

The Thirteenth Amendment’s Punishment Clause: A Spectacle of Slavery Unwilling to Die

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INTRODUCTION

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 places subject to their jurisdiction.

Thirteenth Amendment (1865)

Nearly sixty years ago, Dr. King penned the illuminating *Letter from a Birmingham Jail*, marking the persistence of criminal punishment in the lives Black Americans seeking inclusion, equality, and freedom. Symbolically, his confinement both foreshadowed the strange and troubling role incarceration would play in the lives of Black Americans generations to come and illustrated the connective fabric of slavery to his present conditions. The profundity of the letter cannot be ignored, nor the space from which Dr. King wrote it—incarcerated after peacefully protesting to advance civil rights for Black Americans.¹

Decades later, many of the concerns undergirding the impetus for Dr. King’s powerful missive, including voter suppression, persist.² Similarly, equality in education remains an unanswered goal and incomplete vision for the civil rights movement.³ In fact, the modern challenge no longer demands inclusion and desegregation alone—the urgent objectives undergirding

¹ Foster Hailey, *Dr. King Arrested at Birmingham*, N.Y. TIMES, Apr. 13, 1963, at 1.

² See generally RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* (2020) (identifying current voter suppression and misinformation tactics).

³ See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991); Jonathan D. Glater, *Barriers to Higher Education Access*, 7 U.C. IRVINE L. REV. 1, 1 (2017) (“While the population on college and university campuses has grown far more racially and ethnically diverse, sizable gaps persist along lines of race and ethnicity, as well as class.”); Keith Meatto, *Still Separate, Still Unequal: Teaching About School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html>, archived at <https://perma.cc/55RM-BAB5> (“Racial segregation in public education has been illegal for 65 years in the United States. Yet American public schools remain largely separate and unequal—with profound consequences for students, especially students of color.”); Erica L. Green, *How Black Girls Get Pushed Out of School*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/us/politics/black-girls-school-racism.html>, archived at <https://perma.cc/3Y4X-CCZC> (reporting on how a group of researchers “has been gathering evidence that young black girls are among the most harshly disciplined and overcriminalized student groups in the country”).

*Brown v. Board of Education*⁴—but rather sparing Black children from unequal surveillance, punishments, and the “school to prison” pipeline.⁵

Yet, equality in voting and education—as crucial as they are—did not comprise nor define the full vision for the civil rights movement or emancipation from enslavement for that matter. The path to substantive civil liberties and civil rights—and freedom in a meaningful sense—included dismantling discrimination in housing,⁶ employment,⁷ healthcare,⁸ food access,⁹ and criminal justice forged by lawmakers.

⁴ 347 U.S. 483 (1954).

⁵ A recent report published by the National Black Women’s Institute summarizes the unfinished work of *Brown* and the urgency at hand, explaining that “[i]n schools in the South, Black female students were: [five times] more likely to receive 1 or more out-of-school suspensions.” The authors further explain the horrific confluence of race and sex in the unequal treatment of Black American girl students. For example, Black girls in the American South are three times more likely to be arrested than their white counterparts for school-related offenses. Additionally, they are two times “more likely to receive 1 or more in-school suspensions;” over two times “more likely to be referred to law enforcement;” and the odds are double that they will be subjected to physical restraints “in comparison to white female students.” See, e.g., MISHA N. INNIS-THOMPSON, NAT’L BLACK WOMEN’S JUST. INST., SUMMARY OF DISCIPLINE DATA FOR GIRLS IN U.S. PUBLIC SCHOOLS: AN ANALYSIS FROM THE 2015–2016 U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS DATA COLLECTION 10 (2018), https://950b1543-bc84-4d80-ae48-656238060c23.filesusr.com/ugd/0c71ee_9506b355e3734ba791248c0f681f6d03.pdf, archived at <https://perma.cc/5G64-XWF2>.

⁶ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (reversing the Supreme Court of Missouri, stating “[t]he historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color”); Aastha Uprety, *Martin Luther King, Jr.’s Fair Housing Legacy: How Testing Played A Role in the Civil Rights Movement*, EQUAL RTS. CTR. (Jan. 21, 2019), <https://equalrightscenter.org/martin-luther-king-fair-housing/>, archived at <https://perma.cc/7P3U-HNBF> (“While most people are aware of Dr. Martin Luther King Jr. as a Civil Rights Movement leader, fewer are familiar with the role he played in the fair housing movement.”); *History of Fair Housing*, U.S. DEP’T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history, archived at <https://perma.cc/JB6A-9HCD> (“Since the 1966 open housing marches in Chicago, Dr. King’s name had been closely associated with the fair housing legislation. President Johnson viewed the Act as a fitting memorial to the man’s life work, and wished to have the Act passed prior to Dr. King’s funeral in Atlanta.”); see also Matthew Desmond and Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. SOC. SCI. 15, 24 (2015) (noting modern challenges to this yet unreached goal of housing equality. For example, that studies “have shown that blacks and Hispanics living in highly segregated neighborhoods were differentially targeted by the subprime lending industry and that cities with higher levels of racial segregation experienced higher levels of foreclosures”).

⁷ See, e.g., Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CAL. L. REV. 388, 388 (1945).

⁸ See generally DAVID BARTON SMITH, *THE POWER TO HEAL: CIVIL RIGHTS, MEDICARE, AND THE STRUGGLE TO TRANSFORM AMERICA’S HEALTH CARE SYSTEM* (2016) (detailing the racial integration of the United States’ healthcare system via the discontinuation of federal Medicare payments to segregated hospitals).

⁹ See, e.g., Andrea Freeman, *Unconstitutional Food Inequality*, 55 HARV. C.R.-C.L. L. REV. 840, 840 (2020) (noting that racial disparities in food access, food-related deaths, and diseases root in American slavery and colonization).

According to Justice Douglas, “[c]ases which have come to this Court depict a spectacle of slavery unwilling to die,” precisely because they emerged from law itself.¹⁰ Justice Douglas explained:

We have seen contrivances by States designed to thwart Negro voting¹¹ . . . Negroes have been excluded over and again from juries solely on account of their race¹² . . . or have been forced to sit in segregated seats in courtrooms.¹³ They have been made to attend segregated and inferior schools . . . or been denied entrance to colleges or graduate schools because of their color.¹⁴ Negroes have been prosecuted for marrying whites. They have been forced to live in segregated residential districts¹⁵ . . . and residents of white neighborhoods have denied them entrance.¹⁶

Justice Douglas’s concurrence revealed the stunning insistence in law itself on the subordination of Black Americans, from being “forced to use segregated facilities in going about their daily lives,”¹⁷ to various other purposeful prohibitions, including exclusions from public parks,¹⁸ public beaches,¹⁹ and public libraries.²⁰ Expressly, the laws underlying the cases to which Justice Douglas referred intended to deny Black Americans the rights and privileges accorded white Americans.²¹ It was against such unjust laws that civil rights leaders, including Dr. King, protested and courageously exposed themselves to physical violence and, sadly, even death—seemingly the price for achieving civil rights victories.

On close reading of Dr. King’s famous letter, four critical points emerge. First, and most obviously, he named for the broader American public the historic and contemporary injustices alive in Birmingham, Alabama:

Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved

¹⁰ *Jones v. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

¹¹ *Id.* (citing *Lane v. Wilson*, 307 U.S. 268 (1939)).

¹² *Id.* (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

¹³ *Id.* (citing *Johnson v. Virginia*, 373 U.S. 61 (1963)).

¹⁴ *Id.* (citing *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957); *Sweatt v. Painter*, 339 U.S. 629 (1950)).

¹⁵ *Id.* (citing *Buchanan v. Warley*, 245 U.S. 60 (1917)).

¹⁶ *Id.* (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

¹⁷ *Jones v. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

¹⁸ *See New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54, 54 (1958).

¹⁹ *See Mayor & City Council of Balt. v. Dawson*, 350 U.S. 877, 877 (1955).

²⁰ *See Brown v. Louisiana*, 383 U.S. 131, 143 (1966).

²¹ History records the extra-legal harms resulting from the many unjust laws targeting Black Americans—powerfully described by Justice Douglas—as subjectively derived. In other words, segregationist laws unconstitutionally denied Black Americans equal treatment demanded by the Constitution. Arguably, segregationist laws intended the psychological cruelty they imposed on Black Americans.

bombings of Negro homes and churches in Birmingham than in any other city in this nation.²²

Dr. King referred to these as, the “hard, brutal, and unbelievable facts” triggering his protest.²³ Yet, Dr. King’s letter sends a message broader than Birmingham: These are problems of the American South and the entire nation.

Second, Dr. King points to the recalcitrance of politicians unwilling to bend law toward the arcs of justice, writing, “political leaders consistently refused to engage in good-faith negotiation” to strike down unjust and unconstitutional laws and practices that undermined the civil rights and civil liberties of Black Americans.²⁴ And as such, local and state lawmakers “left the Negro community with no other alternative” but to galvanize a social movement to protest, demonstrate, and appeal for relief from segregationist laws.²⁵

Third, while his message directly recognizes and names the brutality of white supremacy and supremacists, *Letter from a Birmingham Jail* is notably not directed at extremists, but rather at individuals complicit in Jim Crow. Dr. King wrote, “[s]hallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.”²⁶ In other words, the unequal society that Dr. King protested persisted as much due to the equivocations and inaction of people who purportedly held goodwill toward racial equality and its achievement, as it persisted due to those who created discriminatory laws.

Fourth, like Justice Douglas, Dr. King centers the unanswered inequalities that define Jim Crow as unresolved byproducts of American slavery. He ties segregation, economic injustice, police violence, and various other harms to slavery. That is, the unpaid labor of Black Americans is not a passing point in American history, but perhaps *the* point. As Dr. King put it, “[f]or more than two centuries [Black] foreparents labored here without wages; they made cotton king; and they built the homes of their masters in the midst of brutal injustice and shameful humiliation.”²⁷

This Article addresses the lingering “evil” of American slavery that concerned Dr. King. It brings up to date concerns made vivid by Dr. King’s criminal confinement and places them in modern conversation during the global pandemic. This Article takes up one largely overlooked vestige of American slavery, namely modern slavery and involuntary servitude within the carceral system in the United States. Ironically, the Thirteenth Amend-

²² Letter from Martin Luther King, Jr. to Bishop C.C.J. Carpenter et al. (Apr. 16, 1963), at 1, https://www.csuchico.edu/iege/_assets/documents/susi-letter-from-birmingham-jail.pdf, archived at <https://perma.cc/2XE7-4H2E>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 3.

²⁷ *Id.* at 5.

ment, which abolished slavery, also provided for its continuance through a largely overlooked constitutional loophole.²⁸ This loophole—the Punishment Clause—permits the permanence of involuntary labor and slavery, largely uninterrupted. This Article addresses the fact that the Thirteenth Amendment’s Punishment Clause has never been repealed or dismantled by legislative action or judicial review.

