcerated workers employed in private companies through work release as eligible for the NLRA's protections. However, the vast majority of incarcerated workers who labor within prisons and jails are currently not covered given that federal and state governments, when acting as employers, are excluded from the NLRA. Kara Goad, *Columbia University and Incarcerated Worker Labor Unions under the National Labor Relations Act*, 103 Cornell L. Rev. 177 (2017).

<sup>124</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotation marks and citations omitted).

<sup>125</sup> See, e.g., *Kulkay v. Roy*, 847 F.3d 637, 643–645 (8th Cir. 2017).

<sup>126</sup> *Bratchett v. Braxton Envtl. Servs. Corp.*, 564 F. App'x 229, 232 (7th Cir. 2014).

<sup>127</sup> Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the U.S.* (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states>.

<sup>128</sup> 42 U.S.C. 1997(e); See also Summary, Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995); Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the U.S.* (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states>.

<sup>129</sup> See e.g., Uptown People's Law Center, *Inmate Grievance Procedure Guide*, <https://www.ilnd.uscourts.gov/assets/documents/forms/paveyhearing/IDOC%20Grievance%20Proc.%20summary.pdf>.

<sup>130</sup> Georgia Department of Corrections, *Standard Operating Procedures, Georgia Statewide Grievance Procedure*, Policy 227.02. See also, e.g., *Woodford v. Ngo*, 548 U.S. 81, 118 (2006) (Stevens, J., dissenting) (noting that grievance filing deadlines “are generally no more than 15 days, and ... in nine States, are between 2 and 5 days”).

<sup>131</sup> Cal. Code Regs. tit. 15, § 3482(b); Prison Law Office, *How to File a CDCR Administrative Grievance and Appeal* (revised June 2020), <https://prisonlaw.com/wp-content/uploads/2020/08/AdminAppeals-June-2020.pdf>. This timeline does not apply to those alleging sexual abuse. See Cal. Code Regs. tit. 15, § 3084(c)(1) (no time limit for

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filing grievance about staff sexual abuse) and Cal. Code Regs. tit. 15, § 3084 (d)(1) (no time limit for filing grievance about sexual abuse by another incarcerated person.).

<sup>132</sup> Shannon Heffernan, *From Roaches To Medical Emergencies, Illinois Inmates Say ‘There’s Nobody That We Can Really Go To For Help’*, WBEZ, NPR (Dec. 2, 2020), <https://www.wbez.org/stories/from-roaches-to-medical-emergencies-illinois-inmates-say-theres-nobody-that-we-can-really-go-to-for-help/160ef42c-e728-4e5d-990b-f584242205df>.

<sup>133</sup> Cal. Code Regs. tit. 15, § 3487(a)(1).

<sup>134</sup> *Id.*

<sup>135</sup> *Serra v. Lappin*, 600 F.3d 1191 (9th Cir. 2010).

<sup>136</sup> The exclusion of prison workers is not explicitly provided for in the FLSA but has developed from judicial precedent. There has been no specific guidance from Congress or the Supreme Court as to whether the language of FLSA is meant to exclude incarcerated workers from its protections. However, most appellate courts have ruled that prison workers are excluded from the definition of “employee” in that Act, thereby excluding them from protection. See Timothy M. Hall, *Coverage, Under Fair Labor Standards Act (FLSA) (29 U.S.C.A. § 201 et seq.), of Prisoners Working for Private Individuals or Entities Other Than Prisons*, 110 A.L.R. FED. 839, 2a (2018); Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers*, 5 U. PA. J. BUS. L. 19 (2002); Renee Elaine Henson, *Picking Cotton for Pennies: An Exploration into the Law’s Modern Endorsement of a Free-Prison Workforce*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 193, 200–01 (2018).

<sup>137</sup> See, e.g., *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369 (4th Cir. 2021) (affirming the district court’s dismissal of an action brought by ICE detainees to recover wages under the FLSA for work performed while detained, on the grounds that the FLSA does not apply to custodial settings); *Harker v. State Use. Indus.*, 990 F.2d 131 (4th Cir. 1993) (rejecting the prisoners’ claim by distinguishing the employee-employer relationship covered in the FLSA from the “custodial relationship” of incarcerated workers); *Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008) (noting that the 2nd, 3rd, 4th, 7th, 8th, 11th, and D.C. Circuits had all held that prisoners are not covered by the FLSA); *Bennett v. Frank*, 395 F.3d 409, 409–10 (7th Cir. 2005); *Villarreal v. Woodham*, 113 F.3d 202, 205–07 (11th Cir. 1997); *Gambetta v. Prison Rehab. Indus. & Diversified Enters.*, 112 F.3d 1119, 1124–25 (11th Cir. 1997); *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 687 (D.C. Cir. 1994); *Harker*, 990 F.2d at 133–36; *Vanskike*, 974 F.2d at 807–12; *Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320, 1324–27 (9th Cir. 1991). The Fifth circuit has developed a more nuanced posture, using the “economic reality” from the Supreme Court test in *Goldberg v. Whitaker House Coop.* to determine whether incarcerated workers are under an employer-employee relationship. See, e.g., *Henagan*, 595 F.3d at 620; *Watson v. Graves*, 909 F.2d 1549, 1553–56 (5th Cir. 1990) (holding that prisoners who had not been sentenced to hard labor and were employed by a private firm while on work release were “employees” of the private employer for the purposes of FLSA coverage). The “economic reality” test originates in the Supreme Court’s holding that “economic reality” should govern the determination of employer status under the FLSA. *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33, 81 S. Ct. 933, 936 (1961).