

# The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration

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# THE THIRTEENTH AMENDMENT: MODERN SLAVERY, CAPITALISM, AND MASS INCARCERATION

*Michele Goodwin*†

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*Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

Thirteenth Amendment (1865)

#### INTRODUCTION

On August 31, 2017, *The New York Times* published a provocative news article, “The Incarcerated Women Who Fight California’s Wildfires.” California is particularly known for its wildfires.<sup>1</sup> The dry-air, hot-weather conditions that persist much of the year and limited rainfall create the conditions that make pockets of the state ripe for devastating wildfires. Strong winds, often referred to as the *Diablo* (or the devil), radiate in the northern part of the state, exacerbating the already vulnerable conditions. The Santa Ana winds do the same in southern counties. Fighting these fires can be a matter of life or death.

In fact, Shawna Lynn Jones died in 2016, only hours after battling a fire in Southern California. She was nearly done with a three-year sentence—barely two months remained of her incarceration. However, the night before, at 3 a.m., she and other women had been called to put out a raging fire. Tyquesha Brown recalls that the fire that night required traversing a steep hillside of loose rocks and soil.<sup>2</sup> This made their task even more challenging. Another woman told a reporter that Jones struggled that night—the weight of her gear and chain

<sup>1</sup> Jaime Lowe, *The Incarcerated Women Who Fight California’s Wildfires*, N.Y. TIMES, (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html?mcubz=1&r=0> [http://perma.cc/BE86-FDUA].

<sup>2</sup> *Id.*

made it difficult for her to establish footing to hike up the hill where the fire blazed.<sup>3</sup> However, she and the other women of Crew 13-3 performed their duties, holding back the fire so that it did not “jump the line.”<sup>4</sup> By doing so, they saved expensive properties in Malibu. However, Jones was dead by 10 a.m. the next morning.<sup>5</sup>

For “less than \$2 an hour,” female inmates like Shawna Jones and Tyquesha Brown “work their bodies to the breaking point” with this dangerous work.<sup>6</sup> The women trudge heavy chains, saws, medical supplies, safety gear, and various other equipment into burning hillsides surrounded by intense flames. On occasion, they may arrive “ahead of any aerial support or local fire trucks,”<sup>7</sup> leaving the prisons in the peak of night, when it is pitch black, arriving before dawn to the color of bright flames and intense heat.

Sometimes the women are called upon to “set the line,” meaning they clear “potential fuel from a six-foot-wide stretch of ground” between the source of the fire (or whatever is burning) and the land or property in need of protection.<sup>8</sup> They dig trenches, moving toward the fire with tools in hand, keeping about ten feet apart from each other while calling out conditions.<sup>9</sup> The women cut wood, clearing it before the flames lick at its brittle brush. After, they scrape or shovel—all in syncope—while clouds of smoke envelope them. For protection, thin bandanas or yellow handkerchiefs cover their mouths. They operate in a frightening rhythm of sorts: saw, hook, shovel, and rake charred earth, trees, or whatever remains from the blazing fire.

To the naked eye, the women could appear to represent progress. For too long, state, federal, and local agencies excluded women from professions that demanded the service of their bodies at the front lines of anything other than childbearing, motherhood, and domestic duties. Women waged legal battles to become firefighters and police officers.<sup>10</sup> Thus, a

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Janice D. Yoder & Patricia Aniakudo, *When Pranks Become Harassment: The Case of African American Women Firefighters*, 35 *SEX ROLES* 253, 266 (1996); Janice D. Yoder & Patricia Aniakudo, “*Outsider Within*” *the Firehouse: Subordination and Difference in the Social Interactions of African American Women Firefighters*, 11 *GENDER & SOC’Y* 324, 327 (1997) (citing a 1990 survey of 356

glance at the women battling California's fires might convey a message of hope and that the only battles left are the fires themselves—and not the persistent claims of institutional and private discrimination,<sup>11</sup> such as colleagues urinating on their beds,<sup>12</sup> sexual harassment,<sup>13</sup> and retaliation for performing their jobs well.<sup>14</sup>

In fact, no special symbol adorns their uniforms announcing the prisoners' status. Make no mistake however; these women are inmates, performing arduous labor for cents on the

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career women firefighters that found “fully 16 percent [of the women surveyed] reported that they gained entry to the fire service as the result of a successful equal employment opportunity complaint”); Petula Dvorak, *Female Firefighters Still Get Harassed By Misogynistic Co-Workers. Why Is That Okay?*, WASH. POST (May 5, 2016), [https://www.washingtonpost.com/local/female-firefighters-still-get-harassed-by-women-hating-co-workers-why-is-that-okay/2016/05/05/d15873a2-12ca-11e6-93ae-50921721165d\\_story.html?utm\\_term=.7062f29f1050](https://www.washingtonpost.com/local/female-firefighters-still-get-harassed-by-women-hating-co-workers-why-is-that-okay/2016/05/05/d15873a2-12ca-11e6-93ae-50921721165d_story.html?utm_term=.7062f29f1050) [<https://perma.cc/G5QG-FVJX>] (describing how “Fairfax County firefighter Nicole Mittendorff hanged herself in Virginia’s Shenandoah mountains and her department launched an investigation into a series of lurid, degrading posts allegedly written by her co-workers in an online forum”).

<sup>11</sup> Justin Jouvenal, *Female Firefighter's Suicide Is a 'Fire Bell in the Night'*, WASH. POST (Aug. 22, 2016), [https://www.washingtonpost.com/local/public-safety/female-firefighters-suicide-is-a-re-bell-in-the-night/2016/08/22/11c73a16-3956-11e6-a254-2b336e293a3c\\_story.html?utm\\_term=.3391adaab18b](https://www.washingtonpost.com/local/public-safety/female-firefighters-suicide-is-a-re-bell-in-the-night/2016/08/22/11c73a16-3956-11e6-a254-2b336e293a3c_story.html?utm_term=.3391adaab18b) [<https://perma.cc/4WWX-XUCT>].

<sup>12</sup> *SF Firefighters Accused of Peeing in Bed of Female Firefighter in 'Egregious Harassment' Case*, CBS SF BAY AREA (Sept. 21, 2016, 12:03 PM), <http://sanfrancisco.cbslocal.com/2016/09/21/sf-firefighters-accused-of-peeing-in-bed-of-female-firefighter-in-egregious-harassment-case/> [<https://perma.cc/B27C-MVLS>] (reporting that “[a] female firefighter reportedly suffered six months of verbal taunting and at least one of her co-workers even urinated in her bed, according to a city human resources investigation”); Michael Bodley, *New Details Emerge in Alleged Harassment of Female SF Firefighter*, SFGATE (Sept. 22, 2016, 6:49 PM), <http://www.sfgate.com/bayarea/article/New-details-emerge-in-alleged-harassment-of-9240490.php> [<https://perma.cc/X577-AWZH>] (“Investigators found credible claims that the harassment included urination in the female firefighter’s bed and feces left on the floor of the women’s bathroom at the station, among other incidents Hayes-White deemed ‘egregious.’ After the woman reported it, her co-workers retaliated by branding her a ‘rat,’ the report says.”).

<sup>13</sup> John C. Griffith et al., *Bullying at the Fire Station? Perceptions Based on Gender, Race and Sexual Orientation*, 5 AM. INT’L J. SOC. SCI. 34 (2016) (finding that “[w]ith regard to sexual harassment, 31.9% of female firefighters indicated they had been verbally harassed and 18.6% were victims of sexual harassment”).

<sup>14</sup> Michelle Roberts, *Two Women Firefighters Sue San Jose for Gender Discrimination*, NBC BAY AREA (June 1, 2017, 6:09 PM), <http://www.nbcbayarea.com/news/local/Two-Women-Firefighters-Sue-San-Jose-for-Gender-Discrimination-425803943.html> [<https://perma.cc/Z9VJ-DKRD>] (reporting on litigation that claimed discrimination in the case of Battalion Chief Patricia Tapia who had “applied for 10 promotions in the last five years and been denied each time”).

dollar<sup>15</sup> and without much training.<sup>16</sup> Civilian firefighters typically receive a three to four-year apprenticeship and a competitive wage.<sup>17</sup> By contrast, after “as little as three weeks” training, the women who make it into the program are sent out to contain wildfires.<sup>18</sup>

Notwithstanding the troubling illnesses and even deaths that occur from inmates performing such dangerous tasks with limited training and incredibly low wages, such programs are perfectly legal. In some prisons and jails, inmates receive no pay or literally only pennies per hour for their labor, engendering analogies to slavery adapted to life behind bars.<sup>19</sup> In Alabama, prisoners earn no pay for what are referred to as “non-industry jobs,” although for work programs facilitated by the state for private industries (making couches, barbecue grills, and other items), a prisoner can earn \$0.25 to \$0.75 per hour.<sup>20</sup> The same is true in Arkansas, Florida, and Georgia.<sup>21</sup>

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<sup>15</sup> The Prison Policy Initiative (“PPI”) provides a comprehensive study of the payments that prisoners earn. Its work is vital for research such as this Article. See *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POLICY INITIATIVE (Apr. 10, 2017) [hereinafter Prison Policy Initiative, *State and Federal Prison Wage Policies*], [https://www.prisonpolicy.org/reports/wage\\_policies.html](https://www.prisonpolicy.org/reports/wage_policies.html) [<https://perma.cc/Q9AE-6EQT>]. A separate study was conducted for this Article, updating PPI’s results, canvassing each state, examining non-industry jobs, as well as jobs in state-owned businesses and comparing that data to states’ minimum wage laws. That data is provided in the appendix. See Michele Goodwin, *Prison Policy Initiative Wage Study Update* (Sept. 18, 2018) (updating Prison Policy Initiative, *State and Federal Prison Wage Policies*).

<sup>16</sup> Lowe, *supra* note 1.

<sup>17</sup> *Id.*; see also BUREAU OF LABOR STATISTICS, HOW TO BECOME A FIREFIGHTER, OCCUPATIONAL OUTLOOK HANDBOOK (Apr. 24, 2018), <https://www.bls.gov/ooh/protective-service/firefighters.htm#tab-4> [<https://perma.cc/V46E-BYEV>] (“Those wishing to become wildland firefighters may attend apprenticeship programs that last up to 4 years. These programs combine instruction with on-the-job-training under the supervision of experienced firefighters. In addition to participating in training programs conducted by local or state fire departments and agencies, some firefighters attend federal training sessions sponsored by the National Fire Academy. These training sessions cover topics including anti-arson techniques, disaster preparedness, hazardous materials control, and public fire safety and education.”).

<sup>18</sup> Lowe, *supra* note 1.

<sup>19</sup> See Michele Goodwin, *Prison Policy Initiative Wage Study Update*, *supra* note 15; Prison Policy Initiative, *State and Federal Prison Wage Policies*, *supra* note 15 (consolidating and reporting the pay scales and wage policies that apply to incarcerated individuals working in state and federal prisons).

<sup>20</sup> *Id.*; see also *Not Just License Plates: 54 Products Alabama Prisoners Get 25 to 75 Cents an Hour to Make*, AL.COM (Apr. 2, 2017, 7:37 AM), [http://www.al.com/news/index.ssf/2017/04/not\\_just\\_license\\_plates\\_produc.html](http://www.al.com/news/index.ssf/2017/04/not_just_license_plates_produc.html) [<https://perma.cc/3EWY-E9GA>] (displaying photos of and discussing the “varied” products made by prisoners who participate in the Alabama Correctional Industries prison work program).

<sup>21</sup> See Michele Goodwin, *Prison Policy Initiative Wage Study Update*, *supra* note 15; Prison Policy Initiative, *State and Federal Prison Wage Policies*, *supra*

In other states that pay for “non-industry” jobs, the wages are hardly better; in Arizona, pay can be as little as \$0.15 per hour or up to \$0.20 in Louisiana—with some exceptions for private industry jobs, which might fetch \$1.00 per hour.<sup>22</sup>

Ironically, the very first female firefighter, Molly Williams, was a slave, forced to put out fires in New York in the early 1800s.<sup>23</sup> A chilling, undated rendering of Molly depicts a Black woman without a coat and seemingly no gloves, pulling an engine (also known as a “pumper”) through thick snow, while white men in coats and top hats flee.<sup>24</sup>

Molly’s *owner* and city officials referred to her as a “volunteer” firefighter; she doused flames while still tethered to the bondage of slavery and a strange, gendered uniform consisting of nothing but her apron and calico dress.<sup>25</sup> Molly’s owner, a wealthy New York merchant, Benjamin Aymar,<sup>26</sup> conscribed her to this duty. Like the California inmates, Molly could not simply walk off the “job.”

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note 15 (reporting that prisoners working in state-owned businesses, “Correctional Industries,” in Arkansas, Florida, and Georgia earn \$0.00, \$0.25 to \$2.00, and \$0.00 per hour, respectively, and earn \$0.00 per hour, \$0.00 to \$50.00 per month, and \$0.00 per hour, respectively, while working in non-industry jobs); ARK. DEP’T OF CORRECTION, ADC 2016 ANNUAL REPORT 26 (2016), [https://adc.arkansas.gov/images/uploads/2016\\_Annual\\_Report\\_Directors\\_Edits\\_+\\_BOC\\_Approval\\_2\\_2\\_2017x1Final.pdf](https://adc.arkansas.gov/images/uploads/2016_Annual_Report_Directors_Edits_+_BOC_Approval_2_2_2017x1Final.pdf) [<https://perma.cc/C72U-ZT5Q>] (noting that inmates in Arkansas are not paid wages for performing compulsory work assignments); Adam Crisp, *Georgia Inmates Strike in Fight for Pay*, TIMES FREE PRESS (Dec. 14, 2010), <https://www.timesfreepress.com/news/news/story/2010/dec/14/georgia-inmates-strike-in-fight-for-pay/36956/> [<https://perma.cc/9UCW-8JYC>]; Arlinda Smith Broady, *Photo Vault: State Inmates Demanded Pay for Work 35 Years Ago*, ATLANTA J. CONST. (Sept. 9, 2015), <https://www.ajc.com/news/local/photo-vault-state-inmates-demanded-pay-for-work-years-ago/9JVSStFBmeGWzJF5ktjHKP/> [<https://perma.cc/JD7H-X2H8>] (discussing a prison strike in 1980, but noting that as of 2015 inmates still were not paid for their work).

<sup>22</sup> See Michele Goodwin, *Prison Policy Initiative Wage Study Update*, *supra* note 15 (reporting that prisoners working in state-owned businesses, “Correctional Industries,” in Arizona and Louisiana earn \$0.20 to \$0.80 and up to \$0.40 per hour, respectively, and earn \$0.15 to \$0.50 and \$0.04 to \$1.00 per hour, respectively, while working in non-industry jobs).

<sup>23</sup> Ginger Adams Otis, *Molly Williams, a Black Woman and a Slave, Fought Fires Years Before the FDNY Was Formed Was a Pioneer for Fellow Female Smoke-Eaters*, N.Y. DAILY NEWS (Apr. 26, 2015, 12:01 AM), <http://www.nydailynews.com/new-york/woman-slave-molly-williams-fought-fires-early-1800s-article-1.2197868> [<https://perma.cc/M28M-R9AF>] (“Molly Williams fought fires in the city even before the FDNY was organized 150 years ago.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 2 JOSEPH ALFRED SCOVILLE, *THE OLD MERCHANTS OF NEW YORK CITY* 72-79 (1866).

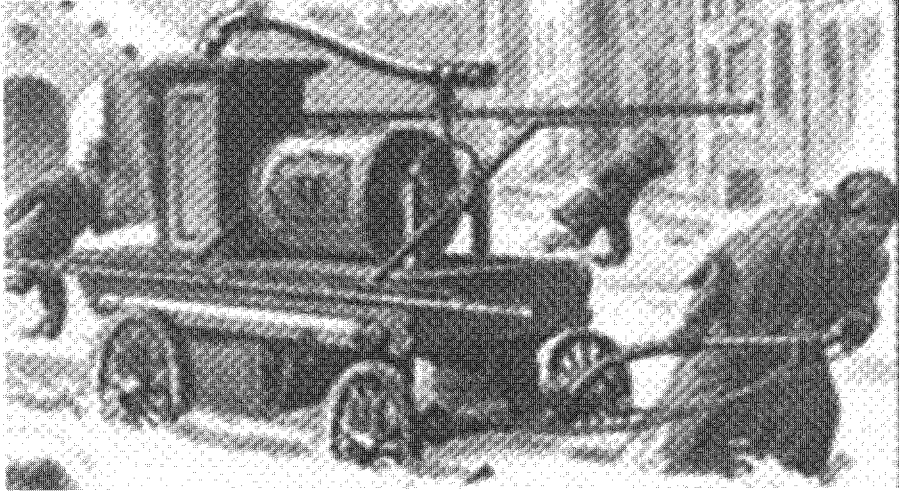


Figure 1 Rendering of Molly Williams, a slave held captive to fight fires in New York (undated)

For inmates, sometimes the labor is for the state—such as California harnessing prison labor to build roads, or to clear fires. According to Lt. Keith Radey, “[a]ny fire you go on state-wide, whether it be small or large, the inmate hand crews make up anywhere from 50 to 80 percent of the total fire personnel.”<sup>27</sup> And it is not just women who make up these fire crews—incarcerated men comprise the bulk of those who fight California’s fires.<sup>28</sup>

In other instances, inmates labor for private, multi-million and billion-dollar industries, earning very little or what might be described as “slave-like” wages. The most famous case of this was in the 1990s, when inmates sewed the merchandise sold by Victoria’s Secret, J.C. Penney, and other retailers.<sup>29</sup> Sometimes inmates work for the state, and in other instances, private businesses essentially lease their labor.<sup>30</sup> The employ-

<sup>27</sup> Lowe, *supra* note 1.

<sup>28</sup> *Id.*; see also German Lopez, *California Is Using Prison Labor to Fight Its Record Wildfires*, VOX (Aug. 9, 2018, 12:20PM), <https://www.vox.com/2018/8/9/17670494/california-prison-labor-mendocino-carr-ferguson-wildfires> [<https://perma.cc/W43A-HSWZ>] (“The California Department of Corrections and Rehabilitation (CDCR) recently boasted about the use of prison labor for firefighting on Twitter: ‘Today, more than 2,000 volunteer inmate firefighters, including 58 youth offenders, are battling wildfire flames throughout CA.’”).

<sup>29</sup> Emily Yahr, *Yes, Prisoners Used to Sew Lingerie for Victoria’s Secret – Just Like in ‘Orange is the New Black’ Season 3*, WASH. POST (June 17, 2015), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3/?utm\\_term=.8b0e0e322858](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3/?utm_term=.8b0e0e322858) [<https://perma.cc/LA92-VTEP>].

<sup>30</sup> *Id.*



ers, whether private industry, the state, or private prisons, would be correct in pointing out that in the *traditional* sense, these women and men are not slaves; in fact, California refers to them as “volunteers.”<sup>31</sup> After all, American slavery was a specific, racialized institution abolished with the ratification of the Thirteenth Amendment in 1865.<sup>32</sup>

For some rehabilitation programs and prison systems, employment is a key part of allowing inmates to develop skills, prepare for the workforce, and shape a positive life within and one day beyond prison walls. As social “reentry” and “ban the box” programs emerge, even more industries are open to assisting the formerly incarcerated upon their release.<sup>33</sup> However, whether these programs represent progress by producing outcomes that benefit rather than exploit inmates or serve as a “chokehold,” fitting within the narrow exception of the Thirteenth Amendment, which permits forced, uncompensated servitude or *slavery* of those convicted of crimes is a question that

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<sup>31</sup> See Annika Neklason, *California Is Running Out of Inmates to Fight Its Fires* (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/how-much-longer-will-inmates-fight-californias-wildfires/547628/> [<https://perma.cc/4WLV-6YLV>] (“To join the squad, inmates must meet high physical standards and complete a demanding course of training. They also have to volunteer.”).

<sup>32</sup> U.S. CONST. amend. XIII; see, e.g., Michele Gillespie, *The Sexual Politics of Race and Gender Mary Musgrove and the Georgia Trustees*, in *THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH* 187 (Catherine Clinton & Michele Gillespie eds., 1997) (expanding the literature on slavery to include the experiences and perspective of Black women, particularly in relation to sexual abuse, assaults, and rapes on plantations); WILLIAM H. HARRIS, *THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR* (1982) (connecting slavery and Jim Crow, explaining how the dire conditions under slavery were exacerbated under the arch of Jim Crow); ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974) (providing a groundbreaking account of the economics of slavery); JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1972) (exposing the inordinate and unyielding hardships enslaved Blacks encountered in the Antebellum south); RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH, 1820–1860* (1964) (detailing accounts of slave life in the southern cities, diversifying the literature on slavery, expanding beyond research of enslaved Blacks' lives on plantations).

<sup>33</sup> Reentry and “ban the box” programs focus on preventing recidivism, by assisting formerly incarcerated women and men as they reenter society after their incarceration. Reentry refers to reentering society, finding and obtaining housing, employment, educational opportunities and other resources. Banning the box refers to a movement to end questions on employment, housing, and university applications (among others) that inquire about prior convictions, as these inquiries may trigger biases against qualified individuals who are formerly incarcerated. See TRONE PRIVATE SECTOR & AM. CIVIL LIBERTIES UNION, *BACK TO BUSINESS: HOW HIRING FORMERLY INCARCERATED JOB SEEKERS BENEFITS YOUR COMPANY* 12 (2017), [https://www.aclu.org/sites/default/files/field\\_document/060917-trone-report\\_web\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/060917-trone-report_web_0.pdf) [<https://perma.cc/H5DZ-TELB>].

deserves debate and scrutiny.<sup>34</sup> Arguments that a low wage is better than no wage, and thus not slavery at all, fall short and fail to address the substantive quality of slavery embedded in the prison economy and how pernicious forms of servitude are ritualistically reimagined, reified, and re-instantiated in the American criminal justice system.<sup>35</sup> Nor do such arguments shed light on the economic motivations of contemporary slavery. From an unpaid laborer's perspective, the conditions and terms that instantiate her condition may seem unfair, inhumane, and downright abusive. However, situated from the view of the state as "holder" of the labor, slavery of this sort is quite simply profitable and legal.

This Article argues that cries for penal reform, while important, do not speak to the urgent issue of slavery behind bars and the externalities that pervade the broader consequences of prison labor markets.<sup>36</sup> Second, although recent attention to private prisons raises questions about whether states should contract with firms that seek to maximize profits in relation to incarceration, this work argues that slavery's fundamental importance to U.S. capitalism and the American economy extended beyond bankrolling private business interests in the 18th and 19th centuries.

For these reasons, now is an important time to consider these matters in order to develop a more robust jurisprudence in exile.<sup>37</sup> Even though political interest and efforts to address

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<sup>34</sup> See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 12 (2017) ("The Chokehold is something like an employment stimulus plan for working-class white people, who don't have to compete for jobs with all the black men who are locked up, or who are underground because they have outstanding arrest warrants, or who have criminal records that make obtaining legal employment exceedingly difficult.").

<sup>35</sup> See, e.g., Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1630 (2015) (examining what the author terms the "new peonage," arguing that the reconfiguration of the state judicial systems in the American South, following the Civil War, trapped African Americans into cyclical coerced labor systems that now emerge in the myriad ways that Blacks are "taxed" in the criminal justice system through various court fines and fees).

<sup>36</sup> See generally DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (discussing the growth and use of the convict lease system from the American Civil War to World War II).

<sup>37</sup> Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 314–15, 317 (2002); Richard M. Re, *The New Supreme Court and the Jurisprudence In Exile*, PRAWFSBLOG (Feb. 17, 2016), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/the-new-supreme-court-and-the-jurisprudence-in-exile.html> [<https://perma.cc/Q4QZ-A3MY>] ("During the past 20 or so years, the Supreme Court's more liberal justices have created a kind of jurisprudence in exile.").

the lingering consequences of legalized slavery may not be at the forefront of congressional or state legislative debate (if present at all), it is nevertheless important to grapple with this important issue. To answer Stephen Sachs' question, "[i]f law is a matter of social practice, as most seem to agree, can there be social practices that hardly anybody in society knows about?"<sup>38</sup>: yes, the prison slave economy.

This Article makes two conceptual contributions. First, it tells a story about the Thirteenth Amendment forbidding one form of slavery while legitimating and preserving others. Of course, the text does not operate absent important actors: legislatures and courts. Yet, as explained by Reva Siegel, despite "repeated condemnation of slavery," such united opposition to the practice "may instead function to exonerate practices contested in the present, none of which looks so unremittingly 'evil' by contrast."<sup>39</sup> In this case, uncompensated prison labor, including that of the dangerous work of female firefighters, inures economic benefits to the state and the companies capable of extracting it.<sup>40</sup> This Article argues that this preservation of the practice of slavery through its transformation into prison labor means that socially, legislatively, and judicially, we have come only to reject one form of discrimination—antebellum slavery—while distinguishing it from the marginally remunerated and totally unremunerated prison labor that courts legitimate.

Second, this Article argues that the promises of the Thirteenth Amendment may actually fill in gaps of the Fourteenth Amendment. For example, the Fourteenth Amendment has been interpreted only to prohibit purposeful/intentional conse-

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<sup>38</sup> Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2255 (2014) (footnote omitted) (challenging the notion of a constitution in exile, but acknowledging that "the 'exile' pejorative can't be dismissed so easily; it stands for a serious criticism that deserves response . . . . [A] constitution in exile might be the 'real' or 'true' law, obscured by usurping courts and officials; or it might be just a plan for law reform, an attempt to revise the law under the cover of restoring it. If a constitutional theory asks us to substantially change our practice—if it makes important legal questions turn on the esoteric views of academics, historians, or political philosophers—can it really be an accurate statement of our law?").

<sup>39</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

<sup>40</sup> Lowe, *supra* note 1; Yahr, *supra* note 29; Angela F. Chan, *America Never Abolished Slavery*, HUFFINGTON POST (May 2, 2015), [https://www.huffingtonpost.com/angela-f-chan/america-never-abolished-slavery\\_b\\_6777420.html](https://www.huffingtonpost.com/angela-f-chan/america-never-abolished-slavery_b_6777420.html) [<https://perma.cc/HD9K-VZBF>] ("[P]eople incarcerated in America . . . are forced to work for pennies an hour with the profits going to countries, states and private corporations, including Target, Revlon and Whole Foods.").

quences or the purposeful/intentional production of disparate burdens.<sup>41</sup> Yet, the Thirteenth Amendment is different textually and historically.

This Article demonstrates that not only is the prison slave system vibrant, it produces profits and wealth for those who exploit prison labor.<sup>42</sup> Part I establishes the framework of this Article. Part II examines the preservation of slavery through the ratification of the Thirteenth Amendment and the Punishment Clause. Part III examines the scale of modern incarceration and forced labor. It argues that just like traditional forms of slavery, the modern system functions according to certain fundamental principles, such as the laws of supply and demand, creating perverse incentives in criminal justice. Part IV turns to the question of reform and offers recommendations to eradicate modern vestiges of slavery.

## I

### A PRODIGIOUS CYCLE: PRESERVING THE PAST THROUGH THE PRESENT

Slavery was and is a status-based condition in the United States. In its antebellum manifestation, slavery was largely imposed on people of color, despite the indentured servitude of Irish immigrants. Early on, indigenous peoples to these lands suffered brutal conquests of their properties and bodies.<sup>43</sup> As journalist Rebecca Onion writes, “[i]n 1637, a group of Pequot Indians, men and boys, having risen up against English colonists in Connecticut and been defeated, were sold to plantations in the West Indies in exchange for African slaves, allowing the colonists to remove a resistant element from their midst.”<sup>44</sup>

Consequently, “[t]he tribe’s women were pressed into service in white homes in New England, where domestic workers were sorely lacking.”<sup>45</sup> That would not be the last Native American account of enslavement in what is now the United States.<sup>46</sup> However, when native peoples died off or suffered to

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<sup>41</sup> Siegel, *supra* note 39, at 1113, 1125; Lea S. VanderVelde, *Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 437–41, 448 (1989).

<sup>42</sup> SVEN BECKERT & SETH ROCKMAN, *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* (2016).