The legal persistence of slavery and involuntary servitude in American prisons and jails brings their shameful past into the unresolved and largely unaddressed present. Today, the harms of slavery manifest not only in well-documented poor infrastructural conditions and uncompensated (or barely compensated) coerced labor, but also in negligent and intentionally harmful responses to raging infections and deaths due to a global pandemic.

As articulated by W.E.B. DuBois in *Black Reconstruction in America, 1860–1880*,²⁹ slavery simply evolved after emancipation and white supremacy, buttressed by law enforcement manifested in unchecked private and state violence. Today, its expansion into detention facilities operated by the United States Immigration and Customs Enforcement (ICE) marks the preservation of slavery through its dynamic transformation. As to the latter, the United States confines nearly 50,000 people within immigrant detention—and two-thirds are confined by private contractors that in recent years have been sued for “coercing detainees into working for a dollar a day and punishing those who don’t.”³⁰

In the wake of a sprawling, hungry system of mass incarceration that disparately impacts the lives of Black and Brown Americans, this Article makes an urgent contribution. It builds upon and distinguishes its aims from prior works. It proceeds in three parts. Part I addresses the historical nexus of “old slavery” to “modern slavery” through the Thirteenth Amendment. Part II unpacks the manifestations, breadth, and scope of modern slavery in the carceral system. It describes the modern carceral system’s enforcement of the Punishment Clause as “slavery 2.0.” Included among the harms are not only the evils of dignitary subordination and forced labor, but also physical health harms, including being forced to engage in uncompensated or barely compensated labor during the COVID-19 pandemic and being denied

²⁸ U.S. CONST. amend. XIII, §1 (“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.” (emphasis added)).

²⁹ DuBois devotes a chapter to this phenomenon. In chapter sixteen, *Back Toward Slavery*, he writes, “It must be remembered and never forgotten that the civil war in the South which overthrew Reconstruction was a determined effort to reduce black labor as nearly as possible to a condition of unlimited exploitation and build a new class of capitalists on this foundation.” *See e.g.*, W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA 1860–1880*, 670 (1935) [hereinafter *DuBois, BLACK RECONSTRUCTION*] (“The wage of the Negro worker, despite the war amendments, was to be reduced to the level of bare subsistence by taxation, peonage, caste, and every method of discrimination.”).

³⁰ Victoria Law, *End Forced Labor in Immigrant Detention*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/forced-labor-immigrants.html>, archived at <https://perma.cc/K6ST-DZTT>.

access to protective services and equipment, from masks to hand sanitizers—even while the incarcerated are forced to make such items. Finally, Part III turns to strategies to overcome and dismantle the Thirteenth Amendment’s Punishment Clause.

I. THE HISTORICAL NEXUS OF ‘OLD SLAVERY TO MODERN SLAVERY’
THROUGH THE THIRTEENTH AMENDMENT

Yes, sir, slavery in the United States owes its giant growth to the Constitution; not that it was created by it, for it existed before, but that it was planted in it, fenced around and protected by it, so that no national power could weed it out short of an amendment to the Constitution.

Senator Daniel Clark (Republican, New Hampshire, 1864)³¹

Most Americans imagine slavery as a bygone era in American history, a raw and brutal period marked by unpaid labor now abolished in all aspects of American society. To their point, in 1865, the Thirteenth Amendment did abolish slavery. Yet, this arguably reasonable account is belied by slavery’s uninterrupted longevity in the United States. A profound truth is masked by liberation. Simply put, the presumption of slavery’s absolute abolition—based in law—fails to account for the fact that slavery is rooted in the Constitution itself, within the Thirteenth Amendment.³²

This textual loophole, known as the Punishment Clause, explicitly permits “slavery” and “involuntary servitude” as “punishment for crime,” where the person has “been duly convicted.”³³ Yet, law students and their professors would be forgiven for ignorance of the law, particularly as the Thirteenth Amendment is largely uncovered in American constitutional law classes. Constitutional law in American law schools largely concerns—and prioritizes—the structure of government, rights emerging from the Fourteenth Amendment, and light coverage (if any) of the Bill of Rights. In this gap is the Thirteenth Amendment and its Punishment Clause, even while the latter conflicts with the foundations of the Bill of Rights and Constitution: freedom and liberty.

A. *The Historical Underpinnings of the Slavery Loophole*

Importantly, even while its lack of instruction in American law schools serves as a grave error and oversight in legal education, the Punishment Clause’s inclusion in the very legislation intended to liberate Black enslaved people from private and public bondage is no mistake. At the time of its

³¹ See e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1368 (1864).

³² U.S. CONST. amend. XIII.

³³ *Id.*

drafting, senators from slaveholding states shrewdly fought for a compromise that could allow for slavery's continuance after the Civil War.³⁴ Section A provides a more substantive review in light of historical omissions, misread and interpreted accounts, and the demand for greater clarity on law and American slavery.

For example, Senator John Brooks Henderson, a Missouri slave owner, co-authored the Punishment Clause.³⁵ He favored adopting a law abolishing slavery that contained a punishment exception similar to the Northwest Ordinance of 1787,³⁶ which prohibited slavery in the new western territory except "in the punishment of crimes whereof the party shall have been duly convicted."³⁷ The Senate Judicial Committee debated and ultimately settled on the Thirteenth Amendment as written today.³⁸ It permitted both slavery and involuntary servitude as constitutionally authorized punishments for committing crimes.³⁹

Nevertheless, some scholars argue that codifying slavery in perpetuity was not the objective of the legislators who fought for the amendment, or that, at best, it is hard to know what Southern lawmakers really intended. To their point, the record from the legislative deliberations is limited.⁴⁰ As such, some scholars argue that the meaning behind the Punishment Clause cannot be confirmed given the "scant legislative history."⁴¹ Further, historians have argued that the Punishment Clause is race-neutral. After all, Black people are not named as part of the Amendment. That the Thirteenth Amendment's drafters did not publish papers on their deliberations adds to the challenge of ferreting out their intentions and the intentions of their colleagues,⁴² imposing a modern challenge for legal scholars.

Yet, even while historians may debate whether the Punishment Clause had anything to do with race, an examination of the congressional record as

³⁴ See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 923–25 (2019) (detailing the implementation of the Punishment Clause and the reluctance of any of the drafters of the provision to speak publicly about its interpretation).

³⁵ See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1487 (1864) (Senator Charles Sumner stating, "The Senator for Missouri [Mr. Henderson] offered a proposition in this form 'Art. 1. Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States.'"); see also 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).

³⁶ Howe, *supra* note 35.

³⁷ NORTHWEST ORDINANCE art. 6 (1787).

³⁸ Howe, *supra* note 35, at 990.

³⁹ *Id.* at 995.

⁴⁰ *Id.* at 991.

⁴¹ 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).

⁴² Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 425 (2009).

well as readings beyond law—that canvas sociology, economics, and attitudes at the time—offer critical insights and important answers.

On April 8, 1864, Senator Charles Sumner (Massachusetts), an anti-slavery Republican who eight years prior suffered and survived a brutal, bloody attack by Representative Preston Brooks (Kansas) in congressional chambers on the matter of slavery, continued debate on the Thirteenth Amendment and the provision “sanctioned” by the Judiciary Committee.⁴³ He began by posing a profound, rhetorical question. If the United States were visited by strangers from another planet, would they not be utterly confused and perplexed by its commitment to the equality of all men:

[T]here were four million human beings in abject bondage, degraded to be chattels, under the pretense of property in man, driven by the lash like beasts, despoiled of all rights, even the right of knowledge and the sacred right of family; so that the relation of husband and wife was impossible and no parent could claim his own child; while all were condemned to brutish ignorance.⁴⁴

Senator Sumner based his proposal for the formal abolition of slavery through a constitutional amendment on several principles all rooted either in the Constitution itself or found within Congress’s authority to protect the general welfare. First, according to Senator Sumner, a close reading of the Constitution would not deliver an affirmative embrace of slavery. He stated, “most clearly and indubitably, whoever finds any support of slavery in the Constitution of the United States has first found such support in himself . . . which he straightway transfers from himself to the Constitution.”⁴⁵ He argued that “positive provisions [in the Constitution] . . . brought [slavery] under the control of Congress.”⁴⁶ As to the latter, Senator Sumner first argued that congressional power “to lay and collect taxes” is “to provide for the common defense and general welfare,” and this power is one that is not “simply incident to that with which it is associated,” but rather a substantive power.⁴⁷

Second, he argued the power of Congress was unlimited, pointing to the clause, “Congress shall have power to declare war; to raise and support ar-

⁴³ United States Senate, *The Caning of Senator Charles Sumner*, May 22, 1856, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm, archived at <https://perma.cc/GS8C-GFP8>.

⁴⁴ *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1479 (1864).

⁴⁵ *Id.* at 1480.

⁴⁶ *Id.*

⁴⁷ Citing Patrick Henry, Senator Sumner argued that he “foresaw” that at a time into the future, congressional power to protect the general welfare would be used to deliver a fatal blow to the institution of slavery. *Id.* (“[T]hey will search that paper [the Constitution] and see if they have the power of manumission. And have they not, sir? Have they not the power to provide for the general defense and welfare? May they not think that they call for the abolition of slavery? May they not pronounce all slaves free? And will they not be warranted by that power?”) (quoting Patrick Henry, *Eliot’s Debates*, vol. 3, p. 596).

mies; to provide and maintain a navy.”⁴⁸ Third, Senator Sumner pointed to another clause in the Constitution, namely “the United States shall guaranty to every State in this Union a republican government,” noting that such a clause must have “meaning congenial with the purposes of the Constitution.”⁴⁹ The real intent of this guarantee, according to Sumner, was to address slavery.⁵⁰ He remarked that this could be found in the solemn Declaration of Independence, “by which it is . . . announced ‘that all men are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.’”⁵¹

Turning from this line of argument, Senator Sumner appealed to fellow senators that the power of Congress to abolish slavery could also be found in the clause “no person shall be deprived of life, liberty, or property *without due process of law*.”⁵² This protection, according to Senator Sumner, applies to every ‘person,’ without distinction of race or color, class or condition.⁵³ In Senator Sumner’s view, Congress enacted this language with slavery in mind, refusing to adopt proposed language “by two slave states, North Carolina and Virginia,” which proposed language that “No *freeman* ought to be deprived of his life, *liberty*, or property but by the *law of the land*.”⁵⁴ In rejecting the Southern lawmakers’ language, Sumner believed “clearly on its face it is an express guarantee of personal liberty and an express prohibition against invasion anywhere.”⁵⁵

Senator Sumner directly and explicitly opposed the Punishment Clause, language adopted by the Judiciary Committee, which he referred to as the “old Jeffersonian ordinance.”⁵⁶ He stated:

But I must be pardoned if I venture to doubt the expediency of perpetuating in the Constitution language which, if it have any signification, seems to imply that “slavery or involuntary servitude” may be provided “for the punishment of crime.”⁵⁷

Perhaps presaging the Fourteenth Amendment, Senator Sumner canvassed international law, identifying the constitution adopted by France and the charters of Belgium, Italy, and Greece as well-known expressions of human rights and the standard that the United States should follow. He offered an amendment that gained no traction among fellow senators. He pro-

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (“The record is important, disclosing the real intention of this guarantee. But no American need be at a loss to designate some of the distinctive elements of a republic according to the idea of American institutions” such as the Declaration of Independence.).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1480.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1482.

⁵⁷ *Id.*

posed language “to strike out the first and second sections of article thirteen as reported by the [Senate Judiciary Committee], and to insert”:

Sec. I. All persons are free [equal] before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States and the jurisdictions thereof.⁵⁸

Eventually, Congress would adopt key aspects of the vision laid forth by Senator Sumner through its enactment of the Fourteenth Amendment. However, that was years into the future. And, even then, Congress would not repeal the Punishment Clause. In 1864, even in the wake of a brutal civil war, a traitorous fight to secede from the Union, the loss of 750,000 lives,⁵⁹ and a resounding defeat, the power and influence wielded by Southern senators was not insignificant.

For example, Senator Lazarus W. Powell (Kentucky) argued against an amendment to the Constitution that would liberate enslaved Black people. As he described them, Black people were property, and federal interference with state regulation of private property was unconstitutional. He voiced concern about the proposed amendment, because all amendments are intended to last into perpetuity.⁶⁰ How exactly to interpret the Senator’s statement is a matter for debate.

However, one reasonable interpretation was that Senator Powell feared Black people gaining freedom into perpetuity. Senator Powell’s statements memorialized in the congressional record support this interpretation. He stated:

I oppose the proposition now pending before the Senate . . . Adopt this amendment, say to the people of the southern States that they are to be deprived of their property and the earnings of their labor, that their whole domestic policy is to be overthrown, and four million miserable blacks turned loose among them, if you please, and do you think they will yield while they have arms to strike?⁶¹

⁵⁸ See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1487 (1864); see also The Caning of Senator Charles Sumner, May 22, 1856, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm, archived at <https://perma.cc/5R9J-UV7P> (“Shortly after the Senate had adjourned for the day, Brooks entered the old chamber, where he found Sumner busily attaching his postal frank to copies of his ‘Crime Against Kansas’ speech. Moving quickly, Brooks slammed his metal-topped cane onto the unsuspecting Sumner’s head. As Brooks struck again and again, Sumner rose and lurched blindly about the chamber, futilely attempting to protect himself. After a very long minute, it ended.”).

⁵⁹ Facing History & Ourselves, *Statistics from The Civil War*, <https://www.facinghistory.org/resource-library/statistics-civil-war>, archived at <https://perma.cc/S9ZK-VE4X>.

⁶⁰ See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1484 (1864).

⁶¹ *Id.* at 1483.

On the other hand, understanding constitutional amendments as enduring legal covenants into perpetuity weaponized the Thirteenth Amendment in the service of Southern lawmakers. Southern lawmakers could rest assured that because constitutional amendments are presumed in perpetuity, even if slavery were abolished in the first clause, it could also be transformed, reimaged, and restored through the Punishment Clause. The Thirteenth Amendment could serve as a vehicle to replenish the supply of Black people for non-compensated labor as a punishment into perpetuity, so long as they were convicted of crimes. Clearly, slavery remained a deeply divisive issue even after the Civil War as evidenced by the congressional record.

In other words, there is much that we know from the congressional records and archives that exist. Archival research of the Congressional Globe's legislative history and debates from the 38th Congress in 1864 and 39th Congress in 1865 sheds light on these matters.⁶² Southern senators rebuffed amendment language that would abolish slavery, which did not include a clause permitting slavery as a punishment.⁶³ The Senate rejected alternatives to the present language in the Punishment Clause, including less restrictive versions of personhood and freedom, such as indentured servitude.⁶⁴ Instead, Senator Garrett Davis (Kentucky)—a Unionist who nevertheless supported slavery—proposed language declaring:

No negro, or person whose mother or grandmother is or was a negro, shall be a citizen of the United States, or be eligible in any civil or military office, or to any place of trust or profit under the United States.⁶⁵

Even as this amendment language failed, history deserves a nuanced reading of Senate deliberations. Perhaps most noteworthy is that not all Northern senators agreed on slavery's abolition. Senator Charles R. Buckalew (Pennsylvania) voted for Senator Davis's amendment along with Senator Willard Saulsbury, Sr. (Delaware).⁶⁶

One legislator floated language that would make indentured servitude permissible in prison, but could not rally sufficient support.⁶⁷ Senators quickly struck it down.⁶⁸ As Kamal Ghali writes, Senator 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 prohi-

⁶² *Id.*

⁶³ *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1370 (1864).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*; *see also* Charles R. Buckalew: *Record of the Democratic Candidate for Governor of Pennsylvania*, N.Y. TIMES, Aug 17, 1872, at A2.

⁶⁷ Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 626–27 (2008).

⁶⁸ *Id.* (citing WAGER SWAYNE, *THE ORDINANCE OF 1787 AND THE WAR OF 1861*, at 71–73 (1892)).

bition on slavery.”⁶⁹ This specific aspect of the debate begs the question whether such a difference—slavery versus indentured servitude—had material meaning for Southern senators? Or Northern senators for that matter—and if so, what were they?

Distinct social, economic, and cultural attitudes and legal policies distinguished slavery from indentured servitude. The latter was largely reserved for white immigrants who could emerge from indentured servitude without the badges of servitude defining their futures—quite unlike that which marked Black people’s lives before,⁷⁰ and even after, obtaining freedom.⁷¹ According to the widely-read Louisiana publisher and vocal proponent of slavery, James Dunwoody Brownson De Bow, one clear distinction between the enslaved Black person and a free, poor white laborer: “No white man at the South serves another as a body servant, to clean his boots, wait on his table, and perform the menial services of his household! His blood revolts against this, and his necessities never drive him to it.”⁷²

Quite simply, “while uniting the various economically divergent groups of whites, the concept of race also strengthened the ardor of most Southerners to fight for the preservation of slavery,” under the expedient logic that “all slaves belonged to a degraded, ‘inferior’ race; and by the same token, all whites, however wretched some of them might be, were superior.”⁷³ That is, “in a race-conscious society whites at the lowest rung could identify themselves with the most privileged and affluent of the community.”⁷⁴

1. *Indentured Servitude v. Slavery in the Thirteenth Amendment Debate*

White indentured servants could “pass” into society without fear of unprovoked violence and terror, fugitive laws threatening their liberty, bounty hunters tracking and stalking them, and a legal system that might conflate their former status with a lingering debt to their prior employers. By contrast, the vestiges of slavery lingered, making even free and freed Black people vulnerable to slave patrols, slave catchers, bounty hunters, corrupt

⁶⁹ *Id.*

⁷⁰ See, e.g., JOHN HOPE FRANKLIN, *THE MILITANT SOUTH 1800–1861*, 85 (1956) (generally documenting the militancy of Southerners in maintaining and policing racial boundaries and preserving slavery to a lethal degree, explaining, “it might be said that the Southern hand rested nervously on its pistol, knife, or sword; and most visitors eyed this threatening posture with proper respect.”); *id.* at 2.

⁷¹ HOPE FRANKLIN, *supra* note 70, at 87.

⁷² James Dunwoody Brownson De Bow, *The Non-Slaveholders of the South: Their Interest in the Present Sectional Controversy Identical with That of the Slaveholders*, 30 *DE BOW’S REV.* 67, 73–74, (1861).

⁷³ HOPE FRANKLIN, *supra* note 70, at 85.

⁷⁴ *Id.*

magistrates, and lawmakers who enacted legislation bent on subjecting Black people to the cruelties of American slavery.⁷⁵

In *The Militant South 1800–1861*, Professor John Hope Franklin chronicled the relentless extremism and terror that governed or *protected* slavery in the South.⁷⁶ Similarly, the social theorist Harriet Martineau who traveled throughout the United States much like the diplomat Alexis de Tocqueville and other Europeans of the era to examine its laws, economics, customs, and social affairs, noted suicide even among Black children to escape the physical violence of slavery. She wrote, “the lady saw the poor child run from story to story, her mistress following, till both came out upon the top of the house. Seeing the child about to spring over, the witness put her hands before her eyes; but she heard the fall, and saw the child taken up, her body bending and limbs hanging as if every bone was broken.”⁷⁷ In this instance, the child was being chased by her “owner” who was brandishing a whip.

In her work, *The Morals of Slavery*, Martineau recounts, “upon a mere vague report, or bare suspicion, persons travelling through the South have been arrested, imprisoned, and in some cases, flogged or otherwise tortured, on pretense that such persons desired to cause insurrection among the slaves.”⁷⁸ Even as hanging and lynching served as potent threats to chill Black insurrection, Martineau observed this “device of terrorism has been so practiced as to deprive the total number of persons who avowedly hold a certain set of opinions, of their constitutional liberty of traversing the whole country.”⁷⁹ Arguably, federal fugitive slave laws of 1793 and 1850 further legitimized and weaponized the South’s violence and militancy with respect to slavery.⁸⁰

Close attention to the distinctions between indentured servitude and slavery reveals two chief distinctions of which senators could not deny, namely freedom and liberty. These two constitutional principles marked the line that separated indentured servitude from slavery. Indentured servants

⁷⁵ See, e.g., *Pennsylvania*, 41 U.S. 539, 543 (1842); see also RICHARD BELL, *STOLEN: FIVE FREE BOYS KIDNAPPED INTO SLAVERY AND THEIR ASTONISHING ODYSSEY HOME* (2019).

⁷⁶ Professor Franklin copiously documents the culture of violence and terrorism that permeated the South in its promotion and defense of slavery. Quoting from a letter sent to a Texas lawmaker whose views on slavery were considered heretical to the Southern promotion of slavery:

That your views . . . on slavery are unsound and dangerous is the fixed belief of this community . . . You are, therefore, explicitly and peremptorily notified that, in your speech you will not be permitted to touch in any manner on the subject of slavery . . . Your introduction of it in any manner will be the prompt signal for consequences to which we need not allude . . . This communication will be read to the assembled public before you proceed with your speech.

HOPE FRANKLIN, *supra* note 70, at 89.

⁷⁷ HARRIET MARTINEAU, *RETROSPECT OF WESTERN TRAVEL* 264 (1838).

⁷⁸ Harriet Martineau, *The Morals of Slavery, in THE IDEAS THAT HAVE INFLUENCED CIVILIZATION, THE ORIGINAL DOCUMENTS* 81 (Oliver J. Thatcher, eds. 1901).