<sup>43</sup> Rebecca Onion, *America’s Other Original Sin*, SLATE (Jan. 18, 2016, 5:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2016/01/native\\_american\\_slavery\\_historians\\_uncover\\_a\\_chilling\\_chapter\\_in\\_u\\_s\\_history.html](http://www.slate.com/articles/news_and_politics/cover_story/2016/01/native_american_slavery_historians_uncover_a_chilling_chapter_in_u_s_history.html) [<https://perma.cc/HE7F-AH8M>].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (“In 1741, an 800-foot-long coffle of recently enslaved Sioux Indians, procured by a group of Cree, Assiniboine, and Monsoni warriors, arrived in Mon-

the point of no longer being valuable to slavery's insatiable machines, Africans served as effective, expendable substitutes until the ratification of the Thirteenth Amendment.<sup>47</sup>

This was an example of American slavery enduring and evolving as those in power substituted one group of vulnerable people for another. This dynamic is what Reva Siegel describes as "preservation-through-transformation,"<sup>48</sup> a model for evaluating status regulation that she applied to equal protection law. This Article borrows that framework not to evaluate the Fourteenth Amendment's Equal Protection Clause as she does, but rather as a means to analyze and understand the fluidity, transformation, and endurance of slavery.

If there is mutual agreement on the reprehensibility of slavery, which there is, as well as law that abolishes it—then what accounts for its continuation? If society resoundingly condemns, should there not be uproar to contest its existence? In other words, can slavery exist in the United States if there is broad condemnation of the practice? If so, how, in the absence of widespread upheaval and condemnation?

There are two ways to think about the abolition of American slavery. One view, quite simply, is that it ended in 1865 with the ratification of the Thirteenth Amendment.<sup>49</sup> This is the widely accepted, uncontested view, which focuses only on the first clause of the Thirteenth Amendment. Some even credit the Emancipation Proclamation Act as doing this work. Simply put, one theory is that slavery died. In fact, Americans frown upon ill-conceived, loose comparisons of the widely accepted account of slavery (antebellum chattel slavery) to contemporary social problems. In other words, slavery is done and over with. Anything else shows a lack of regard for the toils, pains, and various atrocities that Black Americans endures.

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trear, ready for sale to French colonists hungry for domestic and agricultural labor. And in 1837, Cherokee Joseph Vann, expelled from his land in Georgia during the era of Indian removal, took at least 48 enslaved black people along with him to Indian Territory.").

<sup>47</sup> FOGEL & ENGERMAN, *supra* note 32, at 25; BLASSINGAME, *supra* note 32; WADE, *supra* note 32.

<sup>48</sup> Siegel, *supra* note 39, at 1119–20 ("White Americans who emphatically opposed slavery regularly disagreed about what it would mean to emancipate African-Americans. Some defined freedom from slavery as equality in civil rights; others insisted that emancipating African-Americans from slavery entailed equality in civil *and* political rights; but most white Americans who opposed slavery did not think its abolition required giving African-Americans equality in 'social rights.'").

<sup>49</sup> Chan, *supra* note 40 ("This past Black History Month, millions of students were told the story of how America abolished slavery 150 years ago with ratification of the 13th Amendment.").

Another version of the American slavery story is that while its antebellum defining characteristics may no longer be in existence, it transformed or evolved—not just once, but perhaps several times.<sup>50</sup> The latter story is more complicated and raises doubts, precisely because of abolition and the Thirteenth Amendment. Formal law itself obscures the lived experience: *slavery cannot exist because it has been abolished by law. Whatever the sharecroppers are doing in the fields with no wage or limited wage is not slavery, because slavery is abolished. Even if there are only limited means to contest their conditions, utilize law as a tool for political or civil rights advocacy, vote, or be educated—that ordering of rights does not constitute slavery. Whatever the Jim Crow prison labor, with its perversities and coercive financial incentives, might be similar to slavery, but it is permitted by law.* To comprehend and confirm slavery's manifestation after its formal abolition requires turning to the lived experience as a means of deciphering and understanding any given law. As Blackmon reminds, “[i]n the immediate wake of emancipation, the Alabama legislature swiftly passed a measure under which the orphans of freed slaves, or the children of blacks deemed inadequate parents, were to be ‘apprenticed’ to their former masters.”<sup>51</sup>

For decades following slavery's formal abolition, it was possible to condemn the practice of it and yet engage in slavery or slavery-like business in at least two ways. The first was simply to acknowledge the primacy of the law, but to claim that the conditions imposed on newly freed Blacks, which were very similar to slavery, were not that at all. One could point to myriad ways in which Jim Crow ushered in distinct differences between antebellum chattel slavery and twentieth century sharecropping, including Blacks' entitlement to wages, even if the sons and daughters of former slaves were mostly in debt to

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<sup>50</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (“Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane.”); BLACKMON, *supra* note 36, at 53 (“The attitudes among southern whites that a resubjugation of African Americans was an acceptable—even essential—element of solving the ‘Negro question’ couldn’t have been more explicit. The desire of white farmers to recapture their former slaves through new civil laws was transparent.”); Chan, *supra* note 40 (“The 13th amendment did not abolish slavery but rather moved it from the plantation to the prison.”).

<sup>51</sup> BLACKMON, *supra* note 36, at 53 (“The South Carolina planter Henry William Ravenel wrote in September 1865: ‘There must . . . be stringent laws to control the negroes, & require them to fulfill their contracts of labour on the farms.’”).

the persons who exploited their labor. A second method for engaging in slavery, while still condemning the practice, was actually tolerated by law itself, the Thirteenth Amendment's carve out for punishment associated with conviction for a crime.<sup>52</sup> This is the second clause of the Thirteenth Amendment.

My point here is to first establish the possibility of condemning slavery on moral (it is an evil practice) or legal (all persons are created equal) grounds, and yet to functionally tolerate or embrace it. In essence, we all know what slavery looks like, but imagining equality unburdened by racism or racial caste is another matter.<sup>53</sup> Indeed, this has been difficult as a matter of law to sort through what the so-called War Amendments conferred. Blacks and whites could agree on the when, where, and what antebellum slavery was, yet possess very different views on what freedom and equality meant for the former.<sup>54</sup> And while Blacks resisted the second-class social,

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<sup>52</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 United States, or any place subject to their jurisdiction.").

<sup>53</sup> Siegel, *supra* note 39, at 1119 (explaining that "[t]he regime of segregation sanctioned in *Plessy* was, after all, the result of efforts to disestablish slavery" even though "today we tend to think about the transition from slavery to segregation as a seamless episode of invidious racial classification").

<sup>54</sup> Famously, Black intellectuals who were united in their disdain and contempt for slavery nonetheless debated what the roles and places of new Black Americans should be. They disputed the terms of what freedom, political, and civil rights should be. Booker T. Washington claimed, "[i]n all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress." BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY 221-22 (1901). This "Atlanta Compromise" was well-received by white Americans in the south. According to W.E.B. Dubois, some whites viewed it as a "complete surrender of the demand for civil and political equality," while others conceived it as a "working basis for mutual understanding." See W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 19 (1903) (critiquing Booker T. Washington and his stance on conciliation) ("Mr. Washington came, with a simple definite programme, at the psychological moment when the nation was a little ashamed of having bestowed so much sentiment on Negroes, and was concentrating its energies on Dollars. His programme of industrial education, conciliation of the South, and submission and silence as to civil and political rights, was not wholly original; . . . But Mr. Washington . . . put enthusiasm, unlimited energy, and perfect faith into his programme, and changed it from a by-path into a veritable Way of Life. And the tale of the methods by which he did this is a fascinating study of human life."); see also BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY 220 (1901) ("No race can prosper till it learns that there is as much dignity in tilling a field as in writing a poem. It is at the bottom of life we must begin, and not at the top. Nor should we permit our grievances to overshadow our opportunities."). The intellectual debates related to freedom and equality spawned by Black men generally overshadowed the philosophies on citizenship equality emerging from Black women. But see Ida B. Wells, *Lynch Law*, HISTORY IS A WEAPON (Feb. 13, 1893), <https://www.historyisaweapon.com/defcon1/wellslynchlaw.html> [<https://per>

political, and legal citizenship conferred on them, “white Americans in the nineteenth [and early twentieth] centur[ies] viewed the changes in racial status law of their day in very different terms: as elevating African-Americans from subordination in slavery to equality at law.”<sup>55</sup> If this is so, it helps to explain why the transformation from slavery to equality has been long and arduous.

For example, the ratification of the Thirteenth Amendment, and perhaps even more importantly, the post-Jim Crow era of the civil rights movement marked the near universal, resounding condemnation of slavery. Chief Justice Earl Warren remarked upon this in *Brown v. Board of Education*, noting that even as the case was reargued, the substance of the litigants’ advocacy related to the “post-War Amendments.”<sup>56</sup>

A decade following, Congress sought to remedy conditions wrought by slavery, most obviously widespread, enduring racial discrimination, through the Civil Rights Act of 1964 (CRA) and the Voting Rights Act of 1965 (VRA). This mid-nineteenth century jurisprudence and legislation cemented profound agreement between Congress and the Supreme Court that slavery, including its post-Thirteenth Amendment iterations, such as *separate but equal* policies, was an evil, un-American philosophy and practice.<sup>57</sup> This was a dramatic turn from the legacy of *Plessy v. Ferguson*.<sup>58</sup>

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ma.cc/7P9T-VYDH] (speaking of what actually constituted freedom for Blacks) (“The first fifteen years of his freedom he was murdered by masked mobs for trying to vote. Public opinion having made lynching for that cause unpopular, a new reason is given to justify the murders of the past 15 years. The Negro was first charged with attempting to rule white people, and hundreds were murdered on that pretended supposition. He is now charged with assaulting or attempting to assault white women. This charge, as false as it is foul, robs us of the sympathy of the world and is blasting the race’s good name.”).

<sup>55</sup> Siegel, *supra* note 39, at 1119.

<sup>56</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (stating that the litigants’ “exhaustive[ ] consideration of the [Fourteenth] Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment” was the main point of reargument).

<sup>57</sup> How the Court and Congress came to this conclusion is a source of debate. See Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32, 32 (2004) (highlighting how segregation became viewed as “un-American” and was broadcasted to the world as such, explaining that rather than parallel stories, *Brown* fit with and within the story of the McCarthy era); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988) (explaining that “[a]t a time when the U.S. hoped to reshape the postwar world in its own image, the international attention given to racial segregation was troublesome and embarrassing”).

<sup>58</sup> ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 214–15 (2006) (“As if in service to that judgment, artists, photographers, editors, publishers, and filmmakers—a new category—had by 1896 created a visual cul-



The enactments of the CRA and the VRA, as well as the Court's landmark *Brown* ruling affirmed near universal agreement on the blights of slavery. At the same time, these political and civil rights advancements obscured the lingering and entrenched impediments to freedom after ratification of the Thirteenth Amendment and overestimated freedom(s) conferred on Blacks. This is why widespread agreement about the immorality of slavery "deeply implicate us in the present" in both measurable and unaccounted-for ways.<sup>59</sup> Only a half-century prior to *Brown*, in *Plessy v. Ferguson*, by a near unanimous decision, the Court ruled that a philosophy of segregation and separate-but-equal did "not conflict with the [T]hirteenth [A]mendment, which abolished slavery and involuntary servitude, except as a punishment for crime."<sup>60</sup> Writing for the majority in *Plessy*, Justice Brown found this was "too clear for argument."<sup>61</sup>

Justice Henry Billings Brown opined, "Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or, at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services."<sup>62</sup> This was not the legal condition of Blacks post-ratification of the Thirteenth Amendment. Yet, the same conditions that defined slavery marked Blacks' social conditions, which were largely ignored by legislatures and courts. Referring to the *Civil Rights Cases*,<sup>63</sup> the Court inferred that badges of slavery were produced through systems and not "as involving an ordinary civil injury" by private parties.<sup>64</sup>

In the *Slaughterhouse Cases*, the Court insisted that the intention undergirding the Thirteenth Amendment focused primarily on abolishing slavery as it was known in the United States (as well as forbidding "the Chinese coolie trade" and Mexican peonage, because these practices amounted to involuntary servitude or slavery). Between these post-Amendment cases, none disputed the question of slavery's abolition, even while Blacks lacked equality in social rights, and their political

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ture based on racial difference. An avalanche of racist imagery in new mass-circulation publications and on movie screens reached every corner of the country, establishing racial distinctions through apelike, child-like, and criminal stereotypes of African Americans."); Siegel, *supra* note 39, at 1128–29.

<sup>59</sup> See Siegel, *supra* note 39, at 1113.

<sup>60</sup> *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 109 U.S. 3, 24 (1883).

<sup>64</sup> *Plessy*, 163 U.S. at 543.

and civil rights were often in dispute. The Thirteenth Amendment removed one pair of shackles and replaced it with another.

Antebellum slavery and the way courts and popular culture imagine it serve as an important moral benchmark.<sup>65</sup> Chief Justice Taney's opinion in *Dred Scott v. Sanford* is a potent reminder of the social castes, legal barriers, and political obstacles for Blacks forged by a slave economy:

[Black slaves] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.<sup>66</sup>

Taney explained that no one found it an axiom in morals or politics to subject Blacks to the conditions of slavery. As he opined, these were not "matters of public concern," and no one for a moment doubted the "correctness of this opinion."<sup>67</sup>

Aspects of slavery's devastating consequences are portrayed in firsthand accounts by slavers and their advocates,<sup>68</sup>

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<sup>65</sup> Slavery morphed into a robust economic system through the capture and importation of Africans and the aggressive maintenance of their subordination as chattel laborers without any rights or pleas that courts would recognize. See, e.g., LACY K. FORD, *DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH* 5 (2009) (exposing how slavers in both the upper south and lower south became unified in preserving the enterprise of slavery and breaking from the Union).

<sup>66</sup> *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857). History marks Justice Taney's opinion as uncharitable and regrettable, but it did not tarnish his reputation. His bust still sits in the halls of Congress.

<sup>67</sup> *Id.*

<sup>68</sup> See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 153–54 (1785) ("I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind. . . . This unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.").

abolitionists,<sup>69</sup> U.S. census records,<sup>70</sup> cases,<sup>71</sup> and interviews and records of the formerly enslaved.<sup>72</sup> Of the latter, narrative accounts expose in vivid detail slavery's humiliating enterprise. States enacted laws requiring that slaves permitted outside the confines of plantations carry a pass, justifying their presence on roads.<sup>73</sup> Failure to conjure a pass often meant severe physical violence inflicted on any Black person, including children.

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<sup>69</sup> FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* vii (1855) ("Not only is slavery on trial, but unfortunately, the enslaved people are also on trial. It is alleged, that they are, naturally, inferior; that they are *so low* in the scale of humanity, and so utterly stupid, that they are unconscious of their wrongs, and do not apprehend their rights.").

<sup>70</sup> See *Distribution of Slaves in 1860*, U.S. CENSUS BUREAU [https://www.census.gov/history/www/reference/maps/distribution\\_of\\_slaves\\_in\\_1860.html](https://www.census.gov/history/www/reference/maps/distribution_of_slaves_in_1860.html) [<https://perma.cc/7WU3-87YL>]; *The Census and Slavery*, N.Y. TIMES (Apr. 2, 1861), <https://www.nytimes.com/1861/04/02/archives> [<https://perma.cc/857B-HJ8Z>].

<sup>71</sup> *Sanford*, 60 U.S. at 393–94; *State v. Mann*, 13 N.C. 263, 263 (1829) (permitting assaults and batteries on female slaves, expressing that "the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North-Carolina" and as such "[h]ere the slave had been *hired* by the Defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slav[e], no rule now laid down is intended to interfere").

<sup>72</sup> See, e.g., HARRIET JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 22 (1861) (recounting life as a slave, including being bequeathed to a child as a gift, raped, beaten by her "mistress" or female owner, and subjected to unrelenting suspicion: "My young mistress was still a child, and I could look for no protection from her"); BLASSINGAME, *supra* note 32, at 290 ("According to the black autobiographers, one of the most important factors affecting their struggle for personal autonomy was the frequency and the nature of the punishment meted out by masters and overseers. In his lifetime a slave usually had several owners . . . [on] average . . . three."); WADE, *supra* note 32, at 94–97, 186, 188, 191–93 (detailing the range of abuses heaped on slaves from burning to gallows, public whipping posts, treadmills, and workhouses); ZORA NEALE HURSTON, *BARRACON: THE STORY OF THE LAST "BLACK CARGO"* 59 (2018) (detailing the experiences of likely the last slave brought to the United States, including whippings, rough sleeping conditions, and grievous working conditions).

<sup>73</sup> Richard C. Wade writes about the policing of slaves, and how slavers believed "some more energetic and scrutinizing system is absolutely *necessary*" to police Blacks in cities, "where from the very denseness of population and closely contiguous settlements . . . there must be need of closer and more careful circumspection" by "active officers." WADE, *supra* note 32, at 80. According to Wade, this "summed up" the urgency for policing and patrolling Blacks. *Id.* State legislatures took up this call and organized in different ways, but "each had some system of routine vigilance." *Id.* North Carolina's slave patrol regulation serves as a relevant example:

1st. Patrols shall be appointed, at least four in each Captain's district.

2d. It shall be their duty, for two of their number, at least, to patrol their respective districts once in every week; in failure thereof, they shall be subject to the penalties prescribed by law.

3d. They shall have power to inflict corporal punishment, if two be present agreeing thereto.

Austin Steward details this practice in *Twenty-Two Years A Slave, And Forty Years A Freeman*, published in 1857. He recounts that,

Slaves are never allowed to leave the plantation to which they belong, without a written pass. Should any one venture to disobey this law, he will most likely be caught by the *patrol* and given thirty-nine lashes. This patrol is always on duty every Sunday, going to each plantation under their supervision, entering every slave cabin, and examining closely the conduct of the slaves; and if they find one slave from another plantation without a pass, he is immediately punished with a severe flogging.<sup>74</sup>

Perhaps, the most impactful of these accounts display a cartography of slavery, such as the abuse written literally on the backs of slaves.<sup>75</sup>

Eric Foner writes, “Even the most gentlemanly and prominent owners inflicted brutal, often sadistic punishments.”<sup>76</sup> Charity Anderson, a former slave interviewed in 1937, recalled

4th. One patroller shall have power to seize any negro slave who behaves insolently to a patroller, or otherwise unlawfully or suspiciously; and hold such slave in custody until he can bring together a requisite number of Patrollers to act in the business.

5th. Previous to entering on their duties, Patrols shall call on some acting magistrate, and take the following oath, to wit: “I, A. B. appointed one of the Patrol by the County Court of Rowan, for Captain B’s company, do hereby swear, that I will faithfully execute the duties of a Patroller, to the best of my ability, according to law and the regulations of the County Court.”

Patrol Regulations for the County of Rowan (1825), <https://docsouth.unc.edu/nc/rowan/rowan.html> [<https://perma.cc/D8QK-SLWG>].

<sup>74</sup> AUSTIN STEWARD, *TWENTY-TWO YEARS A SLAVE, AND FORTY YEARS A FREEMAN* (1857), as reprinted in 1 NAT’L HUMAN. CENTER RESOURCE TOOLBOX, *THE MAKING OF AFRICAN AM. IDENTITY 1500-1885* at 1 (Nat’l Human. Center, 2007).

<sup>75</sup> For example, the iconic renderings and photograph of Gordon or “Whipped Peter,” from 1863, which sear into the imagination the extent of the torture to which Blacks on plantations were exposed. Gordon’s back was “recognized as a searing indictment of slavery” and “was presented as the latest evidence in the abolitionist campaign.” *The Scourged Back: How Runaway Slave and Soldier Private Gordon Changed History*, AM.’S BLACK HOLOCAUST MUSEUM, <https://abhmuseum.org/the-scourged-back-how-runaway-slave-and-soldier-private-gordon-changed-history/> [<https://perma.cc/ZXS4-GNDH>] (citing Frank H. Goodyear, *How Mass Produced and Widely Distributed Images Helped the Abolitionist Movement*, AM.’S BLACK HOLOCAUST MUSEUM, <https://abhmuseum.org/the-scourged-back-how-runaway-slave-and-soldier-private-gordon-changed-history/>) (“The photograph pictures the runaway slave Gordon exposing his scourged back to the camera,” which depicted the “severe whipping for undisclosed reasons. . . . This beating left him with horrible welts on much of the surface of his back.”). As a writer for the *New York Independent* wrote, “This Card Photograph should be multiplied by 100,000, and scattered over the States” because “it tells the story to the eye.” *Id.*

<sup>76</sup> FONER, *supra* note 58, at 14.

witnessing slaves “tore up by dogs, and whipped unmercifully.”<sup>77</sup> In an undated interview, Walter Calloway, purchased as a child by an Alabama planter, shared this memory of an overseer who “whipped a nigger gal ‘bout thirteen years old so hard she nearly die.”<sup>78</sup> Finally, Mary Reynolds, a former slave interviewed at a convalescent home in Dallas, Texas, expressed that the horrors of slavery go beyond anything that words can convey. Instead, she confided, “I got the scars on my old body to show to this day.”<sup>79</sup> She witnessed brutalities more severe than what she experienced, “I seed them put the men and women in the stock with they hands screwed down through holes in the board and they feets tied together and they naked behinds to the world. Solomon the . . . overseer beat them with a big whip and massa look on . . . They cut the flesh most to the bones and some . . . never got up again.”<sup>80</sup> These accounts vividly implicate the American South in the conspiracy of slavery and inhumanity toward Africans.

Nevertheless, these powerful and important narratives, often the collective fixed point on slavery, inadvertently obscure its broader reach. Fixation on those accounts of slavery interfere with understanding how it can persist under alternative conditions and thus transform into something beyond its most identifiable form.<sup>81</sup> Defining slavery exclusively by antebellum plantations and Blacks picking cotton in pastoral fields is an understandable mistake. Yet it traps readers of that history into essentialist and reductive framings of slavery. It stymies a more nuanced discourse and analysis on slavery’s past and its transformations.

If the definition of American slavery is primarily or exclusively based on the spectacle of those terms and contours—unpaid labor of Blacks toiling in pastoral fields—it is possible, even likely, to overlook or misidentify its other iterations and

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<sup>77</sup> Interview by Ila B. Prine with Charity Anderson, in Mobile, Ala. (Apr. 16, 1937), <http://xroads.virginia.edu/~hyper/wpa/anderso1.html> [<https://perma.cc/XGQ6-PLXD>].

<sup>78</sup> Interview by W.P. Jordan with Walter Calloway, in Birmingham, Ala. (undated), <http://xroads.virginia.edu/~hyper/wpa/callowa1.html> [<https://perma.cc/ZWA2-5XUK>].

<sup>79</sup> Interview with Mary Reynolds, in Dallas, Tex. (undated), <http://xroads.virginia.edu/~hyper/wpa/reynold1.html> [<https://perma.cc/G5KZ-NCQ9>].

<sup>80</sup> *Id.*

<sup>81</sup> See JENNIFER MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* (2004) (examining how African women’s labor became intertwined with the economic growth of colonies and what eventually became the United States); Bonnie Martin, *Neighbor-to-Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slaves*, in *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* (Sven Beckert & Seth Rockman eds., 2016).

broader social contexts then and now. Such as the fact that sometimes Black slaves were paid wages, even if marginal, which they could keep. That is, slavery was not about only wages, but also self-determination and autonomy.<sup>82</sup> The problem with the fixed benchmark on slavery is the suggestion that the enterprise can only be (or is primarily) about southern, plantation fieldwork.

As a juxtaposition, consider slavery's urban dynamics, what Richard Wade deftly described in *Slavery in the Cities: The South 1820–1860*.<sup>83</sup> Or, consider the presence and advocacy for slavery in northern states, such as New York,<sup>84</sup> Connecticut (whose legislature rejected emancipation legislation in 1777, 1780, and 1799),<sup>85</sup> and Pennsylvania.<sup>86</sup> In 1703, 42 percent of New York's households owned slaves and throughout the eighteenth century, "[a]mong the colonies' cities, only Charleston, South Carolina, had more" slaves per capita than New York.<sup>87</sup>

In Vermont, even after its abolition of slavery, Justice Stephen Jacob, who served on the Vermont Supreme Court, continued to own at least one slave, Dinah.<sup>88</sup> Purchased at age 30,

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<sup>82</sup> See, e.g., EMMA CHRISTOPHER, *SLAVE SHIP SAILORS AND THEIR CAPTIVE CARGOES: 1730–1807*, 120–21, 193–94 (2006) (discussing wage-earning sailors' acute appreciation of freedom, which derived in part from observing the treatment of slaves, who some sailors viewed as receiving treatment similar to that received by the sailors themselves); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 104–05 (1947) (observing that despite the relative mildness of slavery in New England and the frequent necessity of teaching slaves to read and write, many slaves preferred freedom to slavery); PHILIP GOULD, *BARBARIC TRAFFIC: COMMERCE AND ANTISLAVERY IN THE EIGHTEENTH-CENTURY ATLANTIC WORLD* 141–51 (2003) (examining the writings of Venture Smith, a slave who bought his freedom by working for wages when not needed by his master).

<sup>83</sup> WADE, *supra* note 32, at 94 (detailing the distinctions between disciplining slaves on a plantation versus in a city, and explaining how urban "masters" turned to police to do so).

<sup>84</sup> Adele Oltman, *The Hidden History of Slavery In New York*, NATION (Oct. 24, 2005), <https://www.thenation.com/article/hidden-history-slavery-new-york/> [<https://perma.cc/TR37-565L>] ("In 1991 excavators for a new federal office building in Manhattan unearthed the remains of more than 400 Africans stacked in wooden boxes sixteen to twenty-eight feet below street level. The cemetery dated back to the seventeenth and eighteenth centuries, and its discovery ignited an effort by many Northerners to uncover the history of the institutional complicity with slavery."); IRA BERLIN & LESLIE M. HARRIS, *SLAVERY IN NEW YORK* (2005).

<sup>85</sup> *Id.*; EDGAR J. MCMANUS, *BLACK BONDAGE IN THE NORTH* 169–70 (1973) ("Connecticut's lawmakers were extremely cautious about moving against slavery. Negroes were more numerous in the state than in the rest of New England combined, and racial anxieties were correspondingly more acute.").

<sup>86</sup> MCMANUS, *supra* note 85, at 162; GARY B. NASH & JEAN R. SODERLUND, *FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH* 55 (1991).

<sup>87</sup> Oltman, *supra* note 84.

<sup>88</sup> See Tim Johnson, *Vermont's 1777 Slavery Ban Had a Complicated Reality*, USA TODAY (Apr. 2, 2014, 1:41PM), <https://www.usatoday.com/story/news/na>

Dinah eventually became infirm and blind, after giving her “vigor” to Justice Jacob’s household.<sup>89</sup> No longer of use to him, Justice Jacob turned her out, making Dinah a public dependent of the local province.<sup>90</sup> When sued, Justice Jacob’s lawyer claimed that Dinah could not be a slave, because Vermont prohibited slavery.<sup>91</sup> On a motion to introduce Dinah’s bill of sale into evidence, Jacob objected. He and his lawyer stated, “we contend that no person can be held in slavery in this state; and the showing of a bill of sale can be no evidence that the unfortunate being supposed to be transferred by it as a human chattel, is a slave.”<sup>92</sup> In other words, because Vermont law banned slavery, purchased and unpaid persons like Dinah were not and could not be slaves at all. The Vermont Supreme Court agreed. Such horrific accounts of slavery are often obscured by the chattel practice in the South, which explains only one brand (albeit dominant) of American antebellum slavery.

Slavery was integral to the American economy and thus, it operated in dynamic and diverse ways. Beckert and Rockman explain that “slave-grown cotton was the most valuable export made in America.”<sup>93</sup> Slavery was so profitable to the growth of American capital that economists and sociologists have yet to thoroughly unpack “the capital stored in slaves.”<sup>94</sup> They do know, however, that the value in just slave bodies “exceeded the combined value of all the nation’s railroads and factories.”<sup>95</sup> It would be a mistake to consider slavery as only valuable to the agrarian south; the north invested in the system to maintain it.<sup>96</sup> Neither has the history of foreign investment, which “underwrote the expansion of plantation lands in Louisiana and Mississippi,” been fully excavated.<sup>97</sup> Relegated to the dustbins of history is the fact that the “highest concentration of steam power in the United States was . . . along the Mississippi rather than on the Merrimack.”<sup>98</sup>

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tion/2014/04/02/vermont-slavery-ban/7200493/ [https://perma.cc/2R62-PV89].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> BECKERT & ROCKMAN, *supra* note 42, at 1.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1–2.

Slavery played a decisive role in the northern U.S. economy.<sup>99</sup> The South did not distribute its goods alone;<sup>100</sup> northern mercantile dealers traded the cotton picked by Black children, women, and men.<sup>101</sup> As William Lloyd Garrison once wrote, the North partnered in the “inequality” of slavery.<sup>102</sup> William Gregg, a South Carolina industrialist claimed that northern cities thrived on the system slavery “built by the capital of Charleston.”<sup>103</sup> Slavery is an economic ecosystem, and its southern epicenter fueled economies in the north. Others declared slavery the “nursing mother of the prosperity of the North.”<sup>104</sup>

The point is that to understand the story of slavery, it should be viewed as dynamic and utterly complex, rather than geographically and temporally fixed. Here, I am not referring to the arguments used to justify it at the time of the antebellum chattel economy: *mores were different at the time; the forefathers were nonetheless brilliant and valiant, etc.* Rather, slavery cannot not be solely fastened to one American ex ante or ex post Thirteenth Amendment account. And, if slavery’s manifestations permeate beyond the borders of the American South and alongside diverse occupations, then perhaps the moral condemnation of it too might reach beyond the fixed agrarian version of it. This history preserving slavery while transforming it remains relevant to the story this Article tells.

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<sup>99</sup> *Id.* at 3.

<sup>100</sup> In a sterling exposé on the Connecticut Courant, then the largest news organization in Connecticut, reporter Liz Petry writes about the paper publishing slave-related advertisements, with the first appearing on April 29, 1765. The paper regularly featured advertisements appealing to the public to return and purchase slaves, or advertisements about the state’s “huge West Indies trade.” See Liz Petry, *Chapter Five: Slavery and the Courant*, HARTFORD COURANT (Sept. 29, 2002), <http://www.courant.com/news/special-reports/hc-newcourant.artsep29-story.html#nt=featured-content> [https://perma.cc/GJX4-KWFR] (also exposing the paper’s complicity in slavery by publishing fugitive slave advertisements: “What is even more damning, however, is the fact that by publishing these ads, the newspaper was promoting and protecting the very institution of slavery.”).

<sup>101</sup> BECKERT & ROCKMAN, *supra* note 42, at 2.

<sup>102</sup> See, e.g., HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 305 (1998) (“Garrison denounced racial discrimination in a firm resolution that assailed Northern segregationists for ‘acting as the bodyguard of slavery.’”).

<sup>103</sup> BECKERT & ROCKMAN, *supra* note 42, at 2.

<sup>104</sup> *Id.* (citing GENERAL CONVENTION OF AGRICULTURISTS AND MANUFACTURERS, AND OTHERS FRIENDLY TO THE ENCOURAGEMENT AND SUPPORT OF THE DOMESTIC INDUSTRY OF THE UNITED STATES 15 (Baltimore 1827)).



## II

PRESERVATION THROUGH TRANSFORMATION: POLICING,  
SLAVERY, AND EMANCIPATION

In March 1864, Congress introduced the Thirteenth Amendment. However, the proposed legislation "failed to receive the two-thirds vote necessary to forward it to the states for ratification."<sup>105</sup> The legislation was submitted before Congress in January 1865 and subsequently won congressional approval on January 31, 1865.<sup>106</sup> Nearly a year later in December of 1865, the Secretary of State certified the Thirteenth Amendment.<sup>107</sup>

By its adoption of the Thirteenth Amendment, Congress abolished slavery with one powerful stroke and reimagined it with another. Given this, one cannot but wonder: *was slavery ever truly meant to be abolished?* Despite the unseating of many southern "planters" in Congress after the Civil War, proponents of slavery in northern states like Delaware and southern states like Kentucky vigorously fought to salvage that explicit hierarchy and social caste system, underscoring Blacks' subordination and whites' supremacy under the law.

Indeed, the chief argument to extend slavery was that the Constitution protected it. For example, some senators argued that legally, Congress lacked the power and any tools to end slavery.<sup>108</sup> Even after the conclusion of the Civil War, senators argued at extended length whether the executive branch or legislature possessed the authority to end slavery.<sup>109</sup> Further, they queried even if members of Congress could abolish slavery through constitutional amendment, should they?

Much like Justice Taney's reading of the natural place of slavery in the legal and social order of the United States in *Dred Scott v. Sandford*, so too did some Senators calculate that slavery was part of the divine order of American law and society.<sup>110</sup> Senator Saulsbury, an anti-abolitionist, argued, "When the

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<sup>105</sup> Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 6 n.14 (1990).

<sup>106</sup> *Id.*; ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988).

<sup>107</sup> 13 Stat. 774 (1865).

<sup>108</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1366 (1864) ("The sinfulness of slavery or the evil of slavery among those with whom it exists is not to be invoked as affording power, in the absence of anything else, to make this proposed change.").

<sup>109</sup> *Id.* at 1420-24.

<sup>110</sup> *Id.*; see also *Dred Scott v. Sandford*, 60 U.S. 393, 427 (1856) (holding that according to the United States Constitution, persons of African descent are not citizens in the United States); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL*

Declaration of Independence was formed . . . every one of the colonies which helped to frame that declaration was a slave-holding colony, and most of the men who were members of that Congress were slaveholders.”<sup>111</sup> Senator Saulsbury’s point was that *if slavery was an evil*, it was one that the founders of the United States were willing to live with and support through law. Like Justice Taney, he reflected that when drafters of the Constitution wrote, “all men are created equal,” they knowingly and purposefully excluded slaves.<sup>112</sup> Thus, “[t]hey were speaking not of the rights of the subject race in their own midst.”<sup>113</sup>

Part II briefly traces the legislative debate on the abolition of slavery and the amended language of the Thirteenth Amendment that permitted slavery’s enduring legacy through prison labor. It argues that slavery’s persistence, inscribed in the Constitution, was not simply about *punishment of all prisoners*, but instead was rooted in the historical understanding that southern prisons were places purposefully associated with the punishment of Black people. Prisons, like plantations, were institutions that forced Black slaves to provide unpaid labor. This account is perhaps one of the clearest examples of slavery’s preservation through its transformation, as Congress made it so through the Thirteenth Amendment.

#### A. Conditioned Abolition

Slavery was “the ward if not the child of the Constitution” itself.<sup>114</sup> Slavery was so engrained in the structure of laws and relationships in the United States that even after the Civil War, lawmakers struggled to imagine a legal system devoid of it. Senator Daniel Clark of New Hampshire, one of the fiercest opponents of slavery urged, “the letters of guardianship be revoked,” and for slavery to meet its end.<sup>115</sup> Clark pressed Con-

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CITIZENSHIP AND THE CONSTITUTION (1989) (unpacking the role of the Constitution in shaping American citizenship).

<sup>111</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1365 (1864) (statement of Senator Saulsbury).

<sup>112</sup> *Id.*; see also JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS (Willmoore Kendall & George W. Carey eds., 1966) (1787) (encouraging the ratification of the Constitution, which permitted slavery in the new government).

<sup>113</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1365 (1864) (statement of Senator Saulsbury).

<sup>114</sup> *Id.* at 1369 (statement of Senator Clark).

<sup>115</sup> *Id.* Clark, a “Radical Republican,” wrote “the resolution that expelled ten southern senators for their support of the rebellion during the Civil War.” See, e.g., *Daniel Clark: A Featured Biography*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/generic/Featured\\_Bio\\_Clark\\_Daniel.htm](https://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_Clark_Daniel.htm) [<https://perma.cc/V9S6-MGF5>] (explaining how Clark fervently opposed slavery

gress to make “slavery impossible” by constitutional amendment that would “remain a part of the Constitution.”<sup>116</sup> To abolish slavery though executive order would only risk its reemergence, especially as the embers that remained burning existed not only in the South, but also in the North.

Congress sought to enforce the abolition of slavery with a constitutional amendment, fearing that the Emancipation Proclamation would not remain in effect after the war as a war powers act.<sup>117</sup> Senator Trumbull, who proposed the constitutional amendment warned, “any and all these laws and Proclamations, giving to each the largest effect claimed by its friends, are ineffectual to the destruction of Slavery.”<sup>118</sup> Skeptical of slavery’s abolition with executive orders and other similar instruments, Trumbull declared, “the only effectual way of ridding the Country of Slavery, so that it cannot be resuscitated, is by an Amendment of the Constitution forever prohibiting it within the jurisdiction of the United States.”<sup>119</sup>

The absence of Confederate legislators in Congress made the requisite two-thirds majority support more plausible. Encouraged by this, Congress moved forward. Representative James Ashley (Ohio), known as a “radical Republican” first introduced an anti-slavery amendment in the House of Representatives in December 1863.<sup>120</sup>

This original proposal prohibited slavery completely but sanctioned “involuntary servitude” as a punishment for a crime—implying that those who might be sentenced to hard labor were not being doomed to lifelong enslavement.<sup>121</sup> Senator Charles Sumner, a widely respected abolitionist, objected to the Punishment Clause. He proposed a model amendment based on France’s Declaration of the Rights of Man and of the Citizen that asserted the equality of all men.<sup>122</sup> This language

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and supported the constitutional amendment that would abolish it). Senator Clark warned that “[t]o restore this Union with slavery in it when we have subdued the rebel armies would be again to build your house on its smoking ruins, when you had not put out the fire which burned it down.” *Id.*

<sup>116</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) (statement of Senator Clark).

<sup>117</sup> Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 990 (2009).

<sup>118</sup> JOHN A. LOGAN, *THE GREAT CONSPIRACY: ITS ORIGIN AND HISTORY* 529 (1886).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> HOWE, *supra* note 117, at 994.

<sup>122</sup> *Id.* at 990; DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN DE 1789 [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN OF 1789] (“The representatives of the French people, organized as a National Assembly, believing that the

was widely rejected, condemned for being too expansive. For instance, Senator Howard expressed fear that Sumner's equality-based amendment might inspire wives to consider themselves equal to their husbands.<sup>123</sup> Sumner persisted, urging legislators to reject the Punishment Clause and "clean the statute book of all existing supports of slavery, so that it may find nothing there to which it may cling for life."<sup>124</sup>

Senator John Brooks Henderson co-authored the prevailing draft.<sup>125</sup> Henderson, a Missouri slave owner, favored adopting a variation of the 1787 Northwest Ordinance's slavery regulation,<sup>126</sup> which contained a punishment exception.<sup>127</sup> The Northwest Ordinance read: "There shall be neither slavery nor involuntary servitude in the said territory otherwise than in the punishment of crimes whereof the party shall have been duly convicted."<sup>128</sup> The Thirteenth Amendment's final version emerged from the Senate Judiciary Committee.<sup>129</sup> It incorporated most of the Northwest Ordinance's substance and permitted both involuntary servitude and perpetual slavery as constitutionally sanctioned punishments for committing crimes.<sup>130</sup>

Unfortunately, no record of the Committee's deliberations survives,<sup>131</sup> and the complete meaning of the Punishment Clause is not readily ascertainable from its "scant legislative history."<sup>132</sup> Further, the Thirteenth Amendment's authors remained silent on their intentions in the years following the Amendment's passage and ratification,<sup>133</sup> posing an additional

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ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man . . . Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen: 1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.")

<sup>123</sup> HOWE, *supra* note 117, at 995.

<sup>124</sup> Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 126 (2013).

<sup>125</sup> HOWE, *supra* note 117, at 990.

<sup>126</sup> *Id.*

<sup>127</sup> Gutierrez, *supra* note 124, at 125.

<sup>128</sup> NORTHWEST ORDINANCE art. 6 (1787).

<sup>129</sup> HOWE, *supra* note 117 at 990.

<sup>130</sup> *Id.* at 995.

<sup>131</sup> *Id.* at 991.

<sup>132</sup> Gutierrez, *supra* note 124, at 126.

<sup>133</sup> Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RIGHTS J. 395, 425 (2009).

obstacle to devising legislative intent. Historians debate whether the Punishment Clause had anything to do with race. To answer this, an examination of historical attitudes regarding mandatory penal labor may be instructive.

Here is what we know. The Senate rejected proposals to abolish slavery that stopped short of permitting slavery in prison. Prior state legislation may have been instructive; some states prohibited slavery but adopted a punishment clause exemption; others abolished the practice, but on a gradual scale. In Vermont, the first state to abolish slavery, the state constitution nevertheless continued to permit the bondage of children, male and female.<sup>134</sup>

The Minnesota legislature abolished slavery decades prior to the ratification of the Thirteenth Amendment, and its legislation reads: "There shall be neither slavery nor involuntary servitude in the State otherwise there is the punishment of crime whereof the party shall have been duly convicted."<sup>135</sup> Similarly, in 1848, the Wisconsin Constitution abolished slavery: "There shall be neither slavery, nor involuntary servitude in this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."<sup>136</sup> Colorado's Constitution also prohibits slavery, except for conviction of a crime.<sup>137</sup> Arguably, these laws mark another version of preservation through transformation: the federal government adopting states' laws, reflecting evolving norms and problems.

Interestingly, the Senate also rejected a milder version of the Punishment Clause, such as indentured servitude. One such bill that proffered the permissibility of indentured servitude in prison found inadequate support, and Senators quickly struck it down.<sup>138</sup> Indentured servitude, reserved largely for

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<sup>134</sup> Johnson, *supra* note 88 ("A closer look at the 1777 constitution shows a reality that's not so simple, even on paper. The slavery ban had loopholes. It applied to males age 21 and older and females 18 and older, not to children.")

<sup>135</sup> MINN. CONST. art. I, § 2 (1874).

<sup>136</sup> WIS. CONST. art. I, § 2 (1848); Tom Kertscher, *Even If Not Practiced, Is Slavery Still Allowable in Wisconsin as Punishment for a Crime?*, POLITIFACT (Nov. 25, 2016, 6:00AM), <https://www.politifact.com/wisconsin/statements/2016/nov/25/lena-taylor/even-if-not-practiced-slavery-still-allowable-wisc/> [https://perma.cc/TPC9-6V3N].

<sup>137</sup> COLO. CONST. art. II, § 26 (1876).

<sup>138</sup> Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 626–27 (2008) (citing WAGER SWAYNE, *THE ORDINANCE OF 1787 AND THE WAR OF 1861* 71–73 (1892)) ("Ashley's narrower version, which would have allowed only indentured servitude of prisoners, but not slavery, would have provided a clear textual basis for the claim that prisoners may be sentenced to hard labor but are still protected by the prohibition on slavery.")

white immigrants, was a less brutal chattel system than slavery. Slavery was almost exclusively reserved for Blacks brought to the United States.<sup>139</sup>

Instead, lawmakers expressed intense opposition to the abolition of slavery. One lawmaker argued for an amendment that stated, "No negro, or person whose mother or grandmother is or was a negro, shall be a citizen of the United States, or be eligible to any civil or military office, or to any place of trust or profit under the United States."<sup>140</sup> Senator Willard Saulsbury, Sr. (Delaware), known for stinging attacks of Abraham Lincoln from the Senate floor during the Civil War, vehemently opposed amending the Constitution to abolish slavery.<sup>141</sup> Senator Saulsbury argued that slavery contributed to the natural order of the United States and relations between Blacks and whites.<sup>142</sup>

Like other pro-slavery members of Congress and the judiciary, Saulsbury claimed that slavery was rooted in historic practice.<sup>143</sup> Saulsbury believed that the drafters of the Constitution never intended that the principle "all men are created equal"<sup>144</sup> would apply to the formerly enslaved. He and others insisted that the Amendment could not bind a state that did not independently ratify it,<sup>145</sup> and furthermore that slaves were property and that property belonged to the State.<sup>146</sup> Saulsbury claimed that whether slavery was morally wrong or evil was irrelevant. He argued that:

[P]roperty is not regulated and was not intended to be regulated by the Constitution of the United States. Property is the creature of the law of the State . . . . [I]f you can go into the States and attempt to regulate the relation of master and slave, you can go into a State and attempt to regulate the relation between parent and child or husband and wife. . . . [T]his provision . . . proposes by an amendment of the Constitution to sweep away and blot out hundreds of millions of dollars' worth of property in the States.<sup>147</sup>

That is, however shameful and inhumane abolitionists and some senators perceived slavery to be, their moral disregard of

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139 JOHN HOPE FRANKLIN, *THE MILITANT SOUTH 1800-1861* (1956); BLASSINGAME, *supra* note 32.

140 CONG. GLOBE, 38th Cong., 1st Sess. 1370 (1864).

141 *Id.* at 1364-67.

142 *Id.*

143 *Id.* at 1364.

144 *Id.* at 1365.

145 *Id.*

146 *Id.* at 1366.

147 *Id.*

the practice did not grant Congress authority to amend the Constitution because these were matters of private property that the government had no power to regulate.<sup>148</sup>

### B. The Punishment Clause: Slavery's Preservation Through Transformation

Some scholars suggest that the purpose of the Punishment Clause had little to do with race. In fact, some argue that while the Punishment Clause may serve to reinforce and legitimize inequality among citizens<sup>149</sup> and has been responsible for institutionalizing a system of relentless racial subordination,<sup>150</sup> its purported aim was most likely to preserve the prevalent practice of imposing penal labor as a criminal punishment rather than racial subordination.<sup>151</sup>

So, was the Punishment Clause rooted in racialized sentiment<sup>152</sup> or race-blind punishment for prisoners?<sup>153</sup> Did it serve to distinguish types of slavery or provide a pathway for transforming existing slavery? This debate has moved beyond academics to popular social commentators, who deliberate on this very point. According to one popular view, “[s]lavery appeared to be done once and for all, but that amendment . . . has

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<sup>148</sup> *Id.* (“The sinfulness of slavery or the evil of slavery among those with whom it exists is not to be invoked as affording power, in the absence of anything else, to make this proposed change.”).

<sup>149</sup> HOWE, *supra* note 117, at 990.

<sup>150</sup> Gutierrez, *supra* note 124, at 122–23; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (2010) (tracing the origins of “penal slavery” to contemporary mass incarceration).

<sup>151</sup> Ghali, *supra* note 138, at 609 (noting that “the drafters sought to free the slaves, but took pains to ensure that they did not inadvertently curtail the power of state governments to punish criminals”); Patrick Rael, *Demystifying the 13th Amendment and Its Impact on Mass Incarceration*, BLACK PERSP. (Dec. 9, 2016), <https://www.aaihs.org/demystifying-the-13th-amendment-and-its-impact-on-mass-incarceration/> [https://perma.cc/98GR-CLD4] (suggesting that popular accounts of the Thirteenth Amendment, including Ava DuVernay’s “powerful overview of the crisis of mass incarceration from the Civil War to the present,” are built on a “faulty foundational history”).

<sup>152</sup> In recent years, pundits have referred to the Thirteenth Amendment’s Punishment Clause as part of a conspiracy. As one recently wrote, “The 13th Amendment to the United States Constitution did not end slavery. In fact, it is the first time the word ‘slavery’ was ever mentioned in the Constitution and it is in this amendment where it is not abolished once and for all as we were taught, but given the constitutional protection that has maintained the practice of American slavery in various forms to this very day.” See Shaun King, *How the 13th Amendment Didn’t Really Abolish Slavery, But Let It Live on in U.S. Prisons*, N.Y. DAILY NEWS (Sept. 21, 2016), <https://www.nydailynews.com/news/national/king-13th-amendment-didn-abolish-slavery-article-1.2801218> [https://perma.cc/8ZPY-Z3JX].

<sup>153</sup> Rael, *supra* note 151.

a poison pill, a trapdoor, an escape clause embedded in its core."<sup>154</sup> At least one historian dismisses such claims as bounded in conspiracy theory and a lack of appreciation for the good faith of the Thirteenth Amendment's framers and judges who would later interpret the Punishment Clause.<sup>155</sup> Patrick Rael argues that "a closer look at the Amendment and its origins" reveals that the "trapdoor" argument "bear[s] little resemblance to the actual history."<sup>156</sup> According to Rael, "surely the abolition of slavery should not mean that no one (black or white) could ever be incarcerated for crimes they committed, right?"<sup>157</sup>

Complicating the case made by scholars like Patrick Rael (that punishment clauses were color blind) are the accompanying texts, such as in the Minnesota law:

*Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.<sup>158</sup>

Fugitive slave laws were among the cruelest tools that slavers and bounty hunters harnessed during the antebellum period, to incite fear in Blacks. These laws were especially terrifying because they indiscriminately imposed the costs of slavery on all Blacks, whether free, indentured, or enslaved.<sup>159</sup> The threat and anxiety of kidnapping and capture were not assuaged by living in a "free state" or being born free.<sup>160</sup> Nor did a state's prohibition of slavery inoculate Blacks from surveillance and abduction into slavery so long as the state recognized fugitive slave laws. Moreover, even when bounty hunters were not

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<sup>154</sup> See King, *supra* note 152; see also Chan, *supra* note 40 ("This past Black History Month, millions of students were told the story of how America abolished slavery 150 years ago with ratification of the 13th Amendment. . . . The problem is the story isn't true. We never actually abolished slavery.").

<sup>155</sup> Rael, *supra* note 151.

<sup>156</sup> *Id.* ("The exception clause alone did nothing to promote racial oppression.").

<sup>157</sup> *Id.*

<sup>158</sup> NORTHWEST ORDINANCE art. 6 (1787).

<sup>159</sup> These costs also extended to the white communities that wanted to live in equality with Blacks. Fugitive slave laws brought about destruction and disharmony in the lives of Blacks to be sure. Blacks hid or fled towns and cities to escape bounty hunters, who often captured and kidnapped them. In addition, such laws scarred entire communities. Whites who aided Blacks in hiding from bondsmen and bounty hunters were branded "complicit." They were harassed, whipped, and could be (and sometimes were) lynched. See WADE, *supra* note 32, at 218, 227.

<sup>160</sup> *Id.* at 214–25.



afoot in search of Blacks to retrieve and return to slavery, police surveilled and arrested Blacks seemingly for appearing not to belong in a place.<sup>161</sup>

The extent of police—and not bondsmen—arresting Blacks was significant. Although scholars are not able to pin down exact numbers, one writes that it was “strikingly high.”<sup>162</sup> For example, “police records in New Orleans for fifteen months in 1858-59 list 913 arrests of ‘runaway slaves.’”<sup>163</sup> The author further explains that “[s]ince no special crackdown had been ordered and newspapers noticed no increase in the problem [of runaway slaves], it is reasonable to assume that this was a routine catch.”<sup>164</sup> Similarly, in Baltimore, Blacks were routinely arrested on suspicion of being a “runaway” or because they were not in possession of their “papers.”<sup>165</sup> Police regularly transformed the latter into slaves, branding them “fugitive slaves,” whether they were of that status previously or not.<sup>166</sup> Even after the precipitous decline in slaves dwelling in Baltimore, local law enforcement charged hundreds of Blacks with being “without proper security.”<sup>167</sup> This type of surveillance and punishment directed at Blacks predated the Punishment Clause and set in place a pattern of race-based policing, arrests, and criminal convictions of Blacks, seemingly just for being.

Elsewhere, according to one reporter, “free blacks” in Vermont “were still being kidnapped and sold out of state” with impunity even after the constitutional abolition of slavery, because the state’s legislature failed to take action to prevent it.<sup>168</sup> Fugitive slave laws aside, the strategic use of law enforcement as a vehicle for the punishment of slaves was already in practice decades before slavery’s abolition.

In a chapter of *Slavery in The Cities*, examining the “web of restraints” on slaves, Richard C. Wade writes that “urban masters did rely more heavily on public agencies for discipline . . . . Ordinances provided that a master could send blacks to the local prison for ‘correction.’”<sup>169</sup> Slave owners “simply made out

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<sup>161</sup> *Id.* at 219.

<sup>162</sup> *Id.* at 218-19.

<sup>163</sup> *Id.* at 219.

<sup>164</sup> *Id.* (“Indeed, in the following month officials picked up 69 more, and this figure did not include blacks who claimed free status but could not prove it.”).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (citing BALTIMORE ORDINANCE App. 340 (1855)).

<sup>168</sup> Johnson, *supra* note 88.

<sup>169</sup> See WADE, *supra* note 32, at 94-95.

a slip for the number of lashes, gave it to the slave to be whipped, and sent him off to jail for punishment.”<sup>170</sup> This system, where the “offending slave is sent to the workhouse with a note and a piece of money, on delivering which he receives so many stripes, and is sent back again,” demonstrates that police and local governments were already in the service of maintaining slavery through accommodating private interests in surveilling and punishing Blacks.<sup>171</sup>

These anecdotes, including fugitive slave laws coinciding with state abolition laws, may not answer with absolute certainty whether framers of the Punishment Clause were motivated by racial animus when they inserted its language in the Thirteenth Amendment. Rather, they illuminate the contexts in which they were operating. They help us to understand that even in abolition, the capture and relegation of Black bodies back into slavery were not mere notions, but anticipated facts.

In *Ruffin v. Commonwealth*, an 1871 Virginia Supreme Court decision, the court offers stunning clarity about the rights that distinguish “freemen” from “convicted felons.”<sup>172</sup> The court claimed that rather than the rights bestowed by the Constitution, prisoners had “only such rights as the statutes may give him.”<sup>173</sup> The court referred to this type of punishment as “penal servitude”<sup>174</sup> for the effectual “common benefit, protection and security of the people.”<sup>175</sup> The court stated it was “essential” that those who committed crimes should “suffer punishment,” including the arduous work of busting rocks, digging trenches and tunnels, and other labor to build southern railroads.

In the case, Judge Joseph Christian ruled that a prisoner was a “slave of the State” and essentially dead to the world.<sup>176</sup>

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<sup>170</sup> See *id.*

<sup>171</sup> *Id.* at 95.

<sup>172</sup> 62 Va. 790, 796 (1871). Those who argue that the Punishment Clause is race neutral point out that the petitioner in this case was white.

<sup>173</sup> *Id.* at 790; Dennis Childs, *Slavery, the 13th Amendment, and Mass Incarceration: A Response to Patrick Rael*, BLACK PERSP, (Dec. 12, 2016), <https://www.aaihs.org/slavery-the-13th-amendment-and-mass-incarceration-a-response-to-patrick-rael/> [<https://perma.cc/R6PK-AY69>] (responding to Rael, *supra* note 151) (“What *Ruffin* expresses in boldface terms; and, more importantly, what the *experience* of Black imprisonment has revealed from the Convict Lease Camp, to the chain gang, to the prison plantation, to the modern penitentiary, is that systems of modern incarceration cannot be disentangled from their moorings in the original systems of mass racialized incarceration that Black people endured during chattel slavery such as the slave pen, the slave ship, and the plantation.”).

<sup>174</sup> *Ruffin*, 62 Va. at 796.

<sup>175</sup> *Id.* at 795.

<sup>176</sup> *Id.*

He reasoned "as a consequence of his crime, not only [has he] forfeited his liberty, but all his personal rights . . . . He is for the time being the slave of the State."<sup>177</sup> According to the ruling, not only is the prisoner stripped of any rights granted by the Thirteenth Amendment's abolition of slavery or the Fourteenth Amendment's Equal Protection or Due Process Clauses, "[h]e is *civilter mortuus* [civilly dead]; and his estate, if he has any, is administered like that of a dead man."<sup>178</sup>

Long before slavery's abolition, politicians debated penal slavery. Thomas Jefferson, author of the Northwest Ordinance (upon which the Thirteenth Amendment is modeled), sought to permit unqualified slavery until 1800, followed by a system of slavery as punishment for crimes.<sup>179</sup> Jefferson was influenced by Cesare Beccarria, an Italian criminologist who protested "barbarism in criminal law and procedure" and proposed perpetual slavery as a more humane alternative to capital punishment.<sup>180</sup> Beccarria did acknowledge that enslavement could be worse than death, given many slave owners' penchant for torturing their human chattel.<sup>181</sup>

The desire to preserve penal slavery reflected the prevalent sentiment of most nineteenth-century white Americans—even abolitionists often wrote such exceptions into anti-slavery texts.<sup>182</sup> Most white citizens believed that requiring criminals to perform hard labor provided genuine social utility, an idea that William Penn popularized in the early American colonies.<sup>183</sup> Penn promoted mandatory penal labor as a mechanism for enforcing public morality, and by the 1820's prison reform era, nearly every state adopted his "Pennsylvania system of punishment."<sup>184</sup>

By 1835, imprisonment, along with hard labor, was a common punishment for almost all crimes.<sup>185</sup> Some historians argue this historical background suggests that the Thirteenth Amendment's Punishment Clause was probably meant to preserve the existing system of prison labor.<sup>186</sup> What they overlook, however, is that those systems were already racialized.