⁷⁹ *Id.*

⁸⁰ Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, *amended by* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

were not “property.” Enslaved persons were by law and social status “property.” The most obvious inhumanity of that designation foisted onto Black people was the denial of personhood. Yet, fastening “property” to their status also furthered white supremacist ideology and practice. It expanded the rights of white people vis-à-vis Black people in ways not permissible with poor, white immigrants or servants. For example, property could be harmed and even destroyed by its owners and lessors.⁸¹

In 1662, the Virginia Grand Assembly enacted one of its first “slave laws,” enforcing the proposition that enslaved persons were mere property and as such, it was not a criminal offense to maim or murder them. According to the legislature, “if any slave resist[s] his master (or other by his masters [sic] order correcting him) and by the extremity of the correction should chance to die, that his death shall not be [accounted a felony].”⁸² Clearly such laws made the lives of Black men, women, and children more vulnerable to violence, death, and psychological terror. Yet, they also served the purpose of legally and psychologically empowering and emboldening slaveowners to a lethal degree. As such, “owners” of enslaved people were not “above the law” but acting within the law to inflict terror and violence on the persons whom they enslaved. Virginia lawmakers clarified, “it cannot be presumed that [premeditated] malice . . . should induce any man to destroy his owne [sic] estate.”⁸³

Sexual subordination and predation also distinguished indentured servitude from enslavement. Generally, Black women lacked standing in courts to seek civil remedies to address the broad, and open secret of rapes and sexual assaults committed against them and their daughters,⁸⁴ and given their status as property, states did not defend their interests.⁸⁵ Sexual violence by white men against Black women was so extensive in the United States that today it remains lodged in the DNA of Black people. According to researchers, white men “contributed three times more to the modern-day gene pool of people of African descent than European women did.”⁸⁶

Thus, indentured servitude, while oppressive and class-based, operated as a labor system, and one that was less cruel than chattel slavery. Moreover,

⁸¹ See, e.g., *State v. Mann*, 13 N.C. (1 Dev.) 263, 263 (1829); SOLOMON NORTHUP, *TWELVE YEARS A SLAVE* (1853); HARRIET JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* (1861).

⁸² 2 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 170, 260, 266, 270 (William Waller Hening ed., 1823).

⁸³ *Id.*

⁸⁴ Christine Kenneally, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html>, archived at <https://perma.cc/X2D9-Q8VE>; JACOBS, *supra* note 81.

⁸⁵ JACOBS, *supra* note 81 at 27–28 (“I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things.”).

⁸⁶ Kenneally, *supra* note 84.

slavery was almost exclusively reserved for kidnapped Africans brought to the United States.⁸⁷

2. *The Meaning of Property in the Thirteenth Amendment Debate*

In the debate regarding the Thirteenth Amendment, Senator Lazarus W. Powell's statements, preserved in the Congressional record, provide insights about how Southern lawmakers prioritized property and the ownership of Black people as a foundational constitutional right:

Mr. President, it was not my purpose a day or two ago to make any remarks upon the main question; but I beg leave now to trespass on the Senate for a short time while I reply very briefly to some of the remarks that have fallen from three honorable Senators from New England . . . I do not believe it was ever designed by the founders of our Government that the Constitution of the United States should be so amended as to destroy property. I do not believe it is the province of the Federal Government to say what is or what is not property.⁸⁸

Senator Powell argued that abolishing slavery was the equivalent of the federal government destroying property. According to Powell, the "province [of the federal government] is to guard, protect, and secure, rather than destroy."⁸⁹ If slavery were outlawed, according to the Senator, "the General Government could, by an amendment to its Constitution, regulate every domestic matter in the States."⁹⁰ In other words, "if it has the right to strike down property in slaves, it certainly would have a right to strike down property in horses, to make a partition of the land, and to say that none shall hold land in any State in the Union in fee simple."⁹¹

Saulsbury maintained that congressional abolition of slavery could not and would not bind a state that did not independently ratify the Thirteenth Amendment.⁹² In an interesting post-Civil War twist, he argued that enslaved Black people constituted property and as such belonged to the State.⁹³ Saulsbury—in his own words—clarifies confusion and skepticism that racial subordination mattered to southern Senators:

⁸⁷ See, e.g., HOPE FRANKLIN, *supra* note 70; JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1979).

⁸⁸ See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (Senator Powell also expressed concerns about the federal government's reach into familial domestic matters, arguing that if "by constitutional amendment [the federal government] can regulate the relation of master and servant, it certainly can, on the same principle, make regulations concerning the relation of parent and child, husband and wife, and guardian and ward.")

⁹² *Id.* at 1365.

⁹³ *Id.* at 1366.

[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.⁹⁴

His racial ideologies aside, Saulsbury's argument was that Congress lacked the constitutional authority to regulate in this sphere, because the bondage of Black Americans was a matter to be addressed at the state level—not by Congress.⁹⁵

3. *Originalism and Other Contestations: Southern Lawmakers' Arguments for the Maintenance of Slavery*

Much can be learned by the rejection of milder alternatives to the Punishment Clause—still troubling for what they portended, but arguably less cruel than the potential for slavery in perpetuity. As previously described, of the key arguments framed in opposition to the Thirteenth Amendment, perhaps most obvious and less likely revelatory, was the view that slavery's abolition would cause disruption and interfere with the Southern ways of life. Senators sympathetic to this view couched their arguments in explicit and implicit racially hostile terms. As alarming as this rhetoric was to abolitionists at the time, Congress had previously enacted fugitive slave laws,⁹⁶ and the Supreme Court upheld slavery⁹⁷ and struck down laws that would accord Black people their freedom.⁹⁸ Thus, rather than reading Southern senators as out of touch with American judicial or legislative values, pro-slavery appeals resonated at some level. Even while substantively troubling, claims that slavery is rooted in American historic practice cannot be denied.⁹⁹

Equally, opposition to the Thirteenth Amendment based on the fear of Black liberation, including concerns about retribution to some degree, anchored the orations of Senators Davis and Powell during the debate. More broadly, economic considerations, beyond the collapse of the Southern economy, drove despair and the fight against the Thirteenth Amendment. South-

⁹⁴ CONG. GLOBE, 38th Cong., 1st Sess. 1479 (1864).

⁹⁵ *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.”).

⁹⁶ Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, *amended by* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

⁹⁷ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 394 (1857).

⁹⁸ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 539–43 (1842).

⁹⁹ CONG. GLOBE, 38th Cong., 1st Sess. 1364 (1864).

ern senators, well aware of the social dynamics in their states, including the low-wage earnings of poor whites, surely could intuit and foresee the social tensions that would emerge with constitutionally emancipated Black people competing in labor markets previously reserved for poor white people.

W.E.B. DuBois writes, “[T]he unrest and bitterness of post-war lawlessness were gradually transmuted into economic pressure.”¹⁰⁰ DuBois noted that while “owners’” efforts were made “to put the Negro to work,” an “equally determined effort by the poor whites to keep him from work which competed with them or threatened their future work and income” ensued after the Civil War and often led to violence, hostilities and discrimination. While these were not legitimate reasons or winning arguments for denying Black people liberation, the economic tensions that would result from the Thirteenth Amendment can be mapped through Reconstruction and well into the twentieth century, much of which was marked by Jim Crow economic policies and practices.¹⁰¹

Yet arguments to maintain slavery in the United States and reject the Thirteenth Amendment altogether extended beyond what one might describe as opprobrium rooted in racism. Senators oppositional to the Thirteenth Amendment turned to Supreme Court doctrine, heavily relying on the precedential value of the *Dred Scott* decision. As well, they framed arguments that today would be recognized as textualist and originalist in rejecting the Thirteenth Amendment.

As to the former, in a fiery appeal rich in criticism targeted at Senator Sumner, Senator Reverdy Johnson (Maryland), who represented John F.A. Sanford in the infamous *Dred Scott v. Sanford*¹⁰² case as well as a conspirator in the murder of Abraham Lincoln, remarked: “But I have yet to be advised that [Senator Sumner], either by nature or by education, has attained so much intellectual celebrity, or possess such transcendent mental ability as to be able to pronounce *ex cathedra* against a decision pronounced by the Supreme Court of the United States.”¹⁰³ Senator Johnson claimed to have “never heard any complaint of [the *Dred Scott* opinion], I mean as to the motives by which it is supposed it was governed, or any complaint in relation to the authoritative character of that decision. . . .”¹⁰⁴

Apart from the weak claims that the Senate’s authority to abolish slavery and free enslaved Black people was controlled by Supreme Court precedent in *Dred Scott*, opponents turned to the Constitution as supporting slavery. Senator Saulsbury argued that “Article XIII” “was not only dis-

¹⁰⁰ W.E.B. DuBois, BLACK RECONSTRUCTION, *supra* note 29, at 673.

¹⁰¹ See, e.g., HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 13–15 (1985) (explaining how the broad enactment of Black Codes and Jim Crow-era policies along with unparalleled violence carried out by labor unions to supplant Black workers effectively reinvented slavery); See also, DOROTHY BROWN, THE WHITENESS OF WEALTH (2021).

¹⁰² *Scott v. Sandford*, 60 U.S. 393.

¹⁰³ CONG. GLOBE, 38th Cong., 1st Sess. 1364 (1864).

¹⁰⁴ *Id.* at 1363–64.

tasteful to myself, but which I believe is distasteful to the country,”¹⁰⁵ because the United States by definition is rooted in secessionism.¹⁰⁶ Responding to fellow senators, he stated “sir, we are sprung from a race of secessionists, however much we may discard the name now, and however excited may be our feelings toward those deluded brethren who have undertaken to assert the right of secession and to act upon it. . . .”¹⁰⁷ Mapping the history of the United States, he observed, “When the Declaration of Independence was formed, which is often quoted as evidence that these modern doctrines in reference to slavery are the correct doctrines, every one of the colonies which helped to frame that declaration was a slaveholding colony, and most of the men who were members of that Congress were slaveholders.”¹⁰⁸ He expressed that it was “absurd” to conflate the drafters’ preamble that “all men are created equal,” with the status of Black people.

According to Saulsbury, the correct reading of the Constitution must be that Black people “constitute no people, having no voice in the Government under which they live.”¹⁰⁹ Rather, “the slave trade continued too in the Constitution of the United States by the framers of that instrument for twenty years.”¹¹⁰ Specifically, he noted that the Constitution, “not only continued the foreign slave trade for twenty years,” but that Congress “guarded and protected the right of the master to his slave by provisions” it enacted.¹¹¹

The textualist arguments against the Thirteenth Amendment and in support of slavery may be lost to history, obscured by the incendiary rhetoric about race. Indeed, few law students would likely recognize the names of either Senators Saulsbury or Johnson or abolitionists such as Senator Daniel Clark or Charles Sumner. Nevertheless, the textualist arguments should not be ignored—not for their legitimacy in the appeal for the preservation of slavery—but rather for their value in acknowledging the troubling foundations of the American democracy. As Senator Saulsbury rightly observed, these instruments—the Declaration of Independence, Constitution, and fugitive slave laws—“provided for the return of the escaped fugitive, and in the language of Justice Story that provision was essential to the formation of the Union, and unless it had been incorporated in the Constitution, no Union could have been formed.”¹¹²

Ultimately, the Punishment Clause language remained embedded in Senate Bill 16, which became the Thirteenth Amendment. Opposition efforts proved futile. Senator Sumner’s proposed amendment based on France’s

¹⁰⁵ *Id.* at 1364.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1365.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

Declaration of the Rights of Man, which promoted human rights in all persons, failed.¹¹³

The Thirteenth Amendment's final version emerged from the Senate Judiciary Committee with much of Senator Henderson's language preserved, permitting both involuntary servitude and slavery into perpetuity as constitutionally sanctioned punishments for committing crimes. By the end of 1865, Southern states enacted numerous "Black Codes," criminal laws that only applied to "Blacks and Mullatoes."¹¹⁴ Their laws served to make criminals of formerly enslaved Black people and thus return them to unpaid labor.