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<sup>177</sup> *Id.* at 796.

<sup>178</sup> *Id.*

<sup>179</sup> HOWE, *supra* note 117, at 993.

<sup>180</sup> *Id.*

<sup>181</sup> Jefferson, a death penalty supporter, likely adopted Beccarria's philosophy on deterrence, rather than humanitarian, grounds. *Id.*

<sup>182</sup> Gutierrez, *supra* note 124, at 125.

<sup>183</sup> *Id.* at 127.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 127-28.

<sup>186</sup> *Id.* at 128.

Thus, whether the Thirteenth Amendment's Punishment Clause preserved penal labor as a longstanding criminal justice norm or not, it has functionally preserved slavery as a means of persistent racial subjugation. Following its inception, southern states almost immediately used the Punishment Clause to systematically "criminalize and incarcerate Blacks."<sup>187</sup> That is, "[a]ntithetical to its purpose, the Thirteenth Amendment turned from a shield protecting against one system of racial subordination (chattel slavery) to a sword enabling another (penal slavery)."<sup>188</sup> This legacy has persisted in alternate and pervasive forms of bondage, such as penal plantations, chain gangs, as well as public and private prisons.<sup>189</sup>

### C. Re-appropriation and Transformation of Black Labor Through Black Codes, Crop Liens, Lifetime Labor, Debt Peonage, and Jim Crow

Today, the Punishment Clause permits slavery to persist in the United States and the racialization of this given the demographic patterns of mass incarceration cannot be overlooked. Rather, unrepentant southern states, their legislators, and law enforcement innovated strategies to reimagine, resuscitate, and replicate slavery. They instantiated new forms of governance over Black bodies such as lifetime labor contracts, debt peonage, and Black Codes, which entrapped the newly emancipated and freed Blacks into unpaid labor and incarceration.<sup>190</sup> Some of these fixtures predated abolition and were retrofitted to Reconstruction and Jim Crow.

Thus, even while the Thirteenth Amendment granted freedom for Blacks trapped under slavery's extreme, burdensome weight, southern legislators, law enforcement, and private businesses reinvented the practice through new forms of servi-

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<sup>187</sup> *Id.* at 122–23.

<sup>188</sup> *Id.*

<sup>189</sup> HOWE, *supra* note 117, at 988.

<sup>190</sup> See, e.g., THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 41 (1965) (noting that a combination of the mass of "anti-free-Negro" legislation and extra-legal customs and practices entrapped the newly emancipated and freed Blacks in the same position they were in before the war); W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880* at 128–81 (1956); Roger Wallace Shugg, *Survival of the Plantation System in Louisiana*, 3 J. SOUTHERN HIST. 311, 324 (1937) (noting that "the subordination of freedmen to peonage" helped preserve the plantation system after the Civil War, entrapping the newly emancipated and freed Blacks into a slavery-like system).

tude, bondage, and threat.<sup>191</sup> Essentially, the Thirteenth Amendment, through the Punishment Clause, permitted the re-appropriation of Black bodies for noncompensated labor in southern states and eventually for northern ones too. Economist Jay Mandle referred to this condition as not enslaved but also not free.<sup>192</sup> Moreover, there were virtually no legal protections for newly freed Blacks from labor exploitation, whether they were freed sharecroppers or newly stamped "convicts."<sup>193</sup>

According to labor historian Herbert Hill, "[a]fter 1877 the willingness of national Republican administrations to make local and state governments responsible for law enforcement on racial matters contributed to the steady and disastrous degeneration of freedman's political and economic condition; one of the results was the extension of segregated racial employment patterns in the North and South alike."<sup>194</sup> It was in the South, where the "proliferation of the infamous Black Codes and Jim Crow laws, conspired to deliver newly freed blacks to the statutory status of nonslaves but not to the equal rights of American citizenship; they were still the bondsmen of subjugation and exploitation."<sup>195</sup> The result was slavery's expansion on southern tenant plantations. Nancy Virts writes: "[u]sing data from tax records, Roger Shugg found that the number of plantations in selected parishes in Louisiana increased by 286 percent be-

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<sup>191</sup> See, e.g., HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 13-15 (1985) (noting that, among other things, the proliferation of the Black Codes and Jim Crow laws, and the use of violence by labor unions to replace black workers effectively reinvented slavery).

<sup>192</sup> JAY R. MANDLE, *NOT SLAVE, NOT FREE: THE AFRICAN AMERICAN ECONOMIC EXPERIENCE SINCE THE CIVIL WAR* (1992).

<sup>193</sup> Not all Black laborers were exploited through the Punishment Clause. Some Black laborers were sharecroppers who, "in the absence of a program of land redistribution" and without meaningful protections against labor discrimination, found themselves without work and unable to compete in a labor market open only to whites. See *id.* at 13. For these Black Americans, sharecropping became their primary means of sustenance. However, sharecropping involved its own varieties of exploitation. Mandle describes this as a "system of plantation tenantry, in which compensation was made in the form of a share of the crop." *Id.* Importantly, "[i]n the southern context a substantial degree of landlord control was retained" in this system, whereby "managerial prerogatives, with their attendant social consequences, remained with the planter." *Id.* The burdens of the yield and success of the crops resided with the sharecroppers, while the management, determination of wages, or apportionment of the crops resided with landowners who were nearly all white.

<sup>194</sup> See, e.g., HILL, *supra* note 191, at 13-14 (1985) (explaining how, after Reconstruction, both custom and law deprived newly freed blacks of the equal rights of American citizenship).

<sup>195</sup> *Id.* at 14.

tween 1860 and 1880.”<sup>196</sup> Shugg’s work was definitive in exposing how the plantation system survived postbellum.<sup>197</sup>

Thus, rather than shrinking after the abolition of slavery, southern plantations increased in size. This also resulted in greater wealth production.<sup>198</sup> During the early years of Jim Crow, tenant plantations increased their size (in acreage) in Alabama, Georgia, Louisiana, Mississippi, and South Carolina “from 19 to 24 percent.”<sup>199</sup> The more acres of cotton planted, the more harvesting was necessary, and consequently the more labor that was needed to further these operations.<sup>200</sup> The Thirteenth Amendment provided the means for acquiring more slave labor in the postbellum slave economy.<sup>201</sup> The convict leasing system and Black Codes provided vital labor for the southern economy as discussed below.

### 1. *Black Codes*

Herbert Hill explained that Black Codes, “which most southern states began enacting as soon as the Union armies withdrew, severely restricted the newly freed Negro workers’ employment rights.”<sup>202</sup> Newly freed Blacks in many states became what Hill referred to as “semislaves.”<sup>203</sup> That is, plantation owners in the South “intended to keep ‘free’ Negro labor under permanent control,” and they found the means to do so through coercive contracts that bound Blacks to interminable future indebtedness that they could never pay off.<sup>204</sup> Such obstacles created barriers to full freedom and equality even after the ratification of both the Thirteenth and Fourteenth Amendments.

For example, “[t]hrough private acts of discrimination and racially discriminatory legislation, improvement of the Negroes

<sup>196</sup> Nancy Virts, *The Efficiency of Southern Tenant Plantations, 1900-1945*, 51 J. ECON. HIST. 385, 387 n.7 (1991) (citing ROGER SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA: A SOCIAL HISTORY OF WHITE FARMERS AND LABORERS DURING SLAVERY AND AFTER, 1840-1875*, at 239-41 (1966)).

<sup>197</sup> Shugg, *supra* note 190, at 311.

<sup>198</sup> Joseph D. Reid, Jr., *White Land, Black Labor, and Agricultural Stagnation: The Causes and Effects of Sharecropping in the Postbellum South*, 16 EXPLORATIONS ECON. HIST. 31, 31 (1979).

<sup>199</sup> Virts, *supra* note 196, at 387.

<sup>200</sup> Reid, *supra* note 198, at 31.

<sup>201</sup> HOWE, *supra* note 117, at 989-90, 1008-18.

<sup>202</sup> See, e.g., HILL, *supra* note 191, at 68 (describing restrictions imposed by Black Codes “designed to maintain what the legislators considered due subordination of the Freedmen”).

<sup>203</sup> *Id.* at 66.

<sup>204</sup> *Id.*

economic status was, in effect, already prohibited.”<sup>205</sup> Some states denied Blacks ownership of land within their territory and prohibited them from operating businesses. Under such constrained conditions, many slaves returned to work with their former owners, only to be subjected to discriminatory labor contracts. Criminal law became a key feature of contract enforcement to such a degree that whatever protections that the Bureau of Freedman, Refugees, and Abandoned Lands originally intended for former slaves were meaningless. Hill suggests 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.”<sup>206</sup> In fact, by 1872, it ceased to function, and Black Codes subverted the bureau’s marginal accomplishments.<sup>207</sup>

Black Codes provided an urgent legal solution to the demand for low- or no-wage labor after the ratification of the Thirteenth Amendment. Rather than individual planters illegally exerting control over their former slaves by forcing them to labor for no compensation in violation of the Thirteenth Amendment’s abolition clause, a legislative solution could provide the mechanism to acquire noncompensated laborers through exercise of the Punishment Clause. This demand for Black bodies and law intensified because Blacks bore the brunt of southern labor, which fueled the southern economy. Nor were southerners adaptable to the legal freedom Blacks had acquired.

In Alabama alone, prior to the Civil War, nearly half the state’s population consisted of enslaved Blacks, supplying no-wage labor.<sup>208</sup> Consequentially, the demand for Black, uncompensated laborers spurred the demand for law. Given President Andrew Johnson’s April 29, 1865 appeal “*Respecting Commercial Intercourse with Insurrectionary States*,” which ushered out “all existing military . . . in any manner restricting internal, domestic, and coastwise commercial intercourse and trade” in southern states and lifting “all restrictions” related to commerce placed on the South during the Civil War, Southern

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205 *Id.*

206 *Id.* at 68.

207 *Id.*

208 THE CIVIL WAR HOME PAGE, [http://www.civil-war.net/pages/1860\\_census.html](http://www.civil-war.net/pages/1860_census.html) [<https://perma.cc/48UZ-G2KN>]; David Martin, *The Birth of Jim Crow in Alabama 1865-1896*, 13 NAT’L BLACK L. J. 184, 185 (“In 1861 the population of Alabama consisted of 526,431 Whites, 2,690 free Blacks, and 435,080 slaves.”)

states could begin the process of rebuilding. And they did so by enacting Black Codes by December 1865.<sup>209</sup>

A cursory sample of the Black Codes include Alabama making it a punishable crime for “free negroes and mulattoes” to assemble in a disorderly manner.<sup>210</sup> Another Alabama Black Code made it “unlawful for any freedman, mulatto, or free person of color in [Alabama] to own fire-arms, or carry about his person a pistol or other deadly weapon under a penalty of a fine of \$100.”<sup>211</sup> An Alabama law announced that “[w]hipping and branding are abolished, as legal punishments, and a new punishment is introduced entitled, ‘hard labor for the county.’”<sup>212</sup> Some states’ codes also affixed excessive penalties for Blacks found guilty of such crimes.

In a classic instance of supply and demand, the Alabama Black Codes spurred the establishment of county courts, which were “established for the trial of misdemeanors.”<sup>213</sup> The anticipated increase in misdemeanors was in direct response to the types of conditions the Black Codes imposed on Black people. The newly enacted Black Codes responded to the demands of white southerners, who were keen to maintain their economic exploitation of Black labor.

The Black Codes were exhaustive, covering all manner of freedoms associated with housing, family, sex, farming, associations, possessing paperwork to farm and sell goods, and more. On December 19, 1865, Alabama amended its criminal statute providing among other things, that Blacks employed by farmers “shall not have the right to sell any corn, rise, peas, wheat, or other grains, any flour, cotton, fodder, hay, bacon, fresh meat of any kind, poultry of any kind, [or] animal of any kind . . . .”<sup>214</sup> Interestingly, this specific Alabama law, although amended after the Thirteenth Amendment, refers to “masters.”<sup>215</sup> The copiously delineated exclusions of Black people from the social and economic life of Alabama counties confirmed the preservation of slavery, despite the Thirteenth Amendment.

Some penalties for minor offenses were as high as fifty dollars. For Blacks who could not afford to pay such fines,

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209 EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION*, 7, 31 (1875).

210 *Withers v. Coyles*, 36 Ala. 320, 326 (Ala. 1860).

211 MCPHERSON, *supra* note 209, at 33.

212 *Id.* at 34.

213 *Id.*

214 *Id.* at 35.

215 *Id.*



Black Codes authorized their confinement to labor.<sup>216</sup> One such law reads, “for such reasonable time, not exceeding three calendar months for any one offense, as may be deemed equivalent to such penalty and costs.”<sup>217</sup> To measure the crippling and inhumane scale of Black Codes, consider that according to the Bureau of Labor Statistics, a \$50 fine in 1913 is equivalent to \$1259.28 in 2017.<sup>218</sup> Nor were such harsh measures reserved for adults. Minors were also subjected to burdensome weight of reorganized slavery.

In Mississippi, violation of Black Codes could result in penalties in excess of \$150.00.<sup>219</sup> Whites could not afford to pay such fines, let alone Blacks who were newly freed from the terrors of slavery. These laws were expressively retaliatory against Blacks, barring where they could live and forcing them to provide annual reports related to their homes and employment. Failure to comply with such laws authorized “every civil officer” and white person to “arrest and carry back to his or her legal employer any freedman, free Negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause.”<sup>220</sup> The Mississippi codes also established a series of vagrancy laws that broadened the scope of offenses and imposed fines of \$150 for violations.<sup>221</sup> If an individual could not pay the fine, the Mississippi codes provided that:

[A]ll fines and forfeitures collected under the provisions of this act shall be paid into the county treasury for general county purposes; and in case any freedman, free Negro, or mulatto shall fail for five days after the imposition of any fine or forfeiture upon him or her for violation of any of the provisions of this act to pay the same, that it shall be, and is hereby made, the duty of the sheriff of the proper county to hire out said freedman, free Negro, or mulatto to any person who will, for the shortest period of service, pay said fine or forfeiture and all costs.<sup>222</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/cgi-bin/cpicalc.pl> <https://data.bls.gov/cgi-bin/cpicalc.pl> [<https://perma.cc/Y4GM-M6GX>].

<sup>219</sup> *See Mississippi Black Codes*, HISTORY IS A WEAPON (citing Laws of the State of Mississippi, passed at a Regular Session of the Mississippi Legislature, held in Jackson, October, November, and December, 1965, Jackson, 1866, 82–93, 165–67), <http://www.historyisaweapon.com/defcon1/mississippiblackcode.html> [<http://perma.cc/DX6B-L8U8>].

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

Florida lawmakers enacted similarly discriminatory Black Codes in their state. For example, an Orlando city ordinance stated that “any person or persons who shall stand or gather on any sidewalk in the city of Orlando in such a manner as to obstruct the passage of persons along such sidewalk, shall, upon conviction, be fined in the sum of five dollars or be imprisoned in the calaboose for five days at hard labor.”<sup>223</sup> An equally cruel law enacted in Florida mandated that “every free negro over twelve years old, who should fail to have a guardian, should be fined and committed to jail until the fine should be paid.”<sup>224</sup> The law also stated that any person who bought or sold to any free “negro or mulatto . . . without the written consent of the selected guardian” would receive a fine.<sup>225</sup>

Perhaps the cruelest laws among the various Black Codes were those that provided for life-long leasing of Blacks, which clearly subverted the intent and force of the Thirteenth Amendment. In 1876, less than a decade after slavery’s abolishment, Georgia enacted legislation that authorized state prisons to lease out inmates for twenty years at the price of \$500,000.<sup>226</sup> Even if not explicitly stated, such laws were primarily intended for and targeted at Blacks. In 1878, Georgia leased out 1,239 prisoners for labor, 1,124 of which were Black.<sup>227</sup>

Black Codes in Louisiana dictated where Blacks could live, mandating that “no negro or freedmen shall be allowed to come within the limits of the Town of Opelousas, without special permission from his employer . . . . Whoever shall violate this provision, shall suffer imprisonment and two days work on the public streets, or shall pay a fine of two dollars and fifty cents.”<sup>228</sup> Blacks were routinely prohibited from holding public meetings by penalty of fine or prison labor. Other laws even forbade preaching, exhorting, “or otherwise declaim[ing] to congregations of colored people[ ] without a special permission in

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223 Carter v. State, 22 Fla. 553, 558 (Fla. 1886).

224 Budd v. Long, 13 Fla. 288, 311 (Fla. 1869).

225 *Id.*

226 William Andrew Todd, *Convict Lease System*, NEW GA. ENCYCLOPEDIA (2005), <https://www.georgiaencyclopedia.org/articles/history-archaeology/convict-lease-system> [http://perma.cc/3DWM-UARG].

227 Fletcher M. Green, *Some Aspects of the Convict Lease System in the Southern States*, in *ESSAYS IN SOUTHERN HISTORY* 116 (Fletcher M. Green, ed., 1949).

228 *Ordinance by the Board of Police of Opelousas, Louisiana, as Printed in a New Orleans Newspaper*, FREEDMEN & SOUTHERN SOCIETY PROJECT (1865) (alteration in original), <http://www.freedmen.umd.edu/Opelousas.html> [http://perma.cc/578V-HAWM].

writing from the president of the police jury."<sup>229</sup> Such laws not only restored the vestiges and badges of slavery, but they also served as a gateway to slave labor through discriminatory criminal laws and enforcement.<sup>230</sup>

Blacks bore the express and direct costs of oppressive Black Codes. Black Codes also strategically undermined the business and familial interests of some white southerners. Whites who were sympathetic to the interests, freedom, and equality of Blacks were constrained in their social and business relationships with them. Whites could not sell, lend, or give firearms to Blacks in some states.<sup>231</sup> Laws made clear these prohibitions extended to "mulattos," which raises concerns about the state constraining and infringing upon interracial family relationships.<sup>232</sup> A white father, concerned about the safety of his offspring, was legally barred from providing a weapon to his mulatto child. Statutes barred whites from interfering in unfair contractual relationships, making it a punishable crime to employ an individual still "under contract" with another employer.<sup>233</sup> For this latter offense, a white contractor could be fined as much as \$500.00 for employing or attempting to employ a Black person whose existing employment resembled slave labor.<sup>234</sup>

Finally, it would be a mistake to confuse Black Codes as a product that only southern states cultivated, produced, and maintained. By far, the Illinois Black Codes were among the most notorious and cruel in the country.<sup>235</sup> Samuel Wheeler,

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<sup>229</sup> WALTER L. FLEMING, 1 DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL & INDUSTRIAL 1865 TO THE PRESENT TIME 280 (1906).

<sup>230</sup> Louisiana also enacted a law that provided "every adult freed man or woman shall furnish themselves with a comfortable home and visible means of support within twenty days after the passage of this act," and anyone failing to do so "shall be immediately arrested by any sheriff or constable . . . and . . . hired out . . . to some citizen, being the highest bidder, for the remainder of the year." JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 101-02 (1884) (alteration in original).

<sup>231</sup> EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 33 (1875) ("Also, making it unlawful for any person to sell, give, or lend fire-arms to any freedman, free negro, or mulatto, under a penalty of not less than \$50 not more than \$100 at the discretion of the jury.")

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 34

<sup>234</sup> *Id.*

<sup>235</sup> Tara McClellan McAndrew, *Illinois Issues: Slave State*, NPR (Oct. 20, 2016), <http://nprillinois.org/post/illinois-issues-slave-state#stream/0> [<http://perma.cc/8EKH-9E6K>] ("Illinois' first Constitution stated that 'slavery and involuntary servitude' could not be 'introduced' in the state, except as criminal punishment.

State Historian of Illinois, stated that the codes were based on “the presumption that if you’re an African-American, you are enslaved.”<sup>236</sup> Blacks “could not vote; testify or bring suit against whites; gather in groups of three or more without risk of being jailed or beaten; and could not serve in the militia and thus were unable to own or bear arms.”<sup>237</sup> Furthermore, if free Blacks visited Illinois for more than 10 days, they could be arrested, suffer repeated fines, and even auctioned.<sup>238</sup> Penalties for disobeying the Black Codes “resembled those of slave states and slave-labor plantations.”<sup>239</sup>

## 2. *Convict Leasing*

In their detailed history of convict leasing in Alabama, William Warren Rogers and Robert David Ward write that the new penal codes established after ratification of the Thirteenth Amendment contained “infamous ‘Black Codes’ that discriminated against the newly [freed slaves], and resembled the ‘Slave Codes’ of antebellum days.”<sup>240</sup> They explain that “[m]ost importantly, the new code enabled county courts to hire out vagrants, mostly blacks, to work out their sentences” and as a result, “[w]orking for the county became the punishment for a number of offenses.”<sup>241</sup> They describe this system, which came to be known as “convict leasing” in the following:

Persons guilty of felonies were sent to the state penitentiary, while the county jails housed those convicted of misdemeanors plus costs. From there the prisoners could be leased for “hard labor” either within the county or elsewhere. The Black Codes . . . remained an accepted and defended mode of punishment and profit.<sup>242</sup>

In Alabama and elsewhere, eventually even penitentiaries began leasing out felons. Wardens served as key administra-

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But it required that already indentured slaves in Illinois be ‘held to their contracts,’ and it legalized the use of slaves in southern salt mines.”).

<sup>236</sup> *Id.*

<sup>237</sup> *Early Chicago: Slavery in Illinois*, WWTW, <http://interactive.wttw.com/a/dusable-to-obama-explore-early-chicago-slavery-illinois> [<http://perma.cc/PGL5-JAEG>].

<sup>238</sup> McAndrew, *supra* note 235.

<sup>239</sup> *Id.* (citing CHRISTOPHER P. LEHMAN, *SLAVERY IN THE UPPER MISSISSIPPI VALLEY, 1787–1865: A HISTORY OF HUMAN BONDAGE IN ILLINOIS, IOWA, MINNESOTA AND WISCONSIN* (2011)).

<sup>240</sup> William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, in *THE ROLE OF CONVICT LABOR IN THE INDUSTRIAL DEVELOPMENT OF BIRMINGHAM* (1998) 1, 1 (citation omitted).

<sup>241</sup> *Id.* at 1.

<sup>242</sup> *Id.*

tors of such system, often directly facilitating the leasing of Black convicts. Rogers and Ward argue that wardens rationalized convict leasing by claiming Blacks (who were “rapidly becoming the penitentiary’s majority population”) did perceive confinement as punishment.<sup>243</sup> Wardens claimed that Blacks “should feel the hardships of labor in iron and coal mines.”<sup>244</sup> Thus, Alabama’s wardens leased Blacks to railroad builders, iron miners, and coal entrepreneurs. The result was a public/private partnership, whereby the state surrendered control, received payment from industrialists, and continued to supply formerly freed persons to these labor markets. There were neither health and safety requirements nor any state oversight to guard against abusive labor practices.

Just as Black slaves lacked legal rights and protections under the antebellum chattel system, so too did the slaves of the Punishment Clause system. Thus, it comes as little surprise that this system forced Blacks to carry out unhealthy and risky work. Working in the mines resulted in the deaths of 41% of Alabama’s prisoners in 1870.<sup>245</sup> In one incident alone in 1911, when the Banner Mine exploded, nearly 130 “convicts” were killed.<sup>246</sup> Even then, the racial disparities in the resulting casualties were quite significant. Of the convict-miners killed in the explosion, twelve were white and 116 were Black.

Perverse incentives only further entrenched convict leasing, and every southern state adopted the practice, including Tennessee, Texas, Georgia, Florida, Arkansas, Mississippi, and Louisiana.<sup>247</sup> The very idea of convict leasing was an innovation for the South, which was desperate to maintain life as it existed prior to the Civil War and Thirteenth Amendment’s ratification. Black subordination was critical to maintaining political and social tradition as well as an ordered way of southern life.<sup>248</sup>

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 2.

<sup>247</sup> *Id.* at 4.

<sup>248</sup> The maintenance of racial power hierarchies in the United States generally, and the South particularly, unfolded in myriad ways with the use of violence such as lynchings and threats of violence such as burning crosses to forge compliance and obedience in Blacks to the imposition of humiliating customs to elevate the social standing of whites. In the South, this ranged from fiercely guarded customs denying Black women and men standard courtesies accorded to whites such as those associated with names (i.e. Mrs., Miss, and Mr.); requiring Blacks, including women and girls, to cede sidewalks when white women and girls passed along, forcing the perceived inferior class of persons into street gutters; and forbidding Blacks to make eye contact with whites among other ways of maintaining social

In fact, in 1921 Mississippi lawmakers enacted a criminal law explicitly forbidding “social equality” with fines up to \$500 and “imprisonment not exceeding six [6] months” at the discretion of the court.<sup>249</sup> The law established that “[a]ny person, firm or corporation who shall be guilty of printing, publishing, or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality . . . between whites and negroes, shall be guilty of a misdemeanor.”<sup>250</sup> In Florida, a state law was “drawn up by a commission whose report praised slavery as a ‘benign’ institution deficient only in its inadequate regulation of black sexual behavior, made disobedience, impudence, and even ‘disrespect’ to the employer a crime.”<sup>251</sup>

As an economic matter, convict leasing was southern innovation consistent with social mores. For example, the state improved its business relationships with industrialists and en-

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order. See, e.g., *Virginia v. Black*, 538 U.S. 343, 354, 357 (2003) (Thomas, J., dissenting) (stating that “cross burnings have been used to communicate both threats of violence and messages of shared ideology” and that “often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful”); *Hamilton v. Alabama*, 376 U.S. 650 (1964) (reversing the contempt conviction of Miss Mary Hamilton, a Black woman who refused to answer in an Alabama court when called only by first name, and establishing that Blacks were entitled to the naming social conventions—such as Mrs. or Miss—reserved solely for whites in the South); *IDA B. WELLS-BARNETT, ON LYNCHINGS* 47 (2002) (explaining that white citizens of the south “are wedded to any method however revolting, any measure however extreme, for the subjugation of the young manhood of the race” and that they “have cheated him out of his ballot, deprived him of civil rights or redress therefor in the civil courts, robbed him of the fruits of his labor, and are still murdering, burning and lynching him”); David Niose, *The Tragedy of Southern Cultural Obsession*, *PSYCHOL. TODAY* (July 12, 2015), <https://www.psychologytoday.com/us/blog/our-humanity-naturally/201507/the-tragedy-southern-cultural-obsession> [<https://perma.cc/37BW-PAA7>] (“Indeed, the racism that defined the century following the Civil War was hardly less egregious than that preceding it. Segregation, inequality, and gross injustices—approximately 4000 African Americans were lynched, mostly in the South, in the decades following the Civil War—were social norms, and Confederate symbolism often accompanied these vile practices. Why anyone today, even one with ancestors who fought for the Confederacy, would wish to associate with such symbols is mind-boggling.”); *Negro Who Refused to Answer to First Name in Court Is Upheld*, *N.Y. TIMES*, Mar. 31, 1964, at A1 (“The N.A.A.C.P. Legal Defense and Educational Fund had asked the Supreme Court to review the case. It argued that the addressing of Negroes familiarly by their first names was a key element in the South’s ‘racial caste system.’”).

<sup>249</sup> “WILLIAM HEMINGWAY, ANNOTATED MISSISSIPPI CODE § 1142e (Supp. 1921), renumbered as MISS. CODE ANN. § 2339 (1942), omitted from current 1972 compilation.

<sup>250</sup> *Id.*

<sup>251</sup> FONER, *supra* note 106, at 200.

trepreneurs. Moreover, convict labor “cost less than free labor,” and as a result, “industrialists bid for it without flinching.”<sup>252</sup> Convict leasing was no more offensive to southern business sensibilities than slavery had been only years before. If anything, it was easier to rationalize—*after all, these laborers were prisoners who deserved punishment.*

North Carolina enacted laws prohibiting free Blacks from migrating to the state. One such law mandated that free Blacks who migrated to North Carolina were required to remove themselves within 20 days.<sup>253</sup> Failure to leave the state would result in a fine of \$500, and individuals who were unable to pay were “liable to be held in servitude, and at labor for a term of time not exceeding ten years.”<sup>254</sup>

North Carolina also enacted a law to criminalize Black loitering or being a vagabond. Again, Blacks could be liable for a fine, and if unable to pay, could be sentenced to labor:

If any free negro, or mulatto, in any county of this State, who is able to labour, shall be found spending his or her time in idleness and dissipation, or having no regular or honest employment or occupation which he or she is accustomed to follow . . . in case he or she shall fail to give such security, or shall not pay the costs and charges of the prosecution, it shall be lawful for the said court, and they are hereby required to hire out such free negro, or mulatto for a term of time to service and labour, which to them may seem reasonable and just, and calculated to reform him or her to habits of industry and morality, not exceeding three years for any one offence.<sup>255</sup>

So, what do these accounts tell us?

Convict leasing generated significant profits for lessees and states. Moreover, because it was so profitable (and popular), corruption and collusion were known and accepted aspects of the business.<sup>256</sup> States adopted expansion measures to increase both the supply of convicts and the leasing of them. For

<sup>252</sup> Rogers & Ward, *supra* note 240, at 1.

<sup>253</sup> AN ACT CONCERNING SLAVES AND FREE PERSONS OF COLOR: REVISED CODE NO. 105, 1826 c 21 s 1, <https://docsouth.unc.edu/nc/slavesfree/slavesfree.html> [<https://perma.cc/BJW9-BSC3>].

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1826 c 21 s 5.

<sup>256</sup> Rogers & Ward, *supra* note 240, at 1. (“State prison inspectors made cursory inspections quarterly, as exploitation and corruption increased. All the while the number of prisoners, mostly blacks, grew.”).

example, by the mid-1880s, Alabama began leasing Black slaves to industrialists in other states.<sup>257</sup>

Convict leasing persisted into the twentieth century, although it was eventually replaced by chain gangs.<sup>258</sup> For some legislators, the abolition of convict leasing was a matter of promoting and protecting the human rights of Blacks. After all, the system of convict leasing was corrupt on multiple levels. Many of the so-called convicts were simply poor individuals rounded up for their vagrancy or loitering. In addition, the policing of vagrancy and loitering was racialized so that, more often than not, Blacks were rounded up for this “crime” when whites were not. Finally, even when whites were arrested for vagrancy and loitering, they were less often subjected to convict leasing. Sadly, because convict leasing was so profitable, states sought to increase the supply of workers by intensifying their policing and arresting of Blacks.

Yet there were other problems with convict leasing, which affected the lives of poor and working-class whites. It undermined a broader economy for poor whites displaced by the Black convicts forced to labor without wage on behalf of the state. As between paying a low wage to the state to rent Blacks versus a meager wage for poor whites, businesses frequently chose the former. As a result, white laborers who desired better working conditions in mines lacked the power to pressure mine owners for better, safer work environments. Mine owners showed no hesitation in replacing poor white laborers with even cheaper Black labor.

The convict-leasing system broke down by the 1920s with Florida and Alabama being the last states to abolish the system in the mid-1920s. Problematically, the system fostered the postbellum normalization of forced labor. Convict leasing favored the interest of cheap labor over fair wages and degraded organized labor. In the end, those most harmed by the system were Blacks who were the chief suppliers of labor under that horrific system. According to one report, leased convicts in

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<sup>257</sup> Early attempts to shut down or redefine convict leasing failed. Financial panics in the late 1890s ruined any plans of reform. *Id.* at 2.

<sup>258</sup> *Slavery By Another Name: Chain Gangs*, PBS, <http://www.pbs.org/tpt/slavery-by-another-name/themes/chain-gangs/> [<https://perma.cc/LTY9-TX5F>] (“In the early 1900s, dramatic stories of the abuse and wretched conditions convict laborers began to be publicized through trials and newspaper accounts. . . . Chain gangs developed as a popular solution to that problem.”).



southern states had a death rate that was almost ten times higher than non-leased convicts.<sup>259</sup>

### 3. *Coercion, Fraud, and Debt Peonage*

Another version of preserving slavery was practiced in Alabama, where federal Judge Thomas Goode Jones heard the “shocking account[s]” of Blacks forced into slave labor under the pretense of having committed a crime.<sup>260</sup> Jones, an appointee of Theodore Roosevelt to the United States District Court for the Middle District of Alabama in 1901, heard first-hand accounts of terrified Blacks, returned to the conditions of slavery decades after its abolition. He wrote to then Attorney General, Philander C. Knox, “[t]he plan is to accuse the negro of some petty offense, and then require him, in order to escape conviction, to enter into an agreement to pay his accuser so much money, and sign a contract, under the terms of which his bondsmen can hire him out until he pays a certain sum.”<sup>261</sup>

According to Judge Jones, “[t]he negro is made to believe he is a convict, and treated as such.”<sup>262</sup> Dozens of Blacks would be rounded up at once and kept “in the stockade at one time.”<sup>263</sup> Judge Jones “urged the attorney general to send a special investigator into the area quickly.”<sup>264</sup> It was clear that slavery had never really disappeared from parts of the south.<sup>265</sup> Recasting and remolding slavery relied upon complicity of local white citizens, law enforcement, and even local judges.

As a result, and like a virulent disease, slavery transformed to various types of slaveries. One model of this included states transferring the debt a Black person owed it to a private party, such as in Jackson Morrison’s case. He owed the state of Georgia \$100 in 1901 “likely the consequence of some petty or imagined infraction of the Jim Crow South’s endless litany of legal restrictions on the poor.”<sup>266</sup> In this case, Moses Jordan paid the fine and transferred Jackson’s debt to himself. Fran-

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<sup>259</sup> *Convict Lease System*, DIGITAL HISTORY (2016), [http://www.digitalhistory.uh.edu/dispatch\\_textbook.cfm?smtid=2&psid=3179](http://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtid=2&psid=3179) [<https://perma.cc/WJ4H-E6FQ>] (noting that in 1873, 25% of all black lease convicts died).

<sup>260</sup> BLACKMON, *supra* note 36, at 170–73.

<sup>261</sup> *Id.* at 171.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *United States v. McClellan*, 127 F. 971 (S.D. Ga. 1904) (maintaining the application of the Thirteenth Amendment to uphold 1867 law forbidding peonage); *Negro Peonage and The Thirteenth Amendment*, 13 YALE L.J. 452 (1904).

<sup>266</sup> La Toya Tanisha Francis & Patrick Rael, *Mentha Morrison: A Story of Debt Peonage in Jim Crow Georgia*, BLACK PERSP. (Oct. 4, 2018), <https://www.aaihs>

cis and Rael note, “[t]hese laws demanded no consent from the debtor, they simply transformed enfeebled African Americans’ civic obligation to the state into a labor contract with a private party.”<sup>267</sup>

In this case, Jordan “sold” Jackson’s labor to Colonel James Smith in Oglethorpe County, Georgia. Even after twenty months of service, Smith refused to acknowledge Morrison’s debt satisfied. To secure her husband’s release, Mentha Morrison, a nursing mother, offered her services to Smith to “accelerate the repayment of her husband’s debt.”<sup>268</sup> Smith worked Mentha “like a man, in all kinds of weather, rain, cold and all, and was not allowed to nurse her six months old babe except at dinner and night, the consequence of which was that it came near to starving.”<sup>269</sup> After eighteen more months of slave labor, Mentha fled the plantation and her husband escaped, only to be returned to the Colonel by local law enforcement. Sadly, when Jackson Morrison was asked by federal officials whether he had been held against his will, he became a “reluctant witness,” denying his illegal confinement, likely “concluding that the federal government’s ability to protect his family was far weaker than the power of Colonel Smith and his connections . . . to assault it.”<sup>270</sup> Morrison’s fate is unknown; his case was closed.

Yet another strain of post antebellum slavery included an updated, modernized version of fugitive slavery: capturing and confining Blacks who previously owed no debts and had not been convicted of any crimes. This type of involuntary servitude, called “debt peonage,” relied on “criminal warrants on manufactured charges to intimidate these helpless colored people into binding themselves and their wives and children into ‘peonage or involuntary service.’”<sup>271</sup>

Debt peonage expanded the categories of slavery.<sup>272</sup> In such instances, peonage dictated that a person’s indebtedness

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.org/mentha-morrison-a-story-of-debt-peonage-in-jim-crow-georgia/ [https://perma.cc/9CEJ-XMWH].

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* (citing PETE DANIEL & PAUL SCHIPPER, THE PEONAGE FILES OF THE U.S. DEPARTMENT OF JUSTICE, 1901–1945, at 1:0021 (1989)).

<sup>272</sup> PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901–1969 at 108 (1972) (explaining that Blacks suffered “the major burden of Southern peonage.”). Only recently has the United States Department of Agriculture acknowledged the “long and arduous struggle” of Black farmers to “own land and to operate independently.” U.S. DEPT OF AGRIC., BLACK FARMERS IN AMERICA, 1865–

to her employer obligated her by law to continue in service to that employer until the obligations were satisfied and the debt paid off. For Black farmers, economically coercive crop liens often morphed into debt peonage, tethering Blacks to the tobacco, sugar cane, and tobacco belts of the south well into the twentieth century.<sup>273</sup> Debt peonage systems were prone to abuse and corruption: the manufacturing of indebtedness by white plantation owners and the complicity of local whites affirming poor Blacks' indebtedness to local law enforcement. One of Georgia's most infamous planters, William Eberhart became well known for "conspiracy to hold blacks in a state of peonage."<sup>274</sup> Witnesses described Eberhart as a ruthless, sadistic, post-antebellum planter who lied about debts owed him by Blacks. Aided by his brother-in-law, who was a justice of the peace, he captured whole families, claiming they owed him money, sexually assaulted Black women, forced their husbands into beds with other women, and tortured their children.<sup>275</sup>

These various types of slaveries transformed from one to another and back again. Debt peonage morphed into convict labor, convict labor turned into convict leasing, and these transformed to chain gangs.<sup>276</sup> One U.S. attorney remarked how "easily" planters "by some strange process, convert free labor into convict labor."<sup>277</sup> Investigators noticed how planters propagated "pretend charge[s]" against Blacks, including women and children. False charges of adultery could result in eighteen months peonage against a woman or stealing a watermelon could result in eight months as a peon.<sup>278</sup>

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2000, at 1 (2002), <http://www.federationsoutherncoop.com/blkfarmhist.pdf> [<https://perma.cc/BJN3-AKQG>].

<sup>273</sup> *Id.* at 1 n.1 (2002) ("The abolition of slavery did not end domineering systems of command and control by some white planters over most black farm operators. The undermining of opportunity for blacks to develop independent farming, in many cases by the use of peonage, existed well into the post-World War II era.").

<sup>274</sup> BLACKMON, *supra* note 36, at 172.

<sup>275</sup> *Id.* at 172-74 (recounting the tragic case of Charley Calloway, "witnesses said that Eberhart brutally beat Calloway's wife, Mary, and then at gunpoint forced the woman to 'yield her body to the lustful embraces' of the plantation owner.").

<sup>276</sup> DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

<sup>277</sup> Francis & Rael, *supra* note 266.

<sup>278</sup> *Id.*

#### 4. *Children and Binding Out: Apprenticeship Laws*

Transitions from slavery to “freedom” also meant that children whose parents had long been sold or traded off were orphaned. These children were as vulnerable to corrosive laws and coercive law enforcement practices as adults. Laws that imposed fines for loitering and vagrancy made them particularly vulnerable to being reunited with slavery of a different hue and color.<sup>279</sup> But, what were orphaned Blacks to do? How could they avoid the perils of convict leasing (even while many did not), including being forced into the dangerous and even deadly coal mines?<sup>280</sup> Blackmon describes, “[d]uring 1888 and 1889, seven of the black laborers forced into the Slope No. 2 mine” in Alabama “were children under the age of ten.”<sup>281</sup> A large number of teenagers died in that mine’s collapse.<sup>282</sup>

Apprenticeship laws were yet another setback for Black youth. These laws, like vagrancy legislation, were drafted with no reference to race, which shaped the impression of race-neutrality and avoided conflict with the Civil Rights Act of 1866. The more esteemed history of apprenticeships in the United States dated back to the colonial period when children were trained with skilled crafts-persons and could later forge a life of economic independence for themselves. During the seventeenth and eighteenth centuries, it was not unusual that a child might lose one or both parents to death from disease, starvation, or other causes. In such instances, the orphaned children were “bound out” to other families, crafts-makers, and others. However, the trajectories were vastly different for Blacks than for their white counterparts, particularly after the formal abolition of slavery.<sup>283</sup>

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<sup>279</sup> See FONER, *supra* note 106, at 200–01 (“Virtually all the former Confederate states enacted sweeping vagrancy and labor contract laws, supplemented by ‘anti-enticement’ measures punishing anyone offering higher wages to an employee already under contract.”).

<sup>280</sup> See BLACKMON, *supra* note 36, at 96–97 (describing the conditions in coal mines to which convict laborers, including children, were sent) (“The private guards who staffed the slave labor mines and camps were vulgar, untrained, and often inebriated. Placed under the complete control of the companies and businessmen who acquired them, the laborers suffered intense physical abuse and the deprivation of food, clothing, medical care, and other basic human needs.”).

<sup>281</sup> *Id.* at 97.

<sup>282</sup> *Id.*

<sup>283</sup> *Orphan to Apprentice: African American Orphans*, MUSEUM OF EARLY TRADES & CRAFTS, <http://www.metc.org/orphan-to-apprentice/#1495649413617-93c72e4a-c39a> [<https://perma.cc/98BN-NXNG>] (“Free African American orphans were treated differently from their white counterparts when being bound out. Instead of being bound to a tradesman in the cities, African American orphans were often bound out to be farm laborers or servants.”).

As Eric Foner writes, “the most bitter complaints centered on apprenticeship laws, which seized upon the consequences of slavery—the separation of families and the freedmen’s poverty—as an excuse for providing planters with the unpaid labor of black minors.”<sup>284</sup> Generally, apprenticeship laws permitted judges to bind Black youth with white employers based on the judgment that the child’s “parents were deemed unable to support them.”<sup>285</sup> There were numerous problems. These practices could be imposed without the consent of parents.<sup>286</sup> Former owners often had the first preference.<sup>287</sup> And the laws permitted “moderate corporal chastisement.” Often, Black youth were bound out to plantations and subjected to cruelties identical in scope and scale to the treacheries and horrors of antebellum slavery. At other times, older youth or adults were bound out as apprentices. In fact, “in some areas, courts bound out individuals for uncompensated labor who could hardly be considered minors; one tenth of the apprentices in one North Carolina county exceeded the age of sixteen, including an ‘orphan’ working at a turpentine mill and supporting his wife and child.”<sup>288</sup> Finally, although white apprentices could be released at ages eighteen (women) and twenty-one (men), Black men could be in apprenticeship until age thirty in North Carolina and Black women until age twenty-one.<sup>289</sup>

## 5. Conclusion

Convict leasing, debt peonage, chain gangs, and various other slaveries demonstrate the preservation and persistence of involuntary servitude and malleability of slavery post antebellum. In *United States v. Eberhart*, Judge Newman pointed out that prior to the Thirteenth Amendment, “[n]o such system as [peonage] ever existed in Georgia.”<sup>290</sup> He wrote, “African slavery existed, but this was the ownership of Africans and persons

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<sup>284</sup> See FONER, *supra* note 106, at 201 (“Although apprenticeships had a venerable history in Europe and America, these arrangements bore little resemblance to the traditional notion of training youths in a skilled trade.”)

<sup>285</sup> *Id.* Strangely, apprenticeships were a foreboding precursor to the family welfare system, which has also been criticized for its treatment of Black children and families, including separations and placement of children in state custody. See also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vi-vii (2002) (recounting a meeting with Black women whose children had been taken away by the state) (“Each woman told me about her battle with the child welfare system to get her children back.”).

<sup>286</sup> See FONER, *supra* note 106, at 201.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> 127 F. 252, 252 (N.D. Ga. 1899).

of African descent as chattels. There could not be, therefore, in Georgia, any such thing as holding persons under this system of peonage, or returning them to it."<sup>291</sup> Instead, peonage was a modern legal innovation, which the court found wrongful.<sup>292</sup> However, Judge Newman concluded that the court was incapable of providing relief for Black women, men, and children caught within this perverse system—at least under the 1867 act to abolish peonage. The court's reasoning is thin—asserting the new peonage is “nothing like the old system of peonage,” because the old system involved voluntary contracting.<sup>293</sup> He concluded, “[t]o merely characterize acts in restraint of personal liberty as peonage is not sufficient to make them such—certainly not under this act of Congress.”<sup>294</sup>

The historic racialization of convict slavery in its modern form is simply inescapable. During and after slavery, states adopted various means to punish Blacks and preserve slavery through the criminal justice system. Southern incarceration emerged from this very cruel intersection of race, labor, and prison. For example, planters rented their slaves to prisons or forced their slaves into prison as punishment for crimes such as running away, showing disrespect, or disobedience.

Sex mattered too and is sadly under-studied in relation to post antebellum slaveries. Sexual assaults and abuse, while horrific, frame only one aspect of poor women's experiences on twentieth century plantations and in jails.<sup>295</sup> In an effort to “counteract the withdrawal of black women from field labor,” legislatures in Texas and Louisiana “mandated that contracts ‘shall embrace the labor of all the members of the family able to work.’”<sup>296</sup> However, what such accounts point to is the uniquely vulnerable statuses of Black women and girls, which rendered them particularly susceptible to exploitation, deception, and coercion post antebellum slavery. Either to protect themselves or the men and children in their lives, young girls and women made difficult choices just as Mentha Morrison.

The late nineteenth century convict leasing system encouraged police officers to “[round] up” Blacks, “and [charge them] with minor offenses like loitering so they could be ‘sold’

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291 *Id.*

292 *Id.*

293 *Id.* at 253.

294 *Id.*

295 FONER, *supra* note 106, at 200.

296 *Id.*

to plantation owners as cheap labor.”<sup>297</sup> Convict leasing, though not the explicit subject of this Article, nonetheless helps to demonstrate its arguments related to slavery’s enduring racialized legacy facilitated through the criminal justice system and government complicity in that system. For example, although the Bureau of Justice Statistics “has not published state-level estimates of the U.S. jail population—which makes up 30% of the total mass incarceration,” what experts in the field know, based on data collected through the census and other government data, is that, like the convict leasing system, states trade prisoners throughout the country.<sup>298</sup>

### III

#### MODERN SLAVERY’S TRANSFORMATIONS

The Thirteenth Amendment permits slavery of incarcerated persons and in turn, state and federal prisons force prisoners into the modern labor conditions of slavery. State and private prisons hone the practice of producing inmates through disparate racialized policing practices, thereby, intentionally or not, replicating slavery and strategically utilizing its core labor force: poor Blacks primarily, but also Latinos, immigrants, Native Americans, and poor whites. During Jim Crow, this phenomenon is depicted through folklore, chain gangs, prison labor songs like Long John,<sup>299</sup> legends such as the tale of John

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<sup>297</sup> Sebastian Murdock & Hayley Miller, *Louisiana Sheriff Wants “Good” Prisoners to Stay Jailed for Their Free Labor*, HUFFINGTON POST (Oct. 12, 2017), [https://www.huffingtonpost.com/entry/louisiana-sheriff-steve-prator-prisoners\\_us\\_59dfa0bee4b0fdad73b2cded](https://www.huffingtonpost.com/entry/louisiana-sheriff-steve-prator-prisoners_us_59dfa0bee4b0fdad73b2cded) [https://perma.cc/T5L2-4SYL].

<sup>298</sup> *States of Incarceration: The Global Context*, PRISON POLY INITIATIVE (2018) [hereinafter PRISON POLICY INITIATIVE, *The Global Context*], <https://www.prisonpolicy.org/global/> [http://perma.cc/8ETZ-3Y2J].

<sup>299</sup> See “*It’s a Long John*”: *Traditional African-American Work Songs*, HIST. MATTERS, <http://historymatters.gmu.edu/d/5758/> [https://perma.cc/4852-VQV7] (“John and Alan Lomax recorded southern musicians (African-American, white, and Mexican-American) for the Library of Congress. They recorded ‘Long John,’ a work song, sung by a man identified as ‘Lightning’ and a group of his fellow black convicts at Darrington State Prison Farm in Texas in 1934. Black prisoners working in gangs to break rocks and clear swamps relied on the repeated rhythms and chants of work songs (originating in the forced gang labor of slavery) to set the pace for their collective labor. ‘Long John’ mixed religious and secular concerns, including the notion of successful escape from bondage, a deeply felt desire of both slaves and prisoners.”); John A. Lomax, *Afro-American Spirituals, Work Songs, and Ballads* (1934), <https://www.loc.gov/folklife/folkcat.html> [https://perma.cc/69CZ-LDEE] (order from the Library of Congress) (recording songs by Lightning John and inmates at Darrington State Prison Farm, Sandy Point, Texas); see also SAM COOKE, *CHAIN GANG* (RCA Victor 1960) (“All day long they work so hard//Till the sun is goin’ down//Working on the highways and byways//And wearing, wearing a frown//You hear them moanin’ their lives away//Then you

Henry,<sup>300</sup> and disturbing images.<sup>301</sup> However, prison slavery has been put to much more astonishing use and purpose in the twentieth and twenty-first centuries. As one commentator writes about chain gangs, the images, look “like 21st century slavery,” where “the photos of men on the chain evoke [that] dark period.”<sup>302</sup>

#### A. Incarceration and Preservation

For whom does the bell of slavery continue to toll? The story of mass incarceration is prolifically and compellingly articulated in the case of men, particularly Black males.<sup>303</sup> In *Chokehold*, Professor Paul Butler offers a framework to understand the enduring legacy of Black oppression: the chokehold. Its focus is the criminal justice system and how Black males fit into it. Butler persuasively argues that law enforcement arbitrarily, but aggressively polices Black men, instilling fear, promoting anxiety, and contributing to the chilling number of Black men in prison.<sup>304</sup> Butler explains that the chokehold is

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hear somebody sa-ay . . . I'm goin' home one of these days . . . Give me water, I'm thirsty//My, my work is so hard.”)

<sup>300</sup> See William Grimes, *Taking Swings at a Myth, With John Henry the Man*, N.Y. TIMES (Oct. 18, 2006), <http://www.nytimes.com/2006/10/18/books/18grim.html?mcubz=1> [<https://perma.cc/6KPZ-Q854>] (describing one theory of John Henry that he was arrested in New Jersey, but sent south “to the Virginia State Penitentiary, where the warden, desperate to raise revenue, had begun leasing prisoners to the railroad for 25 cents a day”).

<sup>301</sup> Carl Weis, *A Chain Gang*, LIBR. CONGRESS (1898), <https://www.loc.gov/item/92522563/> [<https://perma.cc/YR8E-AP5G>].

<sup>302</sup> Jessica Jerreat, ‘It Looks Like 21st Century Slavery’: Photographer’s Images of Arizona’s Chain Gangs Evoke a Dark Period in the Country’s History, DAILY MAIL (Jan. 29, 2014, 7:32 PM), <http://www.dailymail.co.uk/news/article-2547778/Images-Arizona-chain-gang-evoke-dark-history-slavery.html> [<http://perma.cc/TV2H-EW2L>] (“A young African-American stands in an Arizona prison, loops of chains slung over his shoulder. It could easily be an image from 200 years ago, but this was taken only last year.”); Steve Fraser & Joshua B. Freeman, *21st Century Chain Gangs: The Rebirth of Prison Labor Foretells A Disturbing Future of America’s “Free Market” Capitalism*, SALON (Apr. 19, 2012, 3:06 PM), [http://www.salon.com/2012/04/19/21st\\_century\\_chain\\_gangs/](http://www.salon.com/2012/04/19/21st_century_chain_gangs/) [<https://perma.cc/UZ6A-ZEEE>].

<sup>303</sup> See BUTLER, *supra* note 34 (focusing exclusively on Black men in his riveting book about mass incarceration); Eric Holder, Att’y Gen., U.S. Dep’t of Just., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013) [hereinafter Holder, Remarks at ABA Meeting], <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<http://perma.cc/2VX5-DPH3>]; President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/L6A7-DVES>].

<sup>304</sup> BUTLER, *supra* note 34, at 47–69 (devoting a chapter to *Controlling The Thug*).



intentional and omnipresent in the lives of Black men. His metaphorical use of chokehold suggests a broader system or trap from which Black men cannot escape.<sup>305</sup>

Professor Butler uses the chokehold to frame a theory related not only to contemporary police misconduct cases against Blacks but also to understand the nation's reliance on the chokehold as a means of shaping and understanding racial and socio-economic hierarchies. On one hand, the chokehold constructs a "thug" of potentially every Black man—rich or poor—"based on the presumption that every African American man is a criminal."<sup>306</sup> On the other hand, he argues the chokehold is an economic device whose roots plant in the horrific gardens of slavery.<sup>307</sup> As such, abusive policing of Blacks has little to do with actually hating Black men and more to do with an economic system that gains its sustenance and momentum through the churning of Black lives through its criminal justice system.

This framework is particularly persuasive and ironic coming from Butler, a former (disenchanted) prosecutor. Butler claims that the criminal justice system is "broke on purpose."<sup>308</sup> He identifies the numerous ways this is so by recounting the tragic deaths of Black men and boys beaten to death, shot, and otherwise killed by law enforcement.<sup>309</sup> Professor Butler argues that these conditions do not come about or emerge out of mistake or thin air. How else to reconcile, he begs, "some of the things that police did to African American people, during the time of the country's first African American president."<sup>310</sup> His answer: the chokehold.<sup>311</sup>

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<sup>305</sup> Professor Butler addresses race and policing in current terms.

<sup>306</sup> BUTLER, *supra* note 34, at 18 ("We have a perfect storm. The Chokehold constructs African American men as thugs, and in some ways, African American men concur—except not as applied to our individual selves."); *id.* at 30.

<sup>307</sup> See *id.* at 6.

<sup>308</sup> See *id.* at 5.

<sup>309</sup> See, e.g., *id.* at 1–15 (describing ways in which "law and social practices [are] designed to respond to African American men," by first enabling the "social and legal construction of every black man as a criminal or potential criminal" then creating law and policy based on this construction and detailing how this process informs law enforcement brutality towards Black men and boys).

<sup>310</sup> *Id.* at 1.

<sup>311</sup> Arguably, the "system" finds many ways other than criminal justice to harness an asphyxiating grip on Black people's lives, such as through unequal wages, segregated and underfunded schools, discrimination in housing, and much more. Equally, as Butler acknowledges, but does not address, the chokehold grips at the lives of Black girls and women too; their lives crushed by the deadly weight and force of social and political inequality. Historic patterns of sexual abuse, state interference with their reproduction and parenting (even the state taking away their children as plantation owners once did with their fore-

The chokehold is a maneuver “in which a person’s neck is tightly gripped in a way that restrains breathing.”<sup>312</sup> Justice Thurgood Marshall described the chokehold thusly: the victim’s “face turns blue as he is deprived of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly.”<sup>313</sup> The advertent act of compressing airflow may result in unintentionally crushing the victim’s hyoid, trachea, or larynx.<sup>314</sup>

The chokehold is a powerful metaphor for the criminal justice vice grip that constrains and threatens Black Americans. Yet, for all the attention on mass incarceration, typically policy-makers and even academics ignore women. Professor Butler’s important account even purposefully considers only men, curi-

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bears’ children), and relentless stigmatization comprise the ways in which the state stamps its mark on their lives.

<sup>312</sup> *Id.* at 3; see also Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/V26N-77YS>] (“Mr. Garner’s final words—‘I can’t breathe’—became a rallying cry for a protest movement. On screens large and small, his last struggle replayed on a loop.”); Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <https://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html> [<https://perma.cc/94WG-AQ78>] (describing Eric Garner’s death, the authors report “the officer immediately threw his arm around the man’s neck and pulled him to the ground, holding him in what appears, in a video, to be a chokehold. The man can be heard saying ‘I can’t breathe’ over and over again as other officers swarm about”).