The chilling effects of the Punishment Clause continue to inform law, policy, and social conditions. The Punishment Clause reshaped abolitionist efforts and perceptions of formerly enslaved persons. Before ratification of the Thirteenth Amendment, abolitionists could speak to the depravity of slaveholders who forced innocent Black children, women, and men into unpaid labor. After the Thirteenth Amendment, incarcerated Black people were simply criminals and convicts—far less worthy of Northerners' sympathy—although they were no different from before.

Thus, even while the Thirteenth Amendment granted freedom to Black people trapped in slavery, Southern legislators, law enforcement, and private businesses reinvented the practice through new forms of servitude, bondage, and threat. Essentially, the Punishment Clause exception permitted the reappropriation of Black bodies for uncompensated labor in Southern states and eventually for Northern ones too. Economist Jay Mandle refers to this condition as "not enslaved but also not free."¹¹⁵ There were virtually no legal protections for newly freed Black people from labor exploitation, whether they were freed sharecroppers or newly stamped "convicts."

B. *Slavery's Capitalism*

In a powerful exposé in the *Connecticut Courant*, then the largest news organization in Connecticut, Liz Petry reported on the paper's publication of slave-related advertisements, with the first appearing on April 29, 1765.¹¹⁶ The paper frequently featured advertisements appealing to the public to re-

¹¹³ CONG. GLOBE, 38TH CONG., 1ST SESS. 990 (1864); Déclaration des droits de l'homme et du citoyen [Declaration of the Rights of Man and of the Citizen] (1789).

¹¹⁴ See Goodwin, *supra* note 34.

¹¹⁵ In chapter one, Mandle explains how the plantation economy was reestablished after the Civil War's end, and later in chapter three, he addresses the tenant plantation system, which largely tethered Black people to miserly wages and debt in the plantation economy. See, e.g., JAY R. MANDLE, NOT SLAVE, NOT FREE: THE AFRICAN AMERICAN ECONOMIC EXPERIENCE SINCE THE CIVIL WAR 5–21, 33–44 (1992).

¹¹⁶ See Liz Petry, *Chapter Five: Slavery and the Courant*, HARTFORD COURANT (Sept. 29, 2002, 3:00 AM), <https://www.courant.com/news/special-reports/hc-newcourant.artsep29-story.html#nt=featured-content>, archived at <https://perma.cc/267S-RDYE>.

turn wanted slaves and encouraging the purchasing of slaves.¹¹⁷ The *Courant* informed readers of the “huge West Indies trade” in slaves and offered details about how they could be purchased.¹¹⁸

As Petry describes, the *Connecticut Courant* played a key role in propagating 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.”¹¹⁹ Among newspapers, the *Courant* was not alone; an entire database is devoted to “runaway slave” advertisements in North Carolina newspapers between 1751–1840.¹²⁰

News media played crucial roles in the expansion and maintenance of slavery as did insurers,¹²¹ banks,¹²² creditors,¹²³ financial markets,¹²⁴ and industrialists who fitted slavers with essential “tools of the trade,” molding iron to fit shackles and chains. To secure the resources “to start[,] many future plantation owners turned to capital markets in London[,] selling debt that was used to purchase boats, goods and eventually people.”¹²⁵ In a revealing investigation on the economic implications of slavery, reporter Zoe Thomas explains, “[I]n the 19th Century, US banks and [S]outhern states would sell securities that helped fund the expansion of slave[-]run plantations.”¹²⁶ And, as the means of advertising sales of enslaved persons or bounties for their capture, the news industry represented one among many institutions in American society engaged with, profiting from, or propping up human enslavement.

If not explicitly, Petry’s exposé implicitly connected the profitability of slavery beyond plantations and estates. In ways less explored in law and

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Sarah Melton, *North Carolina Runaway Slave Advertisements Project*, SOUTHERN SPACES (Aug. 1, 2013), <https://southernspaces.org/2013/north-carolina-runaway-slave-advertisements-project/>, archived at <https://perma.cc/56W7-QQ3V>; Samantha Winer, *A Brief History of Slavery in North Carolina*, N.C. RUNAWAY SLAVE ADVERTISEMENTS, 1751–1840, <http://libcdm1.uncg.edu/cdm/history/collection/RAS>, archived at <https://perma.cc/7MKW-CTA5>.

¹²¹ See, e.g., Jasper Lee & Frank Stasio, *Life Insurance on Slaves Helped Build New York Life Insurance*, N.C. PUB. RADIO (Jan. 10, 2017, 12:31 PM), <https://www.wunc.org/race-demographics/2017-01-10/life-insurance-on-slaves-helped-build-new-york-life-insurance>, archived at <https://perma.cc/ZALZ-N6VH> (last visited Sept. 26, 2021).

¹²² See, e.g., Jasper Jolly, *Barclays, HSBC and Lloyds among UK Banks that Had Links to Slavery*, THE GUARDIAN (June 18, 2020, 12:44 PM), <https://www.theguardian.com/business/2020/jun/18/barclays-hsbc-and-lloyds-among-uk-banks-that-had-links-to-slavery>, archived at <https://perma.cc/44NE-2NM6>.

¹²³ See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 79–83 (2014); RICHARD KILBOURNE, JR., *DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA, 1825–1885* 1–15 (1995).

¹²⁴ See generally SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2014).

¹²⁵ Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC NEWS (Aug. 29, 2019), <https://www.bbc.com/news/business-49476247>, archived at <https://perma.cc/2L6W-5ZYB>.

¹²⁶ *Id.*

society, myriad industries and institutions buttressed slavery and profited from it.¹²⁷ Even though the “South was producing 75 percent of the world’s cotton,” it had to be sold, transported, profits protected and invested.¹²⁸

Like cotton, tobacco proved incredibly profitable. Prior to the “American Revolution, tobacco was the colonies’ main cash crop, with exports of the aromatic leaf increasing from 60,000 pounds in 1622 to 1.5 million by 1639. By the end of the century, Britain was importing more than 20 million pounds of tobacco per year.”¹²⁹ In other words, adjacent to the agrarian economy, slavery was an economic industry that reached well beyond the modern reductive understandings of forced servitude confined to the tobacco and cotton fields with goods for the immediate service to a planter and her or his family.

Slavery proved integral, if not essential, to the American economy.¹³⁰ Enslaved Black people “represented Southern planters’ most significant investment—and the bulk of their wealth.”¹³¹ Slavery provided for the economic flourishing of the American South and North. It positioned American colonies and later the United States as a global economic leader.¹³² Southerners credibly claimed that slavery was the chief financial institution in the United States. William Gregg, a South Carolina industrialist, argued that Northern cities thrived on the system slavery “built by the capital of Charleston.”¹³³ Slavery was an economic ecosystem, and its Southern epicenter fueled economies in the North. Not surprisingly, slavery was considered the “nursing mother of the prosperity of the North.”¹³⁴

According to Greg Timmons, “[s]lavery was so profitable, it sprouted more millionaires per capita in the Mississippi River valley than anywhere in the nation.”¹³⁵ Indeed, “[i]f the Confederacy had been a separate nation, it would have ranked as the fourth richest in the world at the start of the Civil War.”¹³⁶

¹²⁷ See, e.g., *id.*; see also Rachel L. Swarns, *Insurance Policies on Slaves: New York Life’s Complicated Past*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html>, archived at <https://perma.cc/K6ZL-TML9> (“James De Peyster Ogden, New York Life’s first president, would later describe the American system of human bondage as ‘evil.’ But by 1847, insurance policies on slaves accounted for a third of the policies in a firm that would become one of the nation’s Fortune 100 companies.”).

¹²⁸ Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY.COM (Sept. 2, 2020), <https://www.history.com/news/slavery-profitable-SouthernSouthern-economy>, archived at <https://perma.cc/QR57-Z3GW>.

¹²⁹ *Id.*

¹³⁰ See generally SVEN BECKERT & SETH ROCKMAN, *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* (2016).

¹³¹ Timmons, *supra* note 128.

¹³² BECKERT & ROCKMAN, *supra* note 130, at 5–6.

¹³³ *Id.* (quoting WILLIAM GREGG, *ESSAYS ON DOMESTIC INDUSTRY: OR, AN ENQUIRY INTO THE EXPEDIENCY OF ESTABLISHING COTTON MANUFACTURES IN SOUTH CAROLINA* 50 (1845)).

¹³⁴ *Id.* (quoting John Forsyth, *The North and the South*, DE BOW’S REV. 361, 365 (1854)).

¹³⁵ Timmons, *supra* note 128.

¹³⁶ *Id.*

1. *Slavery: Wall Street and Banking*

For example, both figuratively and literally, slavery thrived at the backdoor of Wall Street and into Europe.¹³⁷ Only “two streets away from the current site of the New York Stock Exchange, men, women and children were bought and sold.”¹³⁸ Historian and curator Sylviane Diouf points to the “aggressive increase in the slave trade and the expansion of the city” as the impetus for the 1711 opening of the Wall Street slave market.¹³⁹ Far from the rolling hills of Kentucky’s tobacco farms, rice fields of South Carolina, or cotton fields of Mississippi, New York City’s slave market was erected “by the East River on Wall Street between Pearl and Water Streets.”¹⁴⁰

New Yorkers participated in slavery as much as their Southern counterparts, such that “[b]y 1730, 42 percent of the population owned slaves, a higher percentage than in any other city in the country except Charleston, South Carolina.”¹⁴¹ The enslaved population played a crucial role in New York City, “literally buil[ding] the city [as] the engine that made its economy run.”¹⁴² New York’s (and the nation’s) first female firefighter was an enslaved Black woman, Molly Williams, memorialized in a sketch that depicts her pulling a large tanker of water in frigid conditions with nothing but her calico dress, head scarf, and no winter-wear—while the white men around her flee in winter coats, gloves, and top hats.¹⁴³

Simply put, slavery’s presence was ubiquitous and economic institutions and corporations such as Lehman Brothers,¹⁴⁴ JP Morgan Chase,¹⁴⁵ Wa-

¹³⁷ ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 169–78 (1944). *See also*, Mehrsa Baradaran, *The Limits of Banking Regulation*, N.Y. TIMES, Aug. 14, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>, archived at <https://perma.cc/78C2-73YP> (arguing that current, fragmented banking systems in the United States are a relic of slavery); Matthew Desmond, *In Order To Understand The Brutality Of American Capitalism, You Have To Start On The Plantation*, N.Y. TIMES, Aug. 14, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>, archived at <https://perma.cc/7TU7-JY6M>.