<sup>313</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 118 (1983). Law enforcement policies typically describe chokeholds as acts that include “any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.” Goldstein & Schweber, *supra* note 312. The chokehold is so dangerous that the New York Police Department (and others across the U.S.) banned the use of the procedure over twenty years ago. The cases of chokeholds range—the use of gripping an arm around the person’s neck, sitting on the neck, or pressure to the neck from a nightstick. *Lyons*, 461 U.S. at 118; Ian Fisher, *Kelly Bans Choke Holds By Officers*, N.Y. TIMES (Nov. 24, 1993), <https://www.nytimes.com/1993/11/24/nyregion/kelly-bans-choke-holds-by-officers.html> [<https://perma.cc/GSS9-KACX>] (“The New York City Police Department has issued an order banning the use of choke holds, the restraining maneuvers that cut off the flow of blood and oxygen to the brain and have been blamed in the deaths of suspects here and around the nation.”); Isabel Wilkerson, *Expert Testifies Choking Caused Stewart’s Death*, N.Y. TIMES (Oct. 29, 1985), <https://www.nytimes.com/1985/10/29/nyregion/expert-testifies-choking-caused-stewart-s-death.html> [<https://perma.cc/Q2PP-RA7E>] (“Six transit police officers are on trial in the death of Mr. Stewart, who lapsed into a coma early on Sept. 15, 1983, after his arrest for scrawling graffiti at a Manhattan subway station. He was taken to Bellevue, bruised, and died 13 days later without regaining consciousness.”).

<sup>314</sup> See *Lyons*, 461 U.S. at 117 n.7 (Marshall, J., dissenting).

ously leaving out Black women, despite the dramatic rise in female incarceration over the past thirty years.<sup>315</sup>

In 2013, Attorney General Eric Holder addressed the American Bar Association (ABA) Annual Meeting, urging the academics, lawyers, and judges in attendance to consider the urgency of penal reform.<sup>316</sup> In a transcript of his remarks, they exclusively focused on the status of men as the subjects of state incarceration.<sup>317</sup> One year later, in a speech addressing the National Association for the Advancement of Colored People (NAACP), President Barack Obama similarly spoke to the need for criminal justice reform as a means to address staggering rates of mass incarceration and dire prison conditions.<sup>318</sup> Like Attorney General Holder, President Obama beseeched his audience to wake up to the perilous conditions of men ensnared by the nation's criminal justice system and failed drug war.<sup>319</sup> Neither thought to reference women.

Women are the forgotten casualties of the carceral state. Their sex seemingly renders them invisible to the politicians, activists, and academics who concentrate their energies on mass incarceration. According to the Women's Prison Association, the leading national policy center devoted to qualitative and quantitative researching women in prison,<sup>320</sup> the population of women in prison grew by 832% in the period from 1977 to 2007.<sup>321</sup> This is twice the rate as that of men during that same period.<sup>322</sup> Another, more conservative estimate, identifies the rate of female incarceration grew by over 750% during roughly this same period.<sup>323</sup> Either account paints a troubling portrait of mass incarceration; more than one million women are tethered to the criminal justice system as a parolee, probationer, or prisoner in the United States.<sup>324</sup>

Indeed, the United States incarcerates more women than any other nation in the world: more than China, India, and

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<sup>315</sup> Michele Goodwin, *Invisible Women: Mass Incarceration's Forgotten Casualties*, 94 TEX. L. REV. 353, 357 (2015).

<sup>316</sup> Holder, Remarks at ABA Meeting, *supra* note 303.

<sup>317</sup> *Id.*

<sup>318</sup> Obama, *supra* note 303.

<sup>319</sup> *Id.*

<sup>320</sup> *Quick Facts: Women & Criminal Justice—2009*, WOMEN'S PRISON ASS'N (Sept. 2009) [hereinafter *Quick Facts* 2009], [http://www.wpaonline.org/wpaassets/Quick\\_Facts\\_Women\\_and\\_CJ\\_2009\\_rebrand.pdf](http://www.wpaonline.org/wpaassets/Quick_Facts_Women_and_CJ_2009_rebrand.pdf) [<http://perma.cc/XW5Y-HX8F>].

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Why It Matters*, WOMEN'S PRISON ASS'N, <http://www.wpaonline.org/about/why-it-matters> [<http://perma.cc/V27P-MUGS>].

<sup>324</sup> *Quick Facts* 2009, *supra* note 320.

Russia combined.<sup>325</sup> That is, American women, like the California firefighters, comprise the largest group of female inmates in the world. They too are part of the prison economy. Moreover, women of color, especially Black women, are directly implicated in this. The Bureau of Justice Statistics further highlights the problem and its impacts on families: “[s]ince 1991, the number of children with a mother in prison has more than doubled, up 131%,” while “[t]he number of children with a father in prison has grown [only] by 77%.”<sup>326</sup>

What accounts for why women’s presence in the prison industrial complex is invisible or hidden? One reason is that the scope of mass incarceration is so extreme. The United States experiences the highest rate of incarceration of any country in the world—more than Germany (85 in 100,000), France (96 in 100,000), Italy (111 in 100,000), England (153 in 100,000), and Spain (159 in 100,000) combined, because the United States incarcerates about 743 per 100,000.<sup>327</sup> Mostly, the rate of incarceration can be attributed to drug offenses.<sup>328</sup> And women now outpace men in convictions for drug offenses.

The market in policed bodies, which is the American prison system, is perhaps an even more dangerous and pernicious chokehold than what Professor Butler describes precisely because it operates as an open secret. For a nation insistent and even successful in its opposition to sweatshops, it ignores those within its own borders.

Incarceration successfully masks slavery and it does so cunningly through the unrelenting vestiges of racial bigotry, finely tuned fear, and stereotypes. Viewed in this light, prison is not about disproportionate and racialized policing and the exploitation of labor, but rather community safety. Despite rates of criminality mapping similarly between Blacks, Whites, and Latinos, most white Americans presume that Blacks are

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<sup>325</sup> ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, *WORLD FEMALE IMPRISONMENT LIST 2* (4th ed. 2017).

<sup>326</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (2008).

<sup>327</sup> ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, *WORLD PRISON POPULATION LIST 3*, 5 (11th ed. 2015). A recent Pew Center on the States report adds another layer to this data. It reports that 1 in 31 Americans is under the supervision of the U.S. criminal justice system (through incarceration, probation, or parole). See JENIFER WARREN, THE PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5* (2009).

<sup>328</sup> See E. ANN CARSON, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2013*, at 16 (2009) (reporting that “more than half of prisoners serving sentences of more than a year in federal facilities were convicted of drug offenses”).

more dangerous, prone to criminality, and likely to commit more crimes. Drug use statistics offer an important point of relevance given the overwhelming number of individuals incarcerated associated with drug use or distribution.<sup>329</sup>

Data from 2015 shows that “about 17 million whites and 4 million African Americans reported having used an illicit drug within the last month.”<sup>330</sup> However, imprisonment rates for Blacks and whites vary dramatically. According to the NAACP, “African Americans and whites use drugs at similar rates, but the imprisonment rate of African Americans for drug charges is almost 6 times that of whites.”<sup>331</sup>

Arguably, police brutality detracts attention from other points of vital inquiry in the criminal justice system, including prison slavery. The modern masks of slavery: mass incarceration, pay to play probation, modern chain gangs, and the exploitation of cheap labor emerge along the color line just as Antebellum slavery was anchored in the same. In 2014, “African Americans constituted 2.3 million, or 34%, of the total 6.8 million correctional population.”<sup>332</sup> According to one of the nation’s chief civil rights organizations, the NAACP, “African Americans are incarcerated at more than 5 times the rate of whites.”<sup>333</sup> For African American women, their rate of incarceration is at least twice that of their white counterparts.<sup>334</sup> Three key points of examination further explicate the racial color line of modern incarceration:

- Nationwide, African American children represent 32% of children who are arrested, 42% of children who are detained, and 52% of children whose cases are judicially waived to criminal court.<sup>335</sup>
- Though African Americans and Hispanics make up approximately 32% of the US population, they comprised 56% of all incarcerated people in 2015.<sup>336</sup>

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<sup>329</sup> See *id.*

<sup>330</sup> *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> [http://perma.cc/WZK7-23YQ].

<sup>331</sup> *Id.* (“African Americans represent 12.5% of illicit drug users, but 29% of those arrested for drug offenses and 33% of those incarcerated in state facilities for drug offenses.”).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

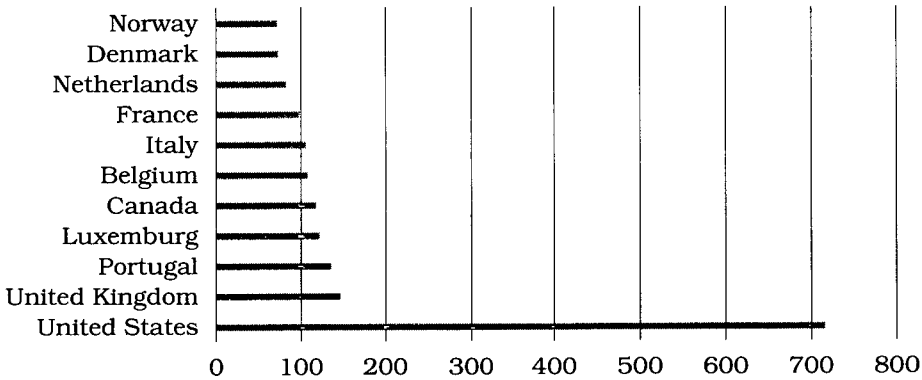
<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

- If African Americans and Hispanics were incarcerated at the same rates as whites, prison and jail populations would decline by almost 40%.<sup>337</sup>

Thus, the scale of mass incarceration is quite significant. Its scope exceeds that of all other developed and peer nations. In 2015, there were 2,173,800 incarcerated persons in the United States.<sup>338</sup> One compelling reference point can be found in data on the founding NATO member nations. Among the founding NATO members, the United States incarcerates at a rate nearly ten times that of Norway and Denmark; nearly eight times that of France, and well over four times that of the United Kingdom.<sup>339</sup> The chart below crystalizes the comparison.

INCARCERATION RATES AMONG FOUNDING NATO MEMBERS  
(PER 100,000 POPULATION)



According to the Prison Policy Initiative, “these data reveal that even the U.S. states that incarcerate the smallest portion of their own citizens are out of step with the larger community of nations.”<sup>340</sup> Advocacy organizations have long urged the U.S. “to reevaluate their own hefty reliance on incarceration, we recommend that they look to the broader global context for evidence that incarceration need not be the default response to larger social problems.”<sup>341</sup> Sadly, however, even such reasonable advice misses the point as to why the system of mass incarceration remains ubiquitous and persistent, and the answer is

<sup>337</sup> *Id.*

<sup>338</sup> DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf> [<http://perma.cc/HH4T-FA4G>].

<sup>339</sup> PRISON POLICY INITIATIVE, *The Global Context*, *supra* note 298.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

located in color line articulated by Frederick Douglass and W.E.B. DuBois more than a century ago.

By comparison to its European counterparts, incarceration in the United States is not only racialized; it is dramatically more expansive than that of peer nations, such as the United Kingdom, Switzerland, France, Italy, German, and others.<sup>342</sup> In fact, “the sheer size of the federal prison system alone—larger than the total prison population of every nation on the planet except for seven (China, Russian Federation, Brazil, India, Thailand, Mexico, and Iran)”<sup>343</sup> exposes the extent to which incarceration has become normalized and by extension, its dirty secret of prison labor exploitation and slavery.

These issues would deserve address, even if it were not for the overwhelming and deeply troubling racialized patterns of modern incarceration that resemble antebellum slavery’s chilling past. Parallels, such as racialized policing and prosecutions, captivity, forced labor, unpaid wages, and the trading of bodies (moving prisoners across states to labor elsewhere is a common feature), can be drawn from slavery’s past too. Yet, important distinctions exist, such as prisoners may petition for redress of violations to constitutional rights and civil liberties. Antebellum slaves were denied such opportunities and they had no rights. Today, such rights arguably could protect prisoners from cruel and unusual punishment but might do little to address the glaring problem of legalized servitude as a matter of constitutional law and policy norms.

## B. Transformation Through Perversity and Complicity

Much like the past, however, the laws of supply and demand create perverse incentives and practices that continuously fuel the system that legitimizes slave and slave-like labor. For example, prisoners in Texas, Arkansas, and Georgia do not receive any pay.<sup>344</sup> In California, former inmate Phillip Ruiz, reported earning 9 cents a month while working as a bread maker, which was too low to buy even a soda at the commissary.<sup>345</sup>

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<sup>342</sup> See *id.*

<sup>343</sup> *Id.*

<sup>344</sup> Kanyakrit Vongkiatkajorn, *Inmates Are Kicking Off a Nationwide Prison Strike Today*, MOTHER JONES (Sept. 9, 2016, 10:00 AM) <http://www.motherjones.com/politics/2016/09/national-prison-strike-inmates/> [<https://perma.cc/7AXX-GR2Z>].

<sup>345</sup> *Id.* (“You have to save up for six months just to buy some food products . . . . It reminds me of a sweatshop on a huge, much larger level.”).

The more prisons are built and the more beds are installed to house the incarcerated, the more inmates are needed—and the more policing becomes tainted by the perception and actuality of racial profiling, selective enforcement, and fulfilling quotas. Law enforcement's response to Louisiana's recently enacted Justice Reinvestment Package (JRP) underscores my point.<sup>346</sup> In Louisiana, known as one of the most notorious slave states during the Antebellum period (for its harsh labor conditions, raping of Black women, and violence against slaves including maiming, cobbling, and other punishments), law enforcement has pushed back against the JRP proposal to reduce mass incarceration and systemically release prisoners.<sup>347</sup> That may not be surprising given the state's disconcerting reputation as having the highest incarceration rate in the United States, with significant, enduring racial disparities. For example, according to the Prison Policy Initiative, in Louisiana, sixty-six percent of the prison population is Black.<sup>348</sup>

In Louisiana, unpaid slave labor of prisoners has been described as a “necessary evil”<sup>349</sup> by those who desire its continuation—similar to the claims made two hundred years ago by plantation owners. Lawmakers and wardens claim they would do away with the system, but it is simply too profitable. Psychologically, in these former antebellum communities, uncompensated servitude is entrenched in the foundation of policing and incarceration.

Arguably, Sheriff Steve Prator, who has voiced public opposition to the Louisiana reforms, represents the class of law enforcement that confuses the purpose of prison with the ability to turn a profit. He told reporters, “In addition to the bad ones . . . they're releasing 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 money.”<sup>350</sup> Surely the purpose of prison is not to run sweatshops or car washes, but rather “to

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<sup>346</sup> Murdock & Miller, *supra* note 297.

<sup>347</sup> See Andrea Livesey, *Conceived in Violence: Enslaved Mothers and Children Born of Rape in Nineteenth-century Louisiana*, 38 J. SLAVE & POST-SLAVE STUD. 373 (2017).

<sup>348</sup> See, e.g., *Blacks Are Overrepresented in Louisiana Prisons and Jails*, PRISON POLY INITIATIVE (2010), [https://www.prisonpolicy.org/graphs/2010percent/LA\\_Blacks\\_2010.html](https://www.prisonpolicy.org/graphs/2010percent/LA_Blacks_2010.html) [<http://perma.cc/E9V8-DDVR>].

<sup>349</sup> Eli Rosenberg, *Louisiana Sheriff Argues Against Releasing “Good” Prisoners Needed for Money-Saving Mental Labor*, INDEP. (Oct. 13 2017, 2:58 PM), <https://www.independent.co.uk/news/world/americas/louisiana-sheriff-prisoner-comments-incarceration-hard-labour-modern-slavery-steve-prator-caddo-a7998866.html> [<https://perma.cc/Z7ZJ-3C2B>].

<sup>350</sup> Murdock & Miller, *supra* note 297.



keep the community safe and to make sure that nobody is incarcerated any longer than necessary.”<sup>351</sup>

Marc Mauer, Executive Director of the Sentencing Project, explains, “[t]his has been going on for a very long time, and many of the local sheriffs welcome it because it’s bringing more money into their jurisdictions.”<sup>352</sup> The strong connection between race, slavery, and the prison economy is unmistakable. As Mauer explains, “It’s one of a number of factors that have contributed to Louisiana being a national leader in its use of imprisonment, and that’s nothing to be proud of.”<sup>353</sup>

Unfortunately, Louisiana only scratches the surface of the deeply-entrenched slave systems within public as well as private economies in the United States. It is the modern rendition of the convict leasing system. And the companies that purchase prison labor or the products developed in whole or in part from the prison system include elite brands and Fortune 500 companies:

Whole Foods,<sup>354</sup> McDonalds,<sup>355</sup> Wal-Mart,<sup>356</sup> Victoria’s Secret (no longer purchasing), AT&T, BP, Bank of America, Bayer, Cargill, Caterpillar, Chevron, Chrysler, Costco, John Deere, Eli Lilly and Company, Exxon Mobil, GlaxoSmithKline, Johnson and Johnson, K-Mart, Koch Industries, Merck, Motorola, Nintendo, Pfizer, Procter & Gamble, Pepsi, ConAgra Foods, Shell, Starbucks, UPS, Verizon, Wendy’s,<sup>357</sup> IBM, Boeing, Motorola, Microsoft, AT&T, Wireless, Texas Instrument, Dell, Compaq, Honeywell, Hewlett-Packard, Nortel, Lucent Technologies, 3Com, Intel, Northern Telecom, TWA, Nordstrom’s, Revlon, Macy’s, Pierre Cardin, and Target Stores.<sup>358</sup>

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Colleen Curry, *Whole Foods, Expensive Cheese, and the Dilemma of Cheap Prison Labor*, VICE NEWS (July 21, 2015), <https://news.vice.com/article/whole-foods-expensive-cheese-and-the-dilemma-of-cheap-prison-labor> [<http://perma.cc/PTS3-E5PY>].

<sup>355</sup> Rebekah Barber, *Nationwide Prison Strike Draws Attention to Unpaid Labor*, FACING SOUTH (Sept. 16, 2016), <https://www.facingsouth.org/2016/09/nationwide-prison-strike-draws-attention-unpaid-labor> [<http://perma.cc/GX3Y-B2AS>].

<sup>356</sup> *Id.*

<sup>357</sup> *50 Companies Supporting Modern American Slavery*, CAGED BIRD (Mar. 29, 2017), <https://www.cagedbirdmagazine.com/single-post/2017/03/28/50-Companies-Supporting-Modern-American-Slavery> [<https://perma.cc/69AF-FUJP>].

<sup>358</sup> Vicky Peláez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RES. (Mar. 10, 2008), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289> [<http://perma.cc/CVQ5-UR8G>].

Prison slavery also extracts more than labor from inmates, especially women. There are other devastating costs associated with incarceration: stigmatization, sexual abuse, and emotional harassment. For women, numerous reports document sexual violence behind bars, sometimes at the hands of guards, meals that contain rotten and rotting foods, and deadly labor conditions—such as putting out California’s wildfires.<sup>359</sup> Even more devastating are the illegal instances in which prison systems rent out men and women as sexual slaves to guards and other prisoners.<sup>360</sup>

Incarcerated individuals are expected to work.<sup>361</sup> Federal policy authorizes this; “convicted inmates confined in Federal prisons, jails, and other detention facilities shall work.”<sup>362</sup> Similar policies exist in each state, governing state prison facilities.

Yet, as this Article emphasizes, there is a sharp and profound distinction between work and slavery. Work implies fair compensation for the labor delivered. Slavery relates to uncompensated labor, bondage, and servitude. Abysmally low prison wage does not fit within the norm of what traditional definitions of “work” convey and more fittingly locates within the slavery contexts.

Even if lawmakers are slow to acknowledge the pervasive thicket of prison labor exploitation and slavery, the incarcerated recognize it. For example, “Melvin Ray, an inmate at the W.E. Donaldson Correctional Facility in Bessemer, Alabama, and a member of an organizing group called the Free Alabama

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<sup>359</sup> See ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEPT’ OF JUSTICE, *SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007*, at 6 (2008); Tom Perkins, *Something Still Stinks in Michigan and Ohio’s Prison Kitchens*, DETROIT METRO TIMES (Feb. 17, 2016), <https://www.metrotimes.com/detroit/something-still-stinks-in-michigan-and-ohios-prison-kitchens/Content?oid=2396672#>. [<https://perma.cc/9XZU-YLRH>]; Katie Warren, *200 Female Inmates Are Fighting Fires in California*, NBC L.A. (Oct. 11, 2017, 12:35 PM), <https://www.nbclosangeles.com/news/local/The-Female-Inmates-Fighting-Fires-in-California-450438783.html> [<https://perma.cc/UVW3-MWC7>].

<sup>360</sup> See Julie K. Brown, *Bartered Sex, Corruption and Cover-ups Behind Bars in Nation’s Largest Women’s Prison*, MIAMI HERALD (Dec. 13, 2015, 6:00 PM), <https://www.miamiherald.com/news/special-reports/florida-prisons/article49175685.html> [<https://perma.cc/U8DU-ALKZ>].

<sup>361</sup> See Caroline Winter, *What Do Prisoners Make for Victoria’s Secret?*, MOTHER JONES (July-Aug. 2008), <http://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret/> [<http://perma.cc/V88R-JMW4>].

<sup>362</sup> Crime Control Act of 1990, Pub. L. No. 101-647, title XXIX, § 2905(a)(1), 104 Stat. 4789, 4914 (1990); see also Genevieve Lebaron, *Slaves of the State: American Prison Labour Past and Present*, OPEN DEMOCRACY (Apr. 23, 2015), <https://www.opendemocracy.net/beyondslavery/genevieve-lebaron/slaves-of-state-american-prison-labour-past-and-present> [<http://perma.cc/Y42E-2BPM>].

Movement stated: “Work is good for anyone. . . . The problem is that our work is producing services that we’re being charged for, that we don’t get any compensation from.”<sup>363</sup> Mr. Ray captures the urgent concern associated with modern slave practices perpetuated in disproportionately racialized U.S. prisons. Moreover, his concerns are echoed by others. Paul Wright with Prison Legal News explains that “if [inmates] refuse to work, they can be punished by having their sentences lengthened and being placed in solitary confinement.”<sup>364</sup>

This observation is confirmed by the Incarcerated Workers Organizing Committee (IWOC). The organization reports that if inmates do not perform according to their overseers’ expectations, punishment is the prison’s recourse.<sup>365</sup> They explain, “They may have replaced the whip with pepper spray, but many of the other torments remain: isolation, restraint positions, stripping off our clothes and investigating our bodies as though we are animals.”<sup>366</sup>

Prisoners cook, clean,<sup>367</sup> serve as rodeo clowns, work call centers, and more. Examples of prison labor work include dental lab work.<sup>368</sup> Inmates even clean up national disasters; prison labor was also used in 2010 in Louisiana to clean up the BP Oil Spill.<sup>369</sup> In dental labs, inmates are typically paid 50 cents per hour, despite the technical skills required to create

<sup>363</sup> Vongkiatkajorn, *supra* note 344; FLA. STAT. ANN. § 944.105 (West 2018); N.M. STAT. ANN. § 33-1-17 (West 2018); TENN. CODE ANN. §§ 41-24-101 to 115 (2016).

<sup>364</sup> Vongkiatkajorn, *supra* note 344; *Private Prisons*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/mass-incarceration/privatization-criminal-justice/private-prisons> [<https://perma.cc/8F2B-RXGE>] (last visited June 26, 2017).

<sup>365</sup> See *Announcement of Nationally Coordinated Prisoner Workstoppage for Sept 9, 2016*, SUPPORT PRISONER RESISTANCE (Apr. 1, 2016), <https://support-prisonerresistance.noblogs.org/post/2016/04/01/announcement-of-nationally-coordinated-prisoner-workstoppage-for-sept-9-2016/> [<https://perma.cc/UFS8-UH5T>].

<sup>366</sup> *2016 Prison Strike Call to Action*, INCARCERATED WORKERS ORG. COMM. (Jan. 11, 2017), <https://incarceratedworkers.org/resources/2016-prison-strike-call-action> [<https://perma.cc/Z43S-9E3B>].

<sup>367</sup> FreeAlabama Fam, *Prison Slaves in Alabama*, YOUTUBE (Oct. 4, 2016), <https://www.youtube.com/watch?v=7fb0jVeTPmQ> [<http://perma.cc/3NRS-WJ9A>].

<sup>368</sup> See Liz Fields, *Hard Labor: Here’s the Weird Shit Inmates Can Do for Work in US Prisons*, VICE NEWS (Sept. 9, 2015), (citing PRIDE ENTERPRISES, 2014 ANNUAL REPORT (2015)) <https://news.vice.com/article/hard-labor-heres-the-weird-shit-inmates-can-do-for-work-in-us-prisons> [<http://perma.cc/GZK2-Z2W2>].

<sup>369</sup> Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), <https://www.thenation.com/article/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/> [<http://perma.cc/AM5N-443k>].

and implant crowns, bridges, and dentures inside the PRIDE dental lab at the Florida's Union Correctional Institution.<sup>370</sup> The animal training facility at the Colorado Correctional Industries (CCI), operates a program where inmates train wild mustangs to be sold.<sup>371</sup> CCI also has a canine training program; some of the dogs go on to become K-9 dogs.<sup>372</sup>

Inmates manufacture military and police gear.<sup>373</sup> UNICOR operates facilities inside prisons that create "stab vests, gun cases, duty belts, firearm targets, and lifelike tactical training sets that mimic villages or terrains where soldiers are sent into during combat."<sup>374</sup> Inmates also create and publish braille books. The National Prison Braille Network trains inmates to produce braille textbooks, music books, and novels. Observers note that the program is comprehensive and includes steps such as "learning to transcribe print documents into braille for people who are blind and visually impaired."<sup>375</sup>

Inmates also perform call center work. For example, female inmates at New York's Bedford Hills Correctional Facility "answer the phones at DMV call centers,"<sup>376</sup> and inmates from Arizona state prisons "make calls on behalf of major clients, including Microsoft and Cisco."<sup>377</sup> The list is exhaustive, in-

<sup>370</sup> Fields, *supra* note 368 (citing PRIDE ENTERPRISES, 2014 ANNUAL REPORT (2015)) (noting that inmates are paid \$8-13 per hour if the products leave the state); PRIDE ENTERPRISES, 2014 ANNUAL REPORT (2015), [https://www.pride-enterprises.org/Themes/PrideDefault/MediaContent/About/2014%20Annual%20Report/2014\\_Annual\\_Report.pdf](https://www.pride-enterprises.org/Themes/PrideDefault/MediaContent/About/2014%20Annual%20Report/2014_Annual_Report.pdf) [<http://perma.cc/MT88-H6PF>].

<sup>371</sup> *Wild Horse Inmate Program (W.H.I.P.)*, CCI, <https://www.coloradoci.com/serviceproviders/whip/> [<http://perma.cc/33VZ-FZCT>] (last visited Aug. 14, 2017).

<sup>372</sup> *Prison Trained Dog Program*, CCI, <https://www.coloradoci.com/serviceproviders/puppy/> [<http://perma.cc/6BJ8-AQ9R>] (last visited Aug. 14, 2017).

<sup>373</sup> Fields, *supra* note 368.

<sup>374</sup> *Id.*

<sup>375</sup> *Welcome to the National Prison Braille Network (NPBN) Website*, NPBN, <http://www.aph.org/pbf/> [<http://perma.cc/8G3P-EHAE>] (last visited Aug. 14, 2017).

<sup>376</sup> *DMV Call Center at Bedford Hills & Greene Correctional Facilities*, N.Y. STATE CORRECTIONS AND COMMUNITY SUPERVISION (Nov. 6, 2013), [http://www.doccs.ny.gov/doccsnews/2013/DMV\\_Call\\_Center.pdf](http://www.doccs.ny.gov/doccsnews/2013/DMV_Call_Center.pdf) [<http://perma.cc/JF8L-CBWR>].