¹³⁸ Thomas, *supra* note 125.

¹³⁹ Sylviane Diouf, *New York City’s Slave Market*, N.Y. PUB. LIBR. (June 29, 2015), <https://www.nypl.org/blog/2015/06/29/slave-market>, archived at <https://perma.cc/73G8-V2CF>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*; *see also* IRA BERLIN & LESLIE HARRIS, *SLAVERY IN NEW YORK* (2005).

¹⁴³ 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), <https://www.nydailynews.com/new-york/woman-slave-molly-williams-fought-fires-early-1800s-article-1.2197868>, archived at <https://perma.cc/Q59G-NVQ9>.

¹⁴⁴ ABS Contributor, *15 Major Corporations You Never Knew Profited from Slavery*, ATLANTA BLACK STAR (Aug. 26, 2013), <https://atlantablackstar.com/2013/08/26/17-major-companies-never-knew-benefited-slavery/2/>, archived at <https://perma.cc/H9DD-3AJL>.

¹⁴⁵ David Teather, *Bank Admits it Owned Slaves*, THE GUARDIAN (Jan. 21, 2005 7:04 PM), <https://www.theguardian.com/world/2005/jan/22/usa.davidteather>, archived at <https://perma.cc/53AW-22FX>.

chovia Bank (now owned by Wells Fargo),¹⁴⁶ Aetna,¹⁴⁷ and New York Life¹⁴⁸ invested in its longevity and viability. In some instances, larger banks absorbed smaller ones that “allowed Southerners seeking loans to use their slaves as collateral and took possession of some of them when their owners defaulted.”¹⁴⁹ “The use of enslaved persons as collateral proved an innovative financial strategy” even if “little discussed by historians.”¹⁵⁰

In the 2000s, California and cities such as Chicago and Philadelphia enacted ordinances and legislation requiring companies that do business in their locales to “disclose their slavery-era activities.”¹⁵¹ In the wake of that important movement, JP Morgan Chase acknowledged that “between 1831 and 1865” Citizens’ Bank and Canal Bank of Louisiana, both now part of JP Morgan, “accepted approximately 13,000 slaves as collateral and ended up owning about 1,250 slaves.”¹⁵² Yet, JP Morgan Chase is not alone in sharing a past deeply connected to human slavery. Rather, America’s economic history—not simply that of race or sociology—intimately intertwines with slavery. Slavery itself is economic history.

2. *Slavery: Mortgaging Human Capital*

In a landmark study of financial strategies deployed during slavery, Professor Bonnie Martin analyzed nearly 9,000 mortgages recorded in the 1700s and 1800s.¹⁵³ These eighteenth and nineteenth century records demonstrate that “Southerners used human collateral to raise large amounts of cash and credit.”¹⁵⁴ The initial goals of Professor Martin’s ambitious research were to interrogate “whether slaveholders in the Euro-American colonies and the pre-emancipation United States used human property as collateral on a regular basis and, if so, to determine how much capital was generated by such mortgages.”¹⁵⁵ The findings from her study clarify that “before and after the American Revolution, slaves were mortgaged in various geographi-

¹⁴⁶ Katie Benner, *Wachovia Apologizes for Slavery Ties*, CNN MONEY (June 2, 2005 1:08 PM), https://money.cnn.com/2005/06/02/news/fortune500/wachovia_slavery/, archived at <https://perma.cc/N6Z9-9CFN>.

¹⁴⁷ Virginia Groark, *Slave Policies*, N.Y. TIMES (May 5, 2002), <https://www.nytimes.com/2002/05/05/nyregion/slave-policies.html>, archived at <https://perma.cc/CSG4-FZ6N>.

¹⁴⁸ *Common Questions*, N.Y. LIFE, <https://www.newyorklife.com/newsroom/common-questions>, archived at <https://perma.cc/AY4F-RJUY> (acknowledging on its website, “New York Life’s predecessor company, Nautilus Insurance Company, sold policies on enslaved persons’ lives between 1846–1848. It is a deeply painful history for which the company has been open and transparent about [*sic*] for decades”).

¹⁴⁹ Swarns, *supra* note 127.

¹⁵⁰ See, e.g., Bonnie Martin, *Slavery’s Invisible Engine: Mortgaging Human Property*, 76 J. S. HIST. 817, 818 (2010).

¹⁵¹ Swarns, *supra* note 127.

¹⁵² Teather, *supra* note 145.

¹⁵³ Martin, *supra* note 150, at 818.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

cal regions within Virginia, South Carolina, and Louisiana, suggesting that the practice was widespread in the South.”¹⁵⁶

Because the process was uncomplicated and enslaved persons were valuable assets, their use as collateral was uncontroversial among slave holding elites and those that wished to gain rank with the wealthy. According to Professor Martin:

Slaves were . . . used as collateral for some of the same reasons homes are used today. Most prospective home buyers cannot pay the full price of a house in cash, and so they go to a bank and apply for a purchase-money mortgage. People in the past acted similarly. If they wanted to buy a slave or slaves and could not pay the cash price, they asked the seller for a purchase-money mortgage. The buyers made a down payment, promised to pay the rest of the price plus interest in installments, and used the same slaves they were buying as collateral for the loan. The seller kept legal title of the slaves until the final payment.¹⁵⁷

Mortgage records collected from Virginia, South Carolina, and Louisiana offer a largely overlooked lens into the financial and economic history of America. Professor Martin’s research shows that with “the reassurance of slave mortgages, neighbor borrowed from neighbor and friends endorsed the debt contracts of friends. As a result, those buying slaves were able to expand their holdings in slaves more quickly because they did not have to save the entire purchase price before making their acquisitions.”¹⁵⁸

Raising capital through mortgaging enslaved people also benefited creditors and sellers. For example, credit-based sales of enslaved persons, using mortgages, “expanded the pool of potential buyers, whether those sellers were the factors of international firms, large planters, small farmers, or artisans.”¹⁵⁹ Further, those “who owned slaves outright and who wanted to retain their workforce” maximized their use of “human collateral to convince merchants to make cash advances and to sell supplies on credit.”¹⁶⁰

The profits generated through human collateral, human renting, leasing, and installment purchasing spawned economic growth and resulted in robust cash and credit markets.¹⁶¹ Mortgaging human life became a means of class transition that accorded the opportunity for slave ownership among those who lacked the means to purchase human beings outright. Nevertheless, enslaved Black people bore the human and relational costs associated with mortgaging people.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 822.

¹⁵⁸ *Id.* at 818.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 819.

Professor Martin offers a typical example of Black families caught within the mortgage and financing industry. In 1802, Pierre Broussard executed a contract in Louisiana for the ownership of Luisa, a twenty-four-year-old Black woman, and her two-year-old daughter, Josefina. Broussard lacked the eight hundred pesos to purchase them outright. Instead, he “paid 400 pesos in cash, with another 400 due ‘at the end of the cotton harvest of the present year.’”¹⁶² Broussard took possession of Luisa and Josefina, but “to guarantee the final payment, the seller retained legal title and a mortgage on Luisa and Josefina.”¹⁶³

Mortgage markets could inflict injury on family ties and bonds. Rarely was it clear to the enslaved whether she or he (or her or his children) were collateral or mortgaged. Nor was it necessarily the case that a person who was collateral for an owner’s debts would know to whom the debt belonged.¹⁶⁴ Thus, the advantageous slave mortgage financing that expanded ownership opportunities for white colonists and later Americans, imposed serious harms on Black families subjected to the equivalent of modern-day foreclosure and repossession.

For enslaved people, mortgage markets threatened the already fraught way of life, especially for those owned by the less-risk averse slave owners, embezzlers, swindlers, and scammers. Slave owners who unwisely gambled on the success of their plantations placed their collateral—enslaved Black people—at tremendous risk of being repossessed by banks and creditors, making family bonds vulnerable to the financial management or mismanagement of white slave-owners.¹⁶⁵ Even if Black people could trace their reclaimed kin to the bank owning the mortgage, which was unlikely, locating the exact transaction would be difficult. Like foreclosing on a home, the time between the point of sale and foreclosure could be years. For example, “[a] lender might foreclose on human property long after recording the mortgage, making it difficult for the families of those seized to link the traumatic memory of a separation with the mortgage that caused it.”¹⁶⁶

Even with the financial tools of mortgage and collateral at hand to maximize wealth and profit, fraud and abuses occurred. According to Professor Martin, at one point, there “had been so many fraudulent sales and multiple mortgages that people were becoming hesitant to buy. . . slaves, and other property—or to lend money to those offering any kind of property as collateral.”¹⁶⁷ To address this, the South Carolina legislature in the seventeenth

¹⁶² *Id.* at 824.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 820.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* (noting, “[w]hen loans were repaid, there were no memory-triggering events. Undoubtedly, some slave owners mortgaged slaves whom otherwise they would have sold, thereby keeping some enslaved families intact. Sadly, however, mortgaging slaves was less a tool used for the reuniting or protection of enslaved families and much more a device that increased the risks that these families would be separated.”).

¹⁶⁷ *Id.* at 821.

century enacted a statute to regulate and restore confidence in the slave-credit industry; in other words, credit was too important “to the smooth functioning and growth of [the] economy.”¹⁶⁸

Peeling back the economic veneers of slavery uncovers painful histories tied to coercive labor that marked human beings as collateral and property. Viewed in this light, an enslaved person might be owned by more than one person, mortgaged,¹⁶⁹ leased,¹⁷⁰ rented, and used as collateral. One of the key questions in *State v. Mann* turned on who had dominion over Lydia, an enslaved Black woman, owned by Elizabeth Jones, but leased to John Mann—who shot and maimed her.¹⁷¹ For the North Carolina Supreme Court, the law was well-settled: Lydia’s harm aside, this case could be dispensed as a matter of *bailment*. The court observed, “the slave had been *hired* by the Defendant, and was in his possession; and the battery was committed during the period of hiring.”¹⁷² Thus, the question of “whether a cruel and unreasonable battery on a slave, by the hirer, is indictable” could only be answered by examining whether one who owned an enslaved person outright could be liable for intentionally inflicting injury.¹⁷³

In his opinion, Judge Ruffin took note that even while personally troubling to him, it was never countenanced in North Carolina that the owner of an enslaved person would be liable for maiming or injuring her property.¹⁷⁴ Rather, according to the judge, “the power of the master must be absolute, to render the submission of the slave perfect.”¹⁷⁵ This logic extended to lessees. He wrote:

Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority. The object is the same—the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner.¹⁷⁶

In fact, this power to control the enslaved was larger than owner or lessee, but rather belonged to “the state of slavery” itself.¹⁷⁷

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *State v. Mann*, 13 N.C. 263, 264 (1829).

¹⁷¹ *Id.* at 263.

¹⁷² *Id.* at 264.

¹⁷³ *Id.* at 264–265.

¹⁷⁴ *Id.* at 265.

¹⁷⁵ *Id.* at 266.

¹⁷⁶ *Id.* at 265.

¹⁷⁷ *Id.* at 266.

Finally, even while mortgaging enslaved Black people did not survive the Thirteenth Amendment's abolition of slavery,¹⁷⁸ the fact that the financial strategy persisted for centuries still matters for two key reasons, as Professor Martin points out. First, "mortgages on enslaved people allowed the resources so central to the expansion of local and regional economies to grow and to circulate more easily[.]"¹⁷⁹ Second, there were "human as well as economic consequences of this practice."¹⁸⁰

3. *Slavery: Profiting from the Dead*

In addition to the banking and mortgage markets tied to slavery, the insurance industry played a crucial role in maximizing the potential wealth from slavery by introducing markets that insured enslaved persons. Indeed, historians point to insurance markets and slave insurance policies as having an impact on the development of insurance firms such as New York Life.¹⁸¹ For example, "[t]he company had two years to invest or spend much of the revenues from the slave policies before death claims exceeded annual premium payments[.]"¹⁸²

According to historian and professor Dan Bouk, slave insurance policies proved advantageous for New York Life, because the insurer was able to establish itself in the South before its larger competitors.¹⁸³ Historian Sharon Ann Murphy explains that slave insurance policies provided an opportunity for companies like New York Life to "break into the industry" and notes that the company "actively promoted these policies[.]"¹⁸⁴

For owners who placed their enslaved property in the most dangerous work, insurance policies provided an economic safety valve or safety net. Insurance was particularly attractive to slave-owning people that placed their property deep into the earth in vulnerable coal mines. Among the labor imposed on Black people was "[digging] for black ore in the underground shafts that oozed deadly gases."¹⁸⁵

To be clear, insuring slaves was not uncommon, nor confined to large plantations. In "Kentucky, Missouri and Tennessee" for two dollars, "residents . . . could purchase a 12-month [insurance] policy from the [Charter Oak Life Insurance Company] on a 10-year-old domestic servant that would yield \$100 if the slave died."¹⁸⁶ Insuring against the deaths of the enslaved property helped to resolve an important question. Alive, the enslaved gener-

¹⁷⁸ See, e.g., *Wainwright, Adm'r v. Bridges, et al.*, 19 La. Ann. 234 (1867), *overruled by White v. Hart*, 80 U.S. 646, 647 (1871); *Boyce v. Tabb*, 85 U.S. 546, 548 (1873).

¹⁷⁹ Martin, *supra* note 150, at 818.

¹⁸⁰ *Id.*

¹⁸¹ Swarns, *supra* note 127.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Groark, *supra* note 147.

ated profits and performed uncompensated labor. However, dead, what was their value? Virtually nothing. Insurance altered that.

According to Rachel Swarns, “[l]ife insurance changed that calculus, allowing slave owners to recoup three-quarters of a slave’s value in the event of an untimely death.”¹⁸⁷ New York Life, Aetna, and US Life “sold insurance policies to slave owners, particularly those whose laborers engaged in hazardous work in mines, lumber mills, turpentine factories and steamboats in the industrializing sectors of the South.”¹⁸⁸ New York Life sold hundreds of policies insuring slaves. However, they were not alone; dozens of “other firms, mostly based in the South, sold such policies, too.”¹⁸⁹ Like modern mortgages, one can only speculate whether banks required that the slaves they mortgaged be insured against losses.

C. Policing and Slavery: Racial Hierarchy and Stereotype

The violent deaths of Breonna Taylor¹⁹⁰ and George Floyd¹⁹¹ expose the fatal problems and unresolved harms associated with and embedded in American policing.¹⁹² Their killings, forever memorialized by a global uprising, made concrete the police violence directed at Black Americans¹⁹³ that far too many white Americans seemingly overlooked and took for granted.¹⁹⁴ The image of George Floyd asphyxiating under the knee of Derek Chauvin, a white Minneapolis police officer, shook the world.¹⁹⁵ Many referred to the killing as a lynching.¹⁹⁶

Yet, contemporary policing and incarceration in the United States root in an older American story tied to race, capitalism, and the maintenance of

¹⁸⁷ Swarns, *supra* note 127.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Richard A. Oppel, Jr. & Derrick Bryson Taylor, *Here’s What You Need to Know About Breonna Taylor’s Death*, N.Y. TIMES (Sept. 5, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html> archived at <https://perma.cc/9FCV-6P8N> (reporting “[t]he death of Breonna Taylor, a Black medical worker who was shot and killed by Louisville police officers in March during a botched raid on her apartment.”).

¹⁹¹ See Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed In Police Custody*, N.Y. TIMES, (Aug. 13, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> archived at <https://perma.cc/KRK5-75V5> (“On May 25, Minneapolis police officers arrested George Floyd . . . Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.”).

¹⁹² See generally PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).

¹⁹³ See Oppel, Jr. & Taylor, *supra* note 190.

¹⁹⁴ See, e.g., *Racial Divide in Attitudes Towards the Police*, OPPORTUNITY AGENDA (last visited Sept. 18, 2021), <https://www.opportunityagenda.org/explore/resources-publications/new-sensibility/part-iv>, archived at <https://perma.cc/4H5M-2KP4>.

¹⁹⁵ Deneen L. Brown, ‘It was a Modern-Day Lynching’: Violent Deaths Reflect a Brutal American Legacy, NAT’L GEOGRAPHIC (June 3, 2020), <https://www.nationalgeographic.com/history/article/history-of-lynching-violent-deaths-reflect-brutal-american-legacy>, archived at <https://perma.cc/GS6A-6G7S>.

¹⁹⁶ *Id.*

slavery.¹⁹⁷ One cannot seriously address incarceration—contemporary or in the past—without studying policing. Policing cannot be meaningfully unpacked in law without understanding its historical foundations strapping it to slavery and the creation of a violent racial order and ordering.

When award-winning journalist Jill Lepore asks how policing “got so big, so fast” in the collection of colonies that preceded and predated the nation’s founding, she answers the question with “mainly slavery.”¹⁹⁸ Indeed, the origins of policing in the United States date and link to American chattel slavery.¹⁹⁹

Slave police patrols²⁰⁰—authorized by law—cleverly integrated poor white Southerners in the enterprise of slavery,²⁰¹ instantiating caste hierarchy in American culture and life. That is, slave ownership and the lifestyles accorded to wealthy white men and women were beyond the reach for poor white people, however patrolling, policing, and overseeing Black people—essential features of slavery and what would become the carceral system—handed them an important role and sowed a mutuality of interests. In that way, both wealthy and working white people relied upon the system of slavery, namely Black people’s uncompensated labor and servitude. Racial hierarchy compensated poor white people for social inequalities they endured.²⁰² It granted them a higher racial order in a caste system of deep stratifications—which denied poor white men voting rights—and stature among elites.

As Jill Lepore and other scholars note, the maintenance of such a lawless system as slavery not only relied upon, but also propagated its own mythologies and racial stereotypes to justify the brutal, inhumane norms it imposed.²⁰³ The capitalism of slavery invested in kidnapping children and women,²⁰⁴ uncompensated labor,²⁰⁵ physical and sexual violence,²⁰⁶ and of

¹⁹⁷ See Jill Lepore, *The Invention of the Police*, THE NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police>, archived at <https://perma.cc/6LZC-A2PA>.

¹⁹⁸ *Id.*

¹⁹⁹ See Goodwin, *supra* note 34.

²⁰⁰ See, e.g., *Patrol Regulations for the County of Rowan*, DOCUMENTING THE AM. SOUTH (last visited Mar. 8, 2021), <https://docsouth.unc.edu/nc/rowan/rowan.html>, archived at <https://perma.cc/7LVJ-FA2Q>.

²⁰¹ *Id.*

²⁰² W.E.B. DuBois, *THE SOULS OF BLACK FOLKS* (1903).

²⁰³ Lepore, *supra* note 197.

²⁰⁴ WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH CENTURY AMERICA* (1995); Kenneth F. Kipple, *Slave Child Mortality: Some Nutritional Answers to a Perennial Puzzle*, 10 J. SOC. HIST. 284, 290 (1977).

²⁰⁵ See generally Richard H. Steckel, *Women, Work, and Health Under Plantation Slavery in the United States*, in *MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS* (David Barry Gaspar & Darlene Clark Hine, eds., 1996).

²⁰⁶ *The Making of African Am. Identity 1500-1885*, Nat’l Human. Center Resource Toolbox (July 2009), <http://nationalhumanitiescenter.org/pds/maail/index.htm>, archived at <https://perma.cc/WV2D-EVP7>.

course, denial of rights.²⁰⁷ Lepore surmises that even while British law governed in the early colonies, “one could argue that” the United States “created the police” and Britain copied it.²⁰⁸

Legislatures declared enslaved persons ungovernable—quite the contradiction to slavery itself. This alone justified police and policing. Uneducable—even while laws punished both the enslaved and those who sought to instruct them in reading and writing.²⁰⁹ The Code of Virginia, Chapter 197, *Assemblage of Negroes*, directed, “If a white person assemble with negroes for the purpose of instructing them to read or write, or if he associate with them in an unlawful assembly, he shall be confined in jail not exceeding six months and fined not exceeding one hundred dollars. . . .”²¹⁰ Similarly, the North Carolina General Assembly enacted *A Bill to Prevent All Persons from Teaching Slaves to Read or Write, the Use of Figures Excepted*, which provided:

Whereas the teaching of slaves to read and write, has a tendency to excite dis-satisfaction in their minds, and to produce insurrection and rebellion, to the manifest injury of the citizens of this State: *Therefore, Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same*, That any free person, who shall hereafter teach, or attempt to teach, any slave within the State to read or write, the use of figures excepted, or shall give or sell to such slave or slaves any books or pamphlets, shall be liable . . . and upon conviction, shall, at the discretion of the court, if a white man or woman, be fined not less than one hundred dollars, nor more than two hundred dollars, or imprisoned; and if a free person of color, shall be fined, imprisoned, or whipped, at the discretion of the court, not exceeding thirty nine lashes, nor less than twenty lashes.²¹¹

North Carolina’s *antiliteracy* law reserved the most lethal of punishments for teaching an enslaved person to read on those who were themselves enslaved. The law provided, “if any slave shall hereafter teach, or attempt to teach, any other slave to read or write, the use of figures excepted, he or she may be carried before any justice of the peace, and on conviction thereof, shall be sentenced to receive thirty-nine lashes on his or her bare back.”²¹²

²⁰⁷ See generally, *Scott v. Sandford*, 60 U.S. 393 (1857); *Prigg v. Com. of Pennsylvania*, 41 U.S. 539 (1842); Fugitive Slave Act of 1793, 1 STAT. 302, ch. 7, § 3; Fugitive Slave Act of 1850, 9 STAT. 462, ch. 60.

²⁰⁸ Lepore, *supra* note 197.

²⁰⁹ See, e.g., Va. Code Ann. ch. 198, §§30–33, *Assembling of negroes; Trading by free negroes* (1830).