<sup>377</sup> *Mass-Racial Incarceration: A Counter-Insurgency War Against Afrikans in America (August 12, 2016 Update—Baltimore Gestapo)*, MAKHERU SPEAKS (AUG. 12, 2016), <http://makheruspeaks.blogspot.com/2016/06/> [<https://perma.cc/772A-TERT>].

cluding rodeo clowning<sup>378</sup> and even picking cotton.<sup>379</sup> At the Angola prison, inmates grow and harvest “corn, cotton, soybean, and wheat crops.”<sup>380</sup> There, the memory of Antebellum slavery remains potent as three-quarters of the Angola inmates are African American and they work in “backbreaking conditions while armed guards stand watch on horseback.”<sup>381</sup>

Most inmates work internally by maintaining the state prisons<sup>382</sup> through landscaping, cleaning, and kitchen work;<sup>383</sup> or for local industries that partner with the state.<sup>384</sup> Of these, nearly 20% of federal prisoners and about 7% of state prisoners are incarcerated by private companies.<sup>385</sup> According to the U.S. Immigration and Customs Enforcement, in 2016 “private prisons held nearly three-quarters of federal immigration detainees.”<sup>386</sup> However, there is more that we do not know about private prison, such as the fact that “private prisons also hold an unknown percentage of people held in local jails in Texas, Louisiana, and a handful of other states.”<sup>387</sup> And despite arguments that private prisons save local governments money by shifting the costs through privatization, the data simply does not comport to such a finding.<sup>388</sup> From a financial point of view private prison facilities do not save money.<sup>389</sup> The federal government has paid more for sometimes complicated

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<sup>378</sup> *Louisiana's Angola Prison Rodeo Has Grown from Tiny Event to Drawing Thousands in Its 50 Years*, INDEP. SPORTS NEWS (Apr. 27, 2014), <http://www.independentsportsnews.com/2014/04/27/louisiana-s-angola-prison-rodeo-has-grown-from-tiny-event-to-drawing-thousands-in-its-50-years/> [<https://perma.cc/K2G4-3JXQ>] (explaining that Angola prison holds a once-a-year rodeo for prisoners, who act as cowboys, rodeo clowns, and vendors of arts and crafts made throughout the year, and that the sales from the rodeo are returned to the Louisiana State Penitentiary Inmate Welfare Fund to provide inmates with “education and recreational supplies”).

<sup>379</sup> *Id.*; *Angola State Prison: A Short History*, KNIGHT CASE STUD. INITIATIVE: JOURNALISM SCH., COLUM. U., [http://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/54/casestudy/www/layout/case\\_id\\_54\\_id\\_547.html](http://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/54/casestudy/www/layout/case_id_54_id_547.html) [<http://perma.cc/5BRY-CZDV>] (last visited Aug. 14, 2017).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*; Fields, *supra* note 368.

<sup>382</sup> Lebaron, *supra* note 362; Vongkiatkajorn, *supra* note 344.

<sup>383</sup> Vongkiatkajorn, *supra* note 344.

<sup>384</sup> FLA. STAT. ANN. § 944.105 (West 2018); N.M. STAT. ANN. § 33-1-17 (West 2018); TENN. CODE ANN. §§ 41-24-101 to 115 (2016).

<sup>385</sup> *Private Prisons*, AM. CIVIL LIBERTIES UNION, *supra* note 364.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS (Aug. 2016) [hereinafter REVIEW OF MONITORING OF CONTRACT PRISONS], <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/8428-CFB9>].

and even devastating outcomes of medical neglect and abuse.<sup>390</sup>

Prison labor can also be divided and evaluated by federal versus state regulation and control. A brief analysis below provides insights into these two systems.

### 1. *Federal Prisons and Labor*

The Federal Bureau of Prisons (BOP) reports that there is a total of 187,756 federal inmates.<sup>391</sup> Of that population, 81% (153,770) are in BOP Custody, 12% (20,693) are in privately managed facilities, and 7% (13,293) are in other types of facilities.<sup>392</sup> In 2015, “federal inmates helped bring in nearly \$472 million in net sales—but only 5 percent of that revenue went to pay inmates.”<sup>393</sup>

The Federal Prison Industries, Inc. (FPI a.k.a. UNICOR), a governmental agency operates prison-labor in federal prisons.<sup>394</sup> UNICOR was founded in 1934<sup>395</sup> and since that time has continued to expand, reporting 10,896 inmate workers in 2016.<sup>396</sup> UNICOR reports that its factories operate in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Minnesota, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia.<sup>397</sup> UNICOR inmates are

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<sup>390</sup> Michele Goodwin, *Will the Justice Department’s Decision to End Private Prisons Help Children?*, HUFFINGTON POST (Aug. 19, 2016), [http://www.huffingtonpost.com/michele-goodwin/the-justice-department-wl\\_b\\_11597668.html](http://www.huffingtonpost.com/michele-goodwin/the-justice-department-wl_b_11597668.html) [<http://perma.cc/CCT6-8BFB>].

<sup>391</sup> *Statistics: Total Federal Inmates*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) [<https://perma.cc/6SRX-KBEG>] (last visited June 28, 2017).

<sup>392</sup> *Id.*

<sup>393</sup> Kanyakrit Vongkiatkajorn, *Prison Labor Is Unseen and “Utterly Exploitative,”* MOTHER JONES (Oct. 6, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/10/prison-labor-strike-history-heather-ann-thompson/> [<https://perma.cc/B258-U3MW>].

<sup>394</sup> 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 PAC. BASIN L.J. 190 (1993), <http://escholarship.org/uc/item/8dk4b6xf> [<https://perma.cc/F6BY-MTP7>].

<sup>395</sup> UNICOR, FED. PRISON INDUS., INC., 80 YEARS OF NEW BEGINNINGS (2016), [https://www.unicor.gov/Publications/Corporate/CATC6500\\_FINAL\\_20160114.pdf](https://www.unicor.gov/Publications/Corporate/CATC6500_FINAL_20160114.pdf) [<https://perma.cc/ZRM9-DEDK>].

<sup>396</sup> U.S. DEP’T OF JUSTICE, UNICOR, FED. PRISON INDUS., INC., FISCAL YEAR 2016 ANNUAL MANAGEMENT REPORT (Nov. 15, 2016) [hereinafter UNICOR, FISCAL YEAR 2016].

<sup>397</sup> *Factory Locations*, UNICOR, FED. PRISON INDUS., INC., <https://www.unicor.gov/About.aspx#FactoryMap> [<https://perma.cc/2EA8-6U5B>] (last visited June 26, 2017).

employed in a variety of industries including: Agribusiness, Clothing and Textiles, Electronics, Office Furniture, Recycling, and Services.<sup>398</sup> In 2016, UNICOR generated \$498 million in total sales.<sup>399</sup>

## 2. State Prisons

Other inmates work for state-level prison industries. Prisoners in states “work at everything from farming and roasting almonds to making the diploma covers that college graduates buy in their University gift shops.”<sup>400</sup> In California, about “30 percent of the state’s firefighting force is comprised of convicts.”<sup>401</sup> These goods are then sold commercially across the United States.<sup>402</sup> Like the convict leasing system, legislatures or courts permit private firms to lease or contract prisoners directly in many states today.<sup>403</sup> In determining whether a

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<sup>398</sup> UNICOR, FISCAL YEAR 2016, *supra* note 396, at i (“UNICOR provides a variety of services, such as data entry (e.g. key punching) and furniture refinishing. It manufactures such products as furniture, electronics, mattresses, clothing, and road signs.”); Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html> [<https://perma.cc/7ZJ9-KQ46>] (noting that inmates are employed in a variety of industries and some assemble solar panels, and make clothing and furniture); *Prison Labour Is a Billion-Dollar Industry, with Uncertain Returns for Inmates*, ECONOMIST (Mar. 16, 2017), <https://www.economist.com/news/united-states/21718897-idaho-prisoners-roast-potatoes-kentucky-they-sell-cattle-prison-labour> [<https://perma.cc/P7ZS-2WCB>] (noting that inmates produce mattresses, spectacles, road signs and body armor, as well as official seals for the Department of Defense and Department of State).

<sup>399</sup> Robert Grieser, *Building Partnerships for Reshoring Success—An Innovative Model*, UNICOR FED. PRISON INDUS. INC., Slide 4 (2017), [https://www.iedcevents.org/Downloads/Conferences/leadership\\_17/grieser.pdf](https://www.iedcevents.org/Downloads/Conferences/leadership_17/grieser.pdf) [<https://perma.cc/TZ33-FUQV>] (“67 operations nationwide / 53 locations; \$498 million in Sales in FY 2016”); Fields, *supra* note 368 (“UNICOR is a semi-public, for-profit corporation run by the Bureau of Prisons. It also contracts prisoners to service electrical equipment and wash laundry, work in the construction and agriculture industries, and manufacture ‘Slippery When Wet’ signs and similar products.”).

<sup>400</sup> Lebaron, *supra* note 362; Whitney Benns, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/DK4M-SWBN>] (“Incarcerated workers, laboring within in-house operations or through convict-leasing partnerships with for-profit businesses, have been involved with mining, agriculture, and all manner of manufacturing from making military weapons to sewing garments for Victoria’s Secret.”).

<sup>401</sup> Fields, *supra* note 368 (“[A]round 280 adult prisoners are currently contracted by the Department of Natural Resources (DNR) to clear trees, staff the firehouse kitchen, and perform a range of firefighting tasks across the state. Even those battling wildfires on the frontlines receive between 70 cents and \$1.60 a day.”).

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

prisoner engaged in labor can be protected using employment law, “Courts look to the character of the relationship between the parties” and apply a two-part test that examines “whether the employer has sufficient control over the work conditions” and “whether the relationship is primarily of an economic character.”<sup>404</sup>

In 1979, the Prison Industry Enhancement Program was created by Congress “to encourage states and units of local government to establish employment opportunities for prisoners that approximate private-sector work opportunities.”<sup>405</sup> The program was designed to pay the inmates the local wage for similar work and enable them to gain useful skills.<sup>406</sup> To this end, there are “37 state and 4 county-based certified correctional industry programs operat[ing] in the United States, and these programs manage at least 175 business partnerships with private industry.”<sup>407</sup>

Inmates either work directly for the prison with the government as their employer, or prisoners are given jobs under the Prison Industry Enhancement Certification Program (a.k.a. PIECP, PIE, or PIE Program). Two years ago, in reporting on the program, the Bureau of Justice Assistance (BJA) described the program as one where “inmates are employed by a private business that has contracted with local correctional authorities for low-cost labor”; this language has since been updated.<sup>408</sup> Today, the BJA no longer describes prison labor as low-wage. Nevertheless, profits associated with prison labor are significant.<sup>409</sup> For instance, “[a]s of September 30, 2005, PIECP generated more than \$33 million for victims’ programs, \$21 million

<sup>404</sup> See Bennis, *supra* note 400.

<sup>405</sup> BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1 (July 2002), <https://www.ncjrs.gov/pdffiles1/bja/193772.pdf> [<https://perma.cc/2PNH-4PTC>].

<sup>406</sup> *Id.*

<sup>407</sup> *Prison Industry Enhancement Certification Program (PIECP)*, BUREAU JUST. ASSISTANCE, U.S. DEP’T OF JUST., [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=73](https://www.bja.gov/ProgramDetails.aspx?Program_ID=73) [<https://perma.cc/S2A5-FQGF>] (last visited July 3, 2017).

<sup>408</sup> *Id.*

<sup>409</sup> *Contract Manufacturing Opportunities*, UNICOR, <https://www.unicor.gov/PieProgram.aspx> [<https://perma.cc/XQB5-Z5NP>] (last visited July 10, 2017). UNICOR’s PIE Program boasts that it offers the following benefits to private companies:

- An infrastructure responsive to innovation and change
- Strategically located facilities for warehousing, distribution, and manufacturing
- A flexible, experienced workforce responsive to marketplace upswings and downturns
- Minimized overhead costs to help drive bottom-line improvements



for inmate family support, \$97.5 million for correctional institution room and board costs, and \$46.6 million in state and federal taxes.”<sup>410</sup> In fact, “allowable” wage deductions may be up to 80% of an inmates gross wages.<sup>411</sup>

### C. The Rise of Privatized Prisons

Prison slavery is profitable, and so is housing, operating, and staffing prisons. This is the business of privatized prisons. One company, which builds and staffs prisons for the government, boasts in its Securities and Exchange Commission filings of “offer[ing] an alternative sentencing option to the courts which allows offenders who are gainfully employed to pay a significant portion of their cost of incarceration while serving their sentence in a community facility.”<sup>412</sup> In recent years, during the Trump Administration, private prison companies have “expanded [their] reach and consolidated [their] market share.”<sup>413</sup> CEOs of these companies speak of “improved occupancy rates” as a perverse benefit of Immigration and Customs Enforcement (ICE) practices, which heavily sweep in undocumented immigrants as “detainees.”<sup>414</sup> If the nearly half-dozen facilities ICE has requested come to fruition, the industry will experience a windfall.<sup>415</sup>

The problems of perverse financial incentives relate to housing not only prisoners but also individuals awaiting trial. A report funded by the Rockefeller Family Fund, *Prisons & Politics: Profiling the Pecuniary Political Persistence of Private Prisons*, notes that “[t]he bail bond industry also figures significantly in the equation.”<sup>416</sup> Each year, because of an inability to

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- Partial to full-service business models to best meet your requirements
  - Proven expertise in a wide range of manufacturing and services sectors
  - A Made in the USA marketing advantage . . . and much more!

*Id.*

<sup>410</sup> *Prison Industry Enhancement Certification Program (PIECP)*, *supra* note 407.

<sup>411</sup> BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, PROGRAM BRIEF: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 4 (Aug. 2018), [https://www.bja.gov/Publications/PIECP-Program-Brief\\_2018.pdf](https://www.bja.gov/Publications/PIECP-Program-Brief_2018.pdf) [<https://perma.cc/TQK4-XTZY>].

<sup>412</sup> See CORECIVIC, 2016 ANNUAL REPORT FORM 10-K at 8 (2017).

<sup>413</sup> Ciara O’Neill, *Private Prisons: Principally Profit-Oriented and Politically Pliable*, FOLLOW THE MONEY (June 7, 2018), <https://www.followthemoney.org/research/institute-reports/private-prisons-principally-profit-oriented-and-politically-pliable> [<https://perma.cc/B9MW-3QM30>].

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

afford bail, thousands of Americans await trial behind bars. This system, referred to as “cash bail” and “money bail,” affects millions of Americans, including women, each year.<sup>417</sup> In 2017, the American Civil Liberties Union (ACLU) reached a settlement in a class-action suit, *Burks v. Scott County, Mississippi*, which challenged a practice of incarcerating people for as long as a year without formally charging them with a crime.<sup>418</sup> One of the litigants, Octavius Burks, was detained for ten months without ever being charged by indictment or appointed a lawyer.<sup>419</sup>

According to the ACLU, every year in the United States, “millions of people must pay bail in order to avoid detention in jail while their case is underway, though they are still innocent in the eyes of the law.”<sup>420</sup> A little over two decades ago, a felony arrest would not necessarily result in pretrial incarceration.<sup>421</sup> Today, that is not the case.<sup>422</sup> The financial impacts of the privatized bail bond system are devastating to those accused of crimes, including those found innocent. For example, “bail corporations keep families’ payments, even when charges are dropped or people are found innocent.”<sup>423</sup>

The federal government turned to privatized prisons in the wake of what Democrats and Republicans both agree was a failed drug war. As the former Deputy Attorney General, Sally Yates explained in a memorandum dated August 18, 2016, “between 1980 and 2013, the federal prison population increased by almost 800 percent.”<sup>424</sup> The federal government turned to private prisons to house its growing incarcerated populations—most of whom were poor and disproportionately men and women of color.<sup>425</sup> Many were young. And, although the U.S. comprises only 5% of the world’s population, it houses

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<sup>417</sup> COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM* 2, 49 (2017), [https://www.aclu.org/sites/default/files/field\\_document/059\\_bail\\_report\\_2\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf) [<https://perma.cc/K59E-R9U5>].

<sup>418</sup> See Settlement Order at 1–2, *Burks v. Scott Cty.*, No. 3:14-cv00745-HTW-LRA (S.D. Miss. June 27, 2017).

<sup>419</sup> Lynn Cooper, *Settlement Will Stop Settlement Will Stop Four Mississippi Counties from Jailing People Indefinitely Because They Can’t Afford Bail*, *EBONY* (June 28, 2017), <https://www.ebony.com/news/mississippisettlement/> [<https://perma.cc/Q3RT-2DXT>].

<sup>420</sup> COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 417, at 2.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 3.

<sup>424</sup> Goodwin, *supra* note 390.

<sup>425</sup> *Id.*

25% of the globe's incarcerated men and women.<sup>426</sup> Nearly two-thirds of the U.S. prison population were arrested for non-violent offenses.<sup>427</sup>

In an effort to move away from privatized prisons, Yates wrote, "they simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security."<sup>428</sup> She is right. Neither do the privatized facilities provide the types of rehabilitative services that are crucial to achieving low recidivism and transitioning incarcerated persons to productive lives beyond prison gates. A 2016 report produced by the Office of the Inspector General found that there were 24 percent more grievances in private or "contract prisons" than those run by the Bureau of Prisons, across eight key areas: medical care, food, "conditions of confinement, institutional operations, safety and security, sexual abuse or assault, Special Housing Units (SHU), and complaints against staff."<sup>429</sup>

President Trump articulated reversing this policy and did so shortly after assuming office in 2017.<sup>430</sup> In his memorandum reversing the Obama policy, Attorney General Jeff Sessions ostensibly anticipated even greater demand for privatized federal prisons, writing that the policy "impaired the Bureau's ability to meet the future needs of the federal correctional system."<sup>431</sup> In a leaked memorandum, dated January 24, 2018, Frank Lara, the Assistant Director of the Correctional Programs Division, specifically calls for the "re-designation" of prisoners for "transfer consideration to private contract facilities."<sup>432</sup>

However, the bigger question relates to states and children. The federal government's prison population is a fraction of what constitutes the overall prison population. States all over

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426 *Id.*

427 *Id.*

428 *Id.*

429 REVIEW OF MONITORING OF CONTRACT PRISONS, *supra* note 389, at 22.

430 Christopher Dean Hopkins, *Private Prisons Back in Mix for Federal Inmates as Sessions Rescinds Order*, NPR (Feb. 23, 2017, 7:38 PM), <https://www.npr.org/sections/thetwo-way/2017/02/23/516916688/private-prisons-back-in-mix-for-federal-inmates-as-sessions-rescinds-order> [<https://perma.cc/8PDQ-2R5M>].

431 *Id.*

432 See Memorandum from F. Lara, Assistant Director of Correctional Programs Division on Increasing Population Levels in Private Contract Facilities for Chief Executive Officers (Jan. 24, 2018), [https://admin.govexec.com/media/gbc/docs/pdfs\\_edit/012518privateprisons.pdf](https://admin.govexec.com/media/gbc/docs/pdfs_edit/012518privateprisons.pdf).

the country accept solicitations from private prisons, including bids to house children. Some of these facilities are notorious boot camps, where children have been beaten or stomped on (on the chest), or have even died.<sup>433</sup> In 2001, a 14-year-old died at a “tough love” private facility. When officials conducted an investigation into the death of that child, they discovered horrible bruises on the other children.<sup>434</sup> Even the notorious Sheriff Arpaio observed that “these kids didn’t get bruises falling off a platform.”<sup>435</sup>

One girl told reporters, “These bruises on my arm are from Sgt. Fontenot punching me, and these on my legs are from him kicking me.”<sup>436</sup> Another child reported, “They were bringing kids over there and making them lay on their backs and pouring mud down their throats and stomping on their chests with the heel of their boot.”<sup>437</sup> In response, one of the officials claimed, “we aren’t doing anything out there that’s not approved by the kids and the parents.”<sup>438</sup>

Beyond cruelty to the inmates they serve, some prisons are notorious for their deplorable living conditions. Tent City Jail, erected in 1993,<sup>439</sup> has been described by its former warden, Joe Arpaio, as a “concentration camp.”<sup>440</sup> The prison has men, women, and teens working on chain gangs, “sustained by twice-daily meals that are the cheapest among the nation’s lockups.”<sup>441</sup> The inmates “risk beatings by gangbangers and guards,” and receive medical care “so abysmal that it has been

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<sup>433</sup> Goodwin, *supra* note 390.

<sup>434</sup> *Id.*

<sup>435</sup> Michael Janofsky, *Desert Boot Camp for Youth Is Shut Down After a Death*, N.Y. TIMES (July 4, 2001), <https://www.nytimes.com/2001/07/04/us/desert-boot-camp-for-youth-is-shut-down-after-a-death.html> [<https://perma.cc/PAE7-6JDM>].

<sup>436</sup> *14-Year-Old Dies at Desert Boot Camp*, ABC NEWS (July 8, 2001), <https://abcnews.go.com/WNT/story?id=130869&page=1> [<https://perma.cc/F6HW-KX5C>].

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> Megan Cassidy & Laura Gómez, *Tent City, Infamous Home of Inmates Who Wear Pink Underwear and Major Piece of Arpaio’s Legacy, Is Closing*, AZCENTRAL (Apr. 4, 2017, 2:17 PM), <http://www.azcentral.com/story/news/local/phoenix-breaking/2017/04/04/maricopa-county-sheriff-paul-penzone-tent-city-closing/100023562/> [<https://perma.cc/6DE3-RKJ9>].

<sup>440</sup> Kelly Weill, *Inmates Left to Rot in 120-Degree Heat*, DAILY BEAST (June 21, 2017, 1:00 AM), <http://www.thedailybeast.com/inmates-left-to-rot-in-120-degree-heat> [<https://perma.cc/2FK7-YP5X>].

<sup>441</sup> James Ridgeway & Jean Casella, *America’s 10 Worst Prisons: Tent City*, MOTHER JONES (May 3, 2013, 10:00 AM), <http://www.motherjones.com/politics/2013/05/10-worst-prisons-america-joe-arpaio-tent-city/> [<https://perma.cc/AZ3S-4725>].

ruled unconstitutional by a federal court.”<sup>442</sup> The prisoners sleep in tents in the Phoenix desert, where temperatures can reach over 110 degrees<sup>443</sup> and are released on work furlough, where they are discharged “into the community for 12 hours a day.”<sup>444</sup>

In 2017, Tent City Jail was scheduled to close.<sup>445</sup> Yet, a spokesperson for the prison stated that as of June 2017, “there are 380 work furlough inmates remaining in Tent City.”<sup>446</sup> Their “[w]ork furlough means they go to their day jobs and return at the end of their workday to sleep in the Tents.”<sup>447</sup> The spokesperson emphasized, that “[a]lmost all of these inmates are in Tent City only at night. We estimate that approximately fifty [of the 380] will be on site in the daytime – meaning that they work either a second or third shift at their job.”<sup>448</sup>

The two main private prison corporations are the CoreCivic (formerly known as Corrections Corporation of America) and the GEO Group, Inc. (formerly known as Wackenhut Securities).<sup>449</sup> The third-largest for-profit prison in the United States is Management & Training Corporation.<sup>450</sup> LaSalle Management Company LLC<sup>451</sup> and Emerald Correctional Management LLC<sup>452</sup> are two smaller private prison companies in the U.S. There are also some non-profit companies with work programs like PRIDE Enterprises that operate throughout the country.<sup>453</sup>

The profits from these industries are staggering and raise important ethical questions about earning money from human labor exploitation that in any other context would be condemned as modern slavery, sweatshop labor, or human trafficking. For example, the Corrections Corporation of America

<sup>442</sup> *Id.*

<sup>443</sup> Cassidy & Gómez, *supra* note 439.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> Weill, *supra* note 440.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* (alteration in original).

<sup>449</sup> CORECIVIC, *supra* note 412, at 29.

<sup>450</sup> *Management & Training Corp.*, PROJECT ON GOV'T OVERSIGHT, <http://www.contractormisconduct.org/contractors/132> [<https://perma.cc/WVR9-3S4C>] (last visited July 3, 2017).

<sup>451</sup> *Company Overview of LaSalle Management Company, LLC*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=8158711> [<https://perma.cc/EX74-SHG4>] (last visited July 3, 2017).

<sup>452</sup> *Company Overview of Emerald Correctional Management LLC*, BLOOMBERG (OCT. 14, 2018, 2:35 PM), <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=30646857> [<https://perma.cc/C2DW-SQLS>].

<sup>453</sup> *Company Overview*, PRIDE ENTERPRISES, <https://www.pride-enterprises.org/content.aspx?page=CompanyOverview> [<https://perma.cc/8ZX3-NQSR>] (last visited July 3, 2017).

(CCA) is the largest private prison company<sup>454</sup> and has been in operation for more than 30 years.<sup>455</sup> Founded in 1983, amid the early but nonetheless escalating drug war, CCA opened its first detention center in 1984 after the Immigration and Naturalization Service awarded them a federal contract to detain undocumented immigrants.<sup>456</sup> Recently, CCA rebranded as CoreCivic in order to change its perceived specialty from corrections and detention services to a broader range of “solutions” available to the government partners.<sup>457</sup>

#### D. Conclusion

The modern manifestation of prison systems is closely linked to the various forms of slavery discussed in Part II. This modern tapestry of involuntary, state-governed labor provides evidence of slavery’s enduring legacy and the formidability of legal innovations related to race. Slavery persists in the criminal justice system because involuntary prison labor is profitable. Because it is profitable, it is widespread. Private industries profit as do private prisons, states, and the federal government.

### IV

#### REFORMING AND TRANSFORMING

##### A. Revisiting the Thirteenth Amendment

Ironically, the Thirteenth Amendment would seem a cure to the plights described: involuntary servitude in prison, inhumane conditions, and backbreaking labor with little or virtually no pay. However, the Thirteenth Amendment stands in the shadows, seemingly invisible to legal scholars who invest in civil rights or social justice scholarship, who instead look to the Fourteenth Amendment to both describe and diagnose constitutional violations as well as to prescribe remedies.<sup>458</sup> In a

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<sup>454</sup> CORECIVIC, *supra* note 412, at 9 (“We believe we own approximately 58% of all privately owned prison beds in the United States, [and] manage nearly 41% of all privately managed prison beds in the United States . . . .”); Suevon Lee, *By the Numbers: The U.S.’s Growing For-Profit Detention Industry* (June 20, 2012, 2:41 PM), <https://www.propublica.org/article/by-the-numbers-the-u.s.s-growing-for-profit-detention-industry> [<https://perma.cc/86ES-CWF4>].

<sup>455</sup> CORECIVIC, *supra* note 412, at 5.

<sup>456</sup> PHILIP MATTERA & MAFRUZA KHAN, GRASSROOTS LEADERSHIP, CORRECTIONS CORPORATION OF AMERICA: A CRITICAL LOOK AT ITS FIRST TWENTY YEARS (Dec. 2003), [https://www.prisonlegalnews.org/media/publications/grassroots\\_leadership\\_cca\\_prison\\_privatisation\\_report\\_2003.pdf](https://www.prisonlegalnews.org/media/publications/grassroots_leadership_cca_prison_privatisation_report_2003.pdf) [<https://perma.cc/6V64-MU7H>].

<sup>457</sup> CORECIVIC, *supra* note 412, at 5.

<sup>458</sup> There are important, instructive exceptions. For analytically rich, empirical legal scholarship addressing the Thirteenth Amendment see Risa L. Goluboff, *The*

sterling review of pre-Brown social-movement activism, Risa Goluboff notes, “[s]cholars seem to have accepted unquestioningly that modern civil rights should be located in the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause, failing to examine how these rights came to be thus situated.”<sup>459</sup>

Professor Guboloff offers an important insight. In the last fifty years, nearly 125,000 law review articles addressing the Fourteenth Amendment have been published. The same cannot be said for Thirteenth Amendment scholarship. In July

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*Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001) (canvassing archival records, including Papers of the NAACP, Peonage, Labor, and the New Deal, 1913–1939, as well as microfilms from Major Archival and Manuscript Collections, Department of Justice Project files, and records from the Library of Congress). “When the lawyers of the Civil Rights Section explored the Reconstruction era for authority, they found the Thirteenth Amendment to be one of the most promising of the available ‘instruments for the protection of individual rights.’” *Id.* at 1637.

Various scholars have considered the Thirteenth Amendment in relation to labor. See Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of Involuntary Servitude*, 119 YALE L.J. 1474 (2010); Lea VanderVelde, *Labor Vision of the Thirteenth Amendment*, 138 U PA. L. REV. 437 (1989); Noah Zatz, *Working at the Boundaries Of Markets: Prison Labor and the Economic Dimension Of Employment Relationships*, 61 VAND. L. REV. 857 (2008); Rebecca Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 892–96 (2016) (asserting a right to labor free from coercion and discrimination based on immutable characteristics).

One of the more expansive areas of Thirteenth Amendment scholarship relates to carceral punishment, implicating the Eighth Amendment’s prohibitions against cruel and unusual punishment by the state. See, e.g., John D. Bessler, *The Concept of “Unusual Punishments” in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J.L. & SOC. POL’Y 307 (2018) (discussing historical development of concept of “cruel and unusual punishments” in context of Eighth Amendment and arguing that American death penalty system is unconstitutional); Alan Bigel, *Justice William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11 (1994) (detailing Justice Brennan and Justice Marshall’s careers and judicial opposition to death penalty, emphasizing their respective judicial philosophies and interpretations of Eighth Amendment); Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3 (2015) (contending “prisoner fault for delay” rationale, used by many courts to reject Eighth Amendment challenges to death penalty, is not an effective bar to such claims); Aliza Cover, *Cruel and Invisible Punishment*, 79 BROOK. L. REV. 1141 (2014) (decrying current state of criminal justice system in America and advocating Eighth Amendment jurisprudence based on counter-majoritarian and anti-discrimination principles).

<sup>459</sup> See Goluboff, *supra* note 458, at 1612–13 (turning “a lens toward constitutional experimentation in the executive branch,” and arguing “that developments in the 1940s are crucial to understanding *Brown’s* meaning and that the activities of the newly created Civil Rights Section of the Department of Justice are crucial to understanding emerging conceptions of civil rights in the 1940s”).

2018, I conducted two dozen research queries to determine the gap in scholarly attention between these two constitutional amendments.<sup>460</sup> At a glance, the findings show that between 1865 and 1956, only twelve law review articles even mention the Thirteenth Amendment in a title. By contrast, for a similar period almost 250 articles directly address the Fourteenth Amendment.<sup>461</sup> That is, for the first hundred years after these monumental amendments achieved ratification, twenty times the scholarly energy invested in developing theories related to antidiscrimination, freedom, equality, and citizenship through the Fourteenth rather than Thirteenth Amendment.<sup>462</sup> Consequently, the Thirteenth Amendment legal canon, while expanding as evidenced by diverse contributions from distinguished legal scholars, remains to some degree, emergent.<sup>463</sup>

To be sure, this is not the reason why all states exploit prison labor, including sometimes to a deadly degree (and nearly always in unexceptionally corrosive and coercive ways). Yet, without greater scholarly and legislative attention important questions will remain inadequately studied and largely unresolved, such as whether the Thirteenth Amendment actually permits slavery or involuntary servitude in prisons (as

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<sup>460</sup> For example, I conducted a review of Thirteenth Amendment in the title of law reviews from 1865 to 1956 (using West Law—a legal search engine and database—on July 24, 2018). This yielded only twelve results. As a follow-up, I researched the number of law review articles that mention the Thirteenth Amendment five or more times for that same period and this revealed eleven articles. Following this, I conducted an inquiry of “Punishment Clause” in relation to the Thirteenth Amendment in law review articles since 1865, only thirty-five articles emerged (for purposes of that inquiry, the term Punishment Clause had to be mentioned five times). On further review, only two Supreme Court cases emerged from my search of Thirteenth Amendment and “Punishment Clause”: *McDonald v. City of Chicago*, 561 U.S. 742, 742 (2010) and *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 671 (1987). Michele Goodwin, Thirteenth Amendment Citation Research Study 1865–1956 (on file with author).

<sup>461</sup> This analysis included searches by decade comparing references to the Thirteenth Amendment versus Fourteenth Amendment. Michele Goodwin, Fourteenth Amendment Citation Research Study 1868–1969 (on file with author).

<sup>462</sup> Put another way, there were more law review articles referencing the Fourteenth Amendment for the period 2015–2018 than the last fifty years of scholarship on the Thirteenth Amendment: 28,329 articles to be exact.

<sup>463</sup> Following title and subject searches, I queried “Punishment Clause” in relation to Thirteenth Amendment in law review articles from 1865 to the present and only 35 articles emerged (for purposes of that inquiry, the term Punishment Clause had to be mentioned five times). In the last fifty years, ten times as many law articles engage the Fourteenth Amendment as compared to the Thirteenth Amendment. My queries do not capture the quality (or nuance) of that scholarship, but they are nevertheless important and informative, because they highlight where legal scholars find value or purchase in placing their scholarly attention.



states see it). From a strict textualist point of view, modern-day prison slavery is not actually permitted by the Punishment Clause because it is not itself "punishment" even though it is ancillary to the sentence actually imposed.

In other words, as a textual matter, the Thirteenth Amendment's Punishment Clause does not permit prison slavery, at least in the way it currently operates, because the clause protects slavery only as "punishment for crime," which if narrowly defined, is meted out by statute or sentencing judge.<sup>464</sup> Arguably, absent this, slavery in prisons and jails is impermissible, because by its very nature, it is deliberate, cruel, and unusual, even while scholars and judges might debate if it is malicious.<sup>465</sup>

Or, if the Thirteenth Amendment's Punishment Clause licenses modern-day slavery, what are its theoretical and punitive limits as matters of law, ethics, and morality? Currently, it would seem only cruel and unusual conditions would trigger any constitutional safeguards against the practice, and not unremunerated, even demeaning labor. Rather than the more novel applications of the Thirteenth Amendment to matters of

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<sup>464</sup> *Wilson v. Seiter*, 501 U.S. 294, 300, 302-03 (1991) (opining that the Eighth Amendment's prohibition against cruel and unusual punishment is triggered "[i]f the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge") (emphasis in original).

<sup>465</sup> *Id.*; *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) ("The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.").

sex,<sup>466</sup> child abuse,<sup>467</sup> bankruptcy,<sup>468</sup> and even international law,<sup>469</sup> the urgency of its role in this work centers on prison labor and for good reason. As described above, historically, policing and jailing served the purposes of racial surveilling, profiling, and intimidation (as much if not more so than a response to preserving peace and promoting safety). Moreover, dramatic, contemporary racial disparities in mass incarceration signify that aspects of these social impediments continue to shape who or what communities are more likely to be policed, prosecuted, and jailed. Race is virtually impossible to remove from the equation of mass incarceration. Thus, for as long as the Punishment Clause remains, so too shall the weight and burdens of a line drawn based on color.

The Punishment Clause has been a vital resource in foreshadowing the reestablishment of slavery and the re-appropriation of Black bodies in public and private labor in the United

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<sup>466</sup> For an examination of scholarship relating the Thirteenth Amendment to female subordination, see Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 796 (1993) (“The economics of slavery reached beyond the fields to encompass the reproductive labor of women. Yet until recently, the female slave has escaped scholarly attention.”); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1248 (2012) (urging that “to ascertain those evolving standards of decency, the Eighth Amendment’s ‘cruel and unusual punishments’ inquiry should be guided by the values underlying the Thirteenth Amendment and its prohibition against the ‘badges and incidents of slavery,’” which include the shackling of incarcerated pregnant women); Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1642 (2012) (relating the Thirteenth Amendment to gender discrimination, emphasizing that while “states ratified the Thirteenth Amendment more than a century and a half ago, courts have yet to delve into its relevance to gender subordination stemming from overt sexism and more subtle forms of stereotyping”).

<sup>467</sup> Two scholars evoke the Thirteenth Amendment in relation to child abuse. See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1374 (1992) (arguing that the Thirteenth Amendment “was designed to challenge longstanding institutions and practices that violated its core values of personhood and dignity”).

<sup>468</sup> Scholars have also taken up the Thirteenth Amendment in relation to bankruptcy. See Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 192–93 (2009) (arguing that the Bankruptcy Code’s 2005 amendments, which impose involuntary repayment plans, implicate the prohibitions on involuntary servitude). *But see* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 590 (2005) (“[T]here is no possibility of contempt or imprisonment for those who fail to make the required payments,” which results “only in denial of the discharge and dismissal of the case.”).

<sup>469</sup> For an insightful examination of the Thirteenth Amendment in relation to the global economy, see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 973 (2002) (unpacking whether the Thirteenth Amendment prohibits U.S. multinational firms “from exploiting foreign slave labor”).

States. As such, the Thirteenth Amendment stands as a perfectly cruel example of law in action, whereby “law on the books,” gives way to the machinations, intentions, and actions of law on the ground. And while it clearly could be claimed that the Thirteenth Amendment explicitly provides authority for the leasing and distribution of *any* human labor subject to criminal punishment, empirical evidence exposes the disparate infliction of both Jim Crow and modern slavery on Blacks.

In Part IV, this Article articulates pathways forward in divesting from prison labor, including forging a change in law. Realistically, however, obstacles remain. As Part III demonstrates, prison labor generates a robust economy—not far different from convict leasing of the past. Moreover, private industries, including the major private prison companies, promote and protect their interests through astronomic spending on robust lobbying efforts. The result is a racialized system rife with human rights abuses, which has been more difficult to dismantle than South African apartheid.

To adopt Professor Paul Butler’s turn of phrase, the modern mask of slavery is the chokehold.<sup>470</sup> However, where he identifies state-enforced physical violence against Blacks as proof of the chokehold (in how Black bodies are gunned down by police, for example),<sup>471</sup> this Article exposes the persistence of slavery through the criminal justice system as the penultimate chokehold. Police violence and the day in and day out mundaneness of racism obscures this particular chokehold.

## B. Reimagining Freedom

The Thirteenth Amendment abolished slavery and involuntary servitude except for a punishment of crime. Thus, the Thirteenth Amendment created an exception or a justification for slavery within the prison system. Over time, the Thirteenth Amendment’s Punishment Clause has rendered freedom from the shackles of slavery more illusory than real. It has re-instantiated one of the grievous wrongs in our nation.

Prison slavery and the systems that feed into it, such as mass incarceration, demand rethinking and reimagining legal rules and social conditions that abolish slavery once and for all in the United States. The following analyzes potential responses to this system, including constitutional amendment, abolishment through Supreme Court ruling, legislative action,

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<sup>470</sup> BUTLER, *supra* note 34, at 226.

<sup>471</sup> *See id.*

and executive order. This Article proposes several ways to divest from prison slavery.

### 1. *Amending the Amendment*

In *The Consent of the Governed: Constitutional Amendment Outside Article V*,<sup>472</sup> Professor Akhil Amar argues that the Constitution can be amended outside of the traditional conceptions of the practice. For my purposes, one way to reimagine and reorder the Thirteenth Amendment is simply to strike the offending language: “except as a punishment for crime whereof the party shall have been duly convicted.”<sup>473</sup>

However, the only way to amend or change the constitution is by proposing and ratifying a new amendment. For example, the Eighteenth Amendment prohibited the manufacture, sale, or distribution of alcohol: “After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”<sup>474</sup> Ratification of the Twenty-First Amendment repealed this amendment: “The eighteenth article of amendment to the Constitution of the United States is hereby repealed. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>475</sup>

This is similar to the effect that the Thirteenth Amendment had on Article IV, Section 2 of the Constitution. Article IV, Section 2, clause 3 addresses fugitive slaves. It states that “[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”<sup>476</sup> However, the Thirteenth Amendment abolished slavery and effectively repealed the Fugitive Slave Clause of Article IV as slavery became unconstitutional.

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<sup>472</sup> See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457–58 (1994).

<sup>473</sup> U.S. CONST. amend. XIII, § 1, cl. 2.

<sup>474</sup> U.S. CONST. amend. XVIII, § 1 (repealed 1933).

<sup>475</sup> U.S. CONST. amend. XXI, §§ 1–2.

<sup>476</sup> U.S. CONST. art. IV, § 2, cl. 3.

## 2. *Abolishing Prison Slavery Through Constitutional Amendment*

The most obvious means of abolishing prison slavery is through constitutional amendment, which would strike the Punishment Clause from the Thirteenth Amendment. The arguments expressed by Senator Andrew Johnson in opposition to slavery and support of a constitutional amendment to abolish the practice remain vital today.<sup>477</sup>

[W]hat says the preamble to the Constitution? . . . [C]an that institution which deals with humanity as property, which claims to shackle the mind, the soul, and the body, which brings to the level of the brute a portion of the race of man, cease to be within the reach of the political power of the people of the United States, not because it was not at one time within their power, but because at that time they did not exert the power?<sup>478</sup>

Article V of the Constitution creates the authority to amend the constitution.<sup>479</sup> The Constitution has been amended only twenty-seven times, and according to the Federal Register, “neither Article V of the Constitution nor [U.S.C.] section 106b describe[s] the ratification process in detail.”<sup>480</sup> What is clear is that the president plays no role in the process and as such lacks the authority to authorize or veto a constitutional amendment. Nevertheless, the office of the president could be a powerful ally in generating support for abolition of prison slavery, or an influential foe.

Article V creates two avenues to amend the Constitution. First, Congress may propose an amendment with a two-thirds majority vote in the House of Representatives and the Senate.

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<sup>477</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1423 (1864).

<sup>478</sup> *Id.*

<sup>479</sup> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

<sup>480</sup> *Federal Register: Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution> [<https://perma.cc/VF39-SKSR>].

Second, two-thirds of the State legislatures can call for a constitutional convention to propose an amendment. However, of the twenty-seven amendments to the Constitution, none were proposed by constitutional convention.<sup>481</sup> Furthermore, in order to be adopted, the proposed amendment must be ratified by three-fourths of the states or thirty-eight states.<sup>482</sup>

The likelihood of a constitutional amendment related to the Thirteenth Amendment and its Punishment Clause through either of these means is doubtful, but nonetheless worth the attention of lawmakers, scholars, activists, and advocacy groups concerned about human rights and the continued racialized exploitation of labor.

### 3. *Legislative Enactment: The Possibility of Federalism*

One channel for advocacy is enacting legislation to ban slavery, including for conviction of a crime, state by state. At least one state has considered this as a ballot initiative and, at the time of this Article's publication, had recently succeeded by a margin of 65% in favor to 35% opposed.<sup>483</sup> In 2018, Colorado voters pursued this option after a failed ballot initiative two years prior.<sup>484</sup> Amendment A asked Colorado voters, "Shall there be an amendment to the Colorado constitution that prohibits slavery and involuntary servitude as punishment for a crime and thereby prohibits slavery and involuntary servitude in all circumstances?"<sup>485</sup> The referendum, which had "overwhelming bipartisan support from Colorado lawmakers" will

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<sup>481</sup> *Id.*

<sup>482</sup> After the Office of the Federal Register has received the required number of ratifications, "it drafts a formal proclamation for the Archivist to certify that the amendment is valid and has become part of the Constitution." It is then published in the Federal Register and U.S. Statutes at Large. The publication serves as official notice to the Congress and to the Nation that the amendment process has been completed. *Id.*

<sup>483</sup> See Kristine Phillips, *Colorado Asked Its Voters to End Slavery as Punishment. It Lost.*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/11/17/slavery-is-technically-still-legal-in-colorado-heres-why/?utm\\_term=.0f94c981f66e](https://www.washingtonpost.com/news/post-nation/wp/2016/11/17/slavery-is-technically-still-legal-in-colorado-heres-why/?utm_term=.0f94c981f66e) [<https://perma.cc/Y7T5-YVDA>]. But see Candice Norwood, *Slavery Is Still a Legal Punishment. Voters in One State Have a (Second) Chance to Abolish It.*, GOVERNING (Oct. 4, 2018), <http://www.governing.com/topics/politics/gov-colorado-ballot-slavery-amendment.html> [<https://perma.cc/2U3X-6KPH>].

<sup>484</sup> Bill Chappell, *Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed*, NPR (Nov. 7, 2018, 3:12 PM), <https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed> [<https://perma.cc/JR79-PQCM>]; Norwood, *supra* note 483.

<sup>485</sup> H.R. Con. Res. 18-1002, 71st Gen. Assemb., 2nd Sess., at 3 (Colo. 2018), [http://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a\\_hcr1002\\_rn2.pdf](http://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_hcr1002_rn2.pdf) [<https://perma.cc/S6CG-P36G>].

amend Article II, Section 26 of the state's constitution, which for more than a century declared, "There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted."<sup>486</sup> The law shall now read, "There shall never be in this state either slavery or involuntary servitude."<sup>487</sup>

States possess the power to legislate independent of the federal government. States have used this authority to protect vulnerable groups through the enactment of civil rights laws and constitutional amendments, to guarantee educational opportunity, promote marriage equality, and protect reproductive privacy. From organ transplant policy to gay marriage, state legislatures have, from time to time, been a more nimble and forceful advocate for the rights of vulnerable individuals than courts or the federal government.<sup>488</sup>

Prior to the 2015 Supreme Court ruling in *Obergefell v. Hodges*,<sup>489</sup> legalizing gay marriage, states such as Alaska, Arizona, California, Colorado, Hawaii, Illinois, Massachusetts, Minnesota, and others enacted laws to create and protect marriage equality. These laws inscribed rights to gay men and women that had not previously existed in federal or state constitutions, which were later upheld by the Supreme Court, thereby permitting gay and lesbian Americans the right to marry.<sup>490</sup>

Thus, a potential approach to addressing modern slavery as made constitutional by the Thirteenth Amendment is through legislative action. Through legislative enactments, Congress and states create rights to protect the interests of people where such rights do not exist in the Constitution. Those rights carry the weight and enforcement of law. Notable examples already exist.<sup>491</sup> Prior to the ratification of the Thir-

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<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> State legislatures have also proven to be hostile to the interests of vulnerable groups, including racial minorities and women. See ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

<sup>489</sup> 135 S. Ct. 2584, 2607 (2015); Pete Williams, *Supreme Court Rules Against Kentucky Clerk in Gay Marriage Case*, NBC NEWS (Sept. 1, 2015, 8:03 AM), <http://www.nbcnews.com/news/us-news/supreme-court-rules-against-kentucky-clerk-gay-marriage-case-n419191> [<https://perma.cc/GT8X-2AJU>].

<sup>490</sup> CNN Library, *Same-Sex Marriage Fast Facts*, CNN (Aug. 26, 2018, 8:43 AM), <https://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html> [<https://perma.cc/MV7E-LWF4>].

<sup>491</sup> See Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, ATLANTIC (Oct. 16, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/> [<https://perma.cc/RDW6-YKUR>].

teenth Amendment abolishing slavery, state legislatures abolished slavery.<sup>492</sup>

Perhaps one of the most compelling examples of the legislative experiment to forge a right where one does not exist within the Constitution relates to public education. That is, while the right to an education is recognized under the Fourteenth Amendment for Equal Protection purposes, the right itself is not protected by the Constitution.<sup>493</sup> Rather this right is created by state governments. In *San Antonio Independent School District v. Rodriguez*,<sup>494</sup> the Court “shifted the emphasis in education litigation to state courts, since a majority of state constitutions guarantee a right to education.”<sup>495</sup>

Consequently, “revisions to those guarantees have transformed some into specific and sophisticated ones.”<sup>496</sup> In her article *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, Professor Anna Williams Shavers references state constitutions that “unlike Federal Constitutional language, contain an explicit reference to education.”<sup>497</sup>

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<sup>492</sup> J. Gordon Hylton, *Before There Were “Red” and “Blue” States, There Were “Free” States and “Slave” States*, MARQ. U. L. SCH. FAC. BLOG (Dec. 20, 2012), <https://law.marquette.edu/facultyblog/2012/12/20/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/> [https://perma.cc/76XX-3X8W].

<sup>493</sup> NCC Staff, *Why There Isn't a Constitutional Right to an Education*, CONST. DAILY (Aug. 22, 2013), <https://constitutioncenter.org/blog/why-there-isnt-a-constitutional-right-to-an-education> [https://perma.cc/ZH6U-SA8B].

The Supreme Court resolved this issue 40 years ago in a case about the means of financing the public elementary and secondary schools in San Antonio, Texas, called *San Antonio Independent School District v. Rodriguez* (1973). By a 5-4 decision, with Justice Lewis Powell writing for the majority, the court found that “the Texas system does not operate to the peculiar disadvantage of any suspect class” and that education “is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”

*Id.*

<sup>494</sup> 411 U.S. 959 (1973).

<sup>495</sup> NCC Staff, *supra* note 493.

<sup>496</sup> *Id.*

<sup>497</sup> “ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § VII, para. 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. II, ch. 5; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. XI, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. II, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OKLA.



Through federalist rulemaking, state legislatures play a major role in securing civil rights. The right to an education is one such example. Moreover, fundamental rights born through state-lawmaking are often bolstered by other state laws, federal laws, judicial ruling, and even federal welfare and funding.<sup>498</sup> The concept of utilizing federalism to secure rights is not new, particularly in circumstances where Congress has failed to act, or where a constitutional guarantee does not exist. The education context provides a strong example of that.<sup>499</sup> Arguably, one of the most effective and efficient means of effectuating such change in law is the use of a model rule or law process.<sup>500</sup>

Finally, the best example of the successful use of federalism to achieve fundamental rights relates directly to the question of slavery. Prior to the ratification of the Thirteenth Amendment in 1865, many states, whether through legislation or constitutional provision, outlawed slavery.<sup>501</sup> The Appendix provides a chronological chart, highlighting States that abol-

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CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. "Scholars disagree as to whether Mississippi's clause is an education clause." Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 150 n.62 (2003) (citing Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 635 (2002) (stating that "every state constitution directly addresses education, though in varying degrees"); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 n.5 (1991) (interpreting the Mississippi clause "as requiring the Mississippi legislature to establish schools, although it does not mandate the type of schools"); Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 17 n. 21 (2002) ("Unlike the federal constitution, every state—except, arguably, Mississippi—has an education clause."); William E. Thro, *Commentary: Judicial Paradigms of Educational Equality*, 174 EDUC. L. REP. 1, 30 n. 105 (2003) (describing the Mississippi state constitution as the only one that does not contain a state education clause).

<sup>498</sup> See Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467 (2007); *The Federal Role in Education*, U.S. DEPT OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/H828-R6Y3>] (last visited Sept. 24, 2017).

<sup>499</sup> See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013); Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45 (2011).

<sup>500</sup> ROBERT A. STEIN, *FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION* (2013).

<sup>501</sup> Hylton, *supra* note 492.

ished slavery prior to the 1865 ratification of the Thirteenth Amendment.

#### 4. *The Supreme Court and Abolishment of Slavery*

The Supreme Court can intervene and determine the constitutionality of both existing and proposed amendments in at least two ways: interpretation and the ratification process. The debate regarding the Second Amendment underscores the powerful role of the Court to determine the constitutionality of the constitution and legislation. Prior to the Supreme Court's decision in *District of Columbia v. Heller*, "guns were primarily a political issue—one for legislatures to sort out without much judicial oversight."<sup>502</sup> That has now changed. According to one commentator, "now guns are also unambiguously a constitutional issue, which means the [j]ustices, not elected lawmakers, have the final say."<sup>503</sup> In *Heller*, the Court found an individual right to keep and bear arms:

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not . . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.<sup>504</sup>

However, prior to *Heller*, the last time the Supreme Court interpreted the Second Amendment was in *United States v. Miller* in 1939, and in that case, the Court interpreted the Second Amendment in conjunction with the Militia Clause, concluding that "[i]n the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."<sup>505</sup> The Court concluded that the district court

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<sup>502</sup> Adam Winkler, *Why the Supreme Court Won't Impact Gun Rights*, ATLANTIC (June 7, 2016), <https://www.theatlantic.com/politics/archive/2016/06/why-the-supreme-court-wont-restrict-gun-rights/485810/> [<https://perma.cc/F6AW-5VNX>].

<sup>503</sup> *Id.*

<sup>504</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (emphasis in original).

<sup>505</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939) (citation omitted).

erred in holding the National Firearms Act provisions unconstitutional.<sup>506</sup>

The Thirteenth Amendment presents a justiciable question regarding the enforcement of the Punishment Clause and its racially discriminatory history and impact, which have caused the disparate suffering of Black Americans. Indeed, it is a question best suited for the Court. In the past, scholars have persuasively argued that the Court has failed to act in the protection of vulnerable individuals. They cite to cases such as *Buck v. Bell*<sup>507</sup> as evidence of the Court's failure to intervene when states inflicted great harms and were not held accountable.<sup>508</sup>

Erwin Chemerinsky writes, "at every opportunity until the Civil War, the Supreme Court acted to protect the rights of slave owners and denied all rights to those who were enslaved."<sup>509</sup> Nevertheless, the Supreme Court is frequently the only hope for vulnerable groups in times of crisis and when suffering from status-based offenses. The Court is often the last hope for minority groups who by state statute or action experience discrimination, stigmatization, and significant harms.

##### 5. *Social Movements: The Role of Activists*

Finally, some scholars and activists remain skeptical that the traditional means of shifting law can effectuate change within the criminal justice system; especially, institutionalized slavery. Thus, some scholars argue for the complete abolishment of prisons, which would eliminate altogether the circumstances that provide for prison labor and slavery behind bars. That is, if prisons no longer exist or if the entire system were abolished and fundamentally rehabilitated, then there is no slavery for the punishment of crime because there, presumably, would be no punishment. This argument finds purchase in the work of Allegra M. McLeod. In her article *Prison Abolition and Grounded Justice*, she argues:

Two hundred and forty years of slavery and ninety years of legalized segregation, enforced in large measure through criminal law administration, render U.S. carceral and puni-

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<sup>506</sup> Luis Acosta, *United States: Gun Ownership and the Supreme Court*, LIBR. CONGRESS (July 2008), <https://www.loc.gov/law/help/second-amendment.php> [<https://perma.cc/P8NX-WP8Q>].

<sup>507</sup> 274 U.S. 200 (1927).

<sup>508</sup> CHEMERINSKY, *supra* note 488, at 219.

<sup>509</sup> *Id.* at 22.

tive policing practices less amenable to the reforms undertaken, for example, in Scandinavian countries, which have more substantially humanized their prisons.<sup>510</sup>

McLeod both equates the prison system to slavery and argues that refining these systems to make them more “humanized” will fail to address the more significant, underlying issues, such as racism, classism, and the persistence of racial hierarchy forged in both law and practice in the United States. She is right. Indeed, “the racial dynamics associated with incarceration and punitive policing in the United States and the practices of racial dehumanization through which U.S. carceral and policing institutions developed” underscore the challenges of adopting a traditional legal framework to protect the human rights and dignity of Black individuals (and all others) funneled through a criminal justice system that profits off of punishment.<sup>511</sup> Sadly, state legislatures, Congress, and the Supreme Court have each been complicit in perpetuating the systems of American slavery.

McCleod argues that these institutions cannot provide the corrective(s) fundamentally required to render justice for Americans caught in the most pernicious aspects of the criminal justice system, precisely because the modern prison system is built upon the dehumanization of the Black body.<sup>512</sup> Further, the dehumanization and denigration of the Black body was not only inherent to slavery, but all other systems and institutions that survived and thrived as its progeny, including the modern-day criminal justice system.

A fundamental tenet of the prison abolition movement is that slavery and the criminal justice system are deeply intertwined and connected through law and practice. On one hand, the criminal justice system is deeply embedded in the institution of slavery. On the other, the institution of slavery is fueled by the criminal justice system. Quite possibly, an overhaul is not enough to salvage human rights and promote human dignity, and perhaps, according to modern abolitionists, both systems should be abolished.

### C. Conclusion

Profit, power, and lack of moral regard for the lives and conditions of those most affected by it fueled slavery’s enduring

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<sup>510</sup> Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1184 (2015).

<sup>511</sup> *Id.* at 1185.

<sup>512</sup> *Id.* at 1188–92.

legacy. Courts, legislatures, and law enforcement play a unique role, both in shaping the multiple histories of slavery, but also in defining its future reach. Part IV provided several possible strategies to dismantle modern slavery. What is clear is that law alone will not suffice. Collective desire to end the exploitation of human labor requires more than law. It requires a shift in values.

#### CONCLUSION

Slavery's preservation in the United State can—in part—be explained by its fluid transformations, which continuously exacted economic gains, preserved southern social order, and inured benefits to private parties as well as the state. These transformations did not outpace law. Rather, the rule of law in the south and lawlessness among local law enforcement frequently accommodated these transformations and innovations. Historically, efforts to stamp out the myriad forms of slavery—convict leasing, peonage, contract transfers, so-called “apprenticeships,” and chain gangs—frequently fell short because of local collusion and complicity, weak federal interventions and protections, and violence. The specter of lynching, which included the hanging women and children, bombings of churches and homes, and arrests, succeeded in instilling a crippling fear among even the most courageous southern Blacks. Local and state laws aggravated these injustices and provided little or no relief for Black men, women, and children subjected to them.

These historic conditions matter today. With the ratification of the Punishment Clause, states lacked any disincentive to do otherwise. Effectively, there were no consequences for continuing slavery within the means articulated by the Thirteenth Amendment. If anything, the Thirteenth Amendment's Punishment Clause may have exacerbated slavery's spread into states that had previously abolished the practice. Substantively, freedom shall not and truly cannot exist without a fundamental change in the criminal justice system, including the abolishment of the Punishment Clause.