²¹⁰ *Id.*

²¹¹ *A Bill to Prevent All Persons from Teaching Slaves to Read or Write, the Use of Figures Excepted*, Gen. Assemb., Sess. of 1830–1831, ch. 6, § 1 (N.C. 1831).

²¹² *Id.*

In other words, “the government of slavery was not a rule of law,” but rather, “[i]t was a rule of police” and policing.²¹³ Slave police patrols in the colonies preexisted the formation of the United States. Virginia authorized its slave police patrol in 1726, followed by North Carolina in 1753.²¹⁴

American courts and legislatures played key roles in shaping contradictory messages that relied on and perpetuated racial stereotypes and inflicted serious harms.²¹⁵ For example, typical of the police patrol laws:²¹⁶

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.

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.”²¹⁷

These patrols understood their roles as policing enslaved Black persons. In his 1857 memoir, Austin Steward meaningfully brings to light the culture of policing and the racialization of social order. He recounts:

Slaves are never allowed to leave the plantation to which they belong, without a written pass. Should anyone 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.²¹⁸

²¹³ Lepore, *supra* note 197.

²¹⁴ *Id.*

²¹⁵ *A Bill to Prevent All Persons from Teaching Slaves*, *supra* note 211.

²¹⁶ *See, e.g., Patrol Regulations for the County of Rowan*, *supra* note 200.

²¹⁷ *Id.*

²¹⁸ AUSTIN STEWARD, *TWENTY-TWO YEARS A SLAVE, AND FORTY YEARS A FREEMAN* (1857), as reprinted in 1 NAT’L HUMAN. CENTER RESOURCE TOOLBOX, *supra* note 206.

Even children were not spared.²¹⁹ Notably, “the youngest person ever executed in the United States was a 12-year-old black girl,” Hanna Ocuish, in 1786, nearly a century before the ratification of the Thirteenth Amendment.²²⁰ Historian Crystal Webster writes, “[e]nslaved children who rebelled against enslavement were also executed, as was the case for James Guild (12), Jane Huff (15) and Rosanne Keen (16), three black children executed in New Jersey in the early nineteenth century.”²²¹ According to Professor Webster, “for over two centuries, the state has imposed violence against black children as a means of establishing and maintaining white supremacy.”²²² In other words, “African American children have been targeted in ways that suppress their present and future attainment of citizenship rights,” and the collective social “lack of awareness of this history has much to do with the way society fails to recognize black children *as* children.”²²³

In *Morals of Slavery*, Harriet Martineau asks, “[w]hat social virtues are possible in a society of which injustice is the primary characteristic? In a society which is divided into two classes, the servile and the imperious?”²²⁴ This question was far from rhetorical, particularly in light of the cruelties of slavery, as well as legislative and judicial resistance to Black citizenship. Framing Black people, as Chief Justice Roger Taney described in *Dred Scott v. Sandford*, as unequal, inherently subordinate, and nearly less than human²²⁵ served to further legitimize slavery and engrain an American caste system and social order.

In *Dred Scott*, Chief Justice Roger Taney explained:

[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.²²⁶

This social ordering framed Black people as inherently and by nature bound to slavery and unequal to white people—in perpetuity.²²⁷ Slavery, ac-

²¹⁹ See Crystal Webster, *Black Children Have Always Known State Violence*, WASH. POST (June 15, 2020), <https://www.washingtonpost.com/outlook/2020/06/15/black-children-have-always-known-state-violence>, archived at <https://perma.cc/YMY7-49HV>.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ HARRIET MARTINEAU, *MORALS OF SLAVERY* 107 (1837).

²²⁵ *Dred Scott v. Sandford*, 60 U.S. 393, 427 (1857).

²²⁶ *Id.* at 407.

²²⁷ *Id.* at 409.

ording to Justice Taney was a natural state for Black people—and quite distinct from the status and stature for white people. Early English laws in the “new world” proclaimed, “Negroes and other Slaves” forever “unqualified to be governed by the Laws”²²⁸ of the nation, while in the same statute observing, “Plantations and Estates . . . cannot be fully managed, and brought into use, without the Labour and Service of great Numbers of Negroes and other Slaves.”²²⁹

In one of its earliest laws, the Virginia legislature determined murdering an enslaved Black person would not be a crime nor impose a penalty. Legislators surmised, “if any slave resists his master (or other by his master’s order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accounted a felony, but the master (or that other person appointed by the master to punish him) be acquitted from molestation, since it cannot be presumed that premeditated malice (which alone makes murder a felony) should induce any man to destroy his own estate.”²³⁰

Even as slavery depended on Black people for arduous, uncompensated labor, local authorities and slave owners relied on the labor and participation of poor white people as important key actors in the preservation and maintenance of the institution. The participation of poor white people in the enforcement of slavery served another key role beyond the systems of policing. That is, it helped to shape social hierarchy and caste in what would become the United States.

Identifying and understanding the racialized commitments to slavery and the power of law in shaping social attitudes and presumptions about race and servitude prove important for settling later debates that suggest slavery was race-neutral generally or specifically in the Punishment Clause of the Thirteenth Amendment.

II. CRUELTY IS THE POINT: THE PUNISHMENT CLAUSE AND LEGAL COMMITMENT TO SLAVERY

In his book, *Cruelty Is the Point: The Past, Present, and Future of Trump’s America*, Adam Serwer expounds upon his provocative essay written in *The Atlantic*, arguing that ideological currents of the present, including white supremacy, are shaped by the nation’s founding in slavery and its cruelties.²³¹ If there is any doubt about Congressional intent to maintain slavery, consider the following. Immediately before ratification, legislatures in Mississippi, Georgia, Alabama, North Carolina, South Carolina, and other slave-

²²⁸ *An Act for the Governing of Negroes*, L. Barbadoes, Preamble, no. 329, 137 (1688).

²²⁹ *Id.*

²³⁰ WILLIAM WALLER HENING, 11 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 1, 170, 260, 266, 270 (13th ed. 1823).

²³¹ ADAM SERWER, CRUELTY IS THE POINT: THE PAST, PRESENT, AND FUTURE OF TRUMP’S AMERICA (2021).

holding states, aggressively legislated, creating new criminal laws specifically targeting Black people newly freed from bondage.²³² Southern lawmakers made it a crime to disrupt the peace by standing peacefully on a corner if accompanied by others. This created laws of vagrancy.²³³ 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.”²³⁴

In 1865, Alabama lawmakers enacted a statute making it a punishable crime for “free negroes and mulattoes” to assemble in a disorderly manner.²³⁵ If Black farmers sold rice or corn, they could be charged with a crime, convicted, and coerced into slavery when not able to pay the fine.²³⁶ For example, 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, animal of any kind”²³⁷

If a Black person remained in a particular town or part of town for more than a few days, that too could be a crime.²³⁸ If a Black person purchased or possessed a gun, that also was made a crime. For example, an Alabama Black Code made it “unlawful for any freedmen, 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.”²³⁹

Alabama’s Black Codes were so numerous that they triggered the expansion of county courts, which were “established for the trial of misdemeanors.”²⁴⁰ The projected increase in misdemeanors directly corresponded to the harsh laws that selectively predisposed Black people to surveillance and punishment from the state. The newly enacted Black Codes answered the demands of white Southerners, eager to preserve their economic exploitation of Black labor.

²³² Goodwin, *supra* note 34, at 141.

²³³ See *Mississippi Black Codes*, HISTORY IS A WEAPON, <http://www.historyisaweapon.com/defcon1/mississippiblackcode.html>, archived at <https://perma.cc/Q6R4-F5KD> (citing Laws of the State of Mississippi, passed at a Regular Session of the Mississippi Legislature, held in Jackson, October, November and December 1965); *Budd v. Long*, 13 Fla. 288, 311 (Fla. 1869).

²³⁴ *Carter v. State*, 22 Fla. 553, 558 (1886).

²³⁵ *Withers v. Coyles*, 36 Ala. 320, 326 (1860).

²³⁶ EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION (FROM APRIL 15, 1865 TO JULY 15, 1875)* 34 (1880).

²³⁷ *Id.* at 35.

²³⁸ *Id.*; see also Tara McClellan McAndrew, *Illinois Issues: Slave State*, NPR (Oct. 20, 2016), <https://www.nprillinois.org/illinois/2016-10-20/illinois-issues-slave-state#stream/0>, archived at <https://perma.cc/F7AU-V6XY>.

²³⁹ MCPHERSON, *supra* note 236, at 33.

²⁴⁰ *Id.* at 34.

Depending on the state, it was a crime for a Black person to bargain for better wages. The result reflected what Southern legislators planned for and memorialized in the Thirteenth Amendment. If Black people could not afford the coercive fines—\$75, \$100, or more—the very law that granted their freedom also stripped it away. The fragile freedom secured through the Thirteenth Amendment proved vulnerable to state legislatures and criminal lawmaking.

For example, the incarcerated were rented and leased by the government to plantations, coal mines, railroads, and any other business ready for cheap labor.²⁴¹ Criminal convictions could result in being leased out for at least 20 years of hard labor.²⁴² Whitney Bennis, a lecturer at Harvard University, explains of the infamous Angola prison in Louisiana:

Angola's farm operations and other similar prison industries have ancestral roots in the black chattel slavery of the South. Specifically, the proliferation of prison labor camps grew during the Reconstruction era following the Civil War, a time when southern states established large prisons throughout the region that they quickly filled, primarily with black men. Many of these prisons had very recently been slave plantations, Angola and Mississippi State Penitentiary (known as Parchman Farm) among them.²⁴³

The gamble paid off for the South.²⁴⁴ As Bennis writes, “Convict leasing was cheaper than slavery, since farm owners and companies did not have to worry at all about the health of their workers.”²⁴⁵ After slavery's abolition, plantations in some states actually grew in acreage size in states like Alabama, Georgia, Louisiana, Mississippi, and South Carolina.²⁴⁶ Irresponsible coalminers in Alabama had an endless supply of young Black children sent into the depths of the earth as convicts, because they had been convicted of a new Southern crime.²⁴⁷ Moreover, Southern lawmakers could now call Black

²⁴¹ See William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, in *THE ROLE OF CONVICT LABOR IN THE INDUSTRIAL DEVELOPMENT OF BIRMINGHAM*, at 1 (1998).

²⁴² See, e.g., Whitney Bennis, *American Slavery Reinvented*, *THE ATLANTIC* (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>, archived at <https://perma.cc/P2CE-T7WK>; William Andrew Todd, *Convict Lease System*, *NEW GA. ENCYCLOPEDIA* (Dec. 12, 2005), <https://www.georgiaencyclopedia.org/articles/history-archaeology/convict-lease-system>, archived at <https://perma.cc/592U-3YDT> (noting that Georgia passed a law in 1876 that allowed the leasing of prisoners for at least twenty years).

²⁴³ *Id.*

²⁴⁴ Michele Bratcher Goodwin, *We Can't Be Free Until We Fully Abolish Slavery*, *APPEAL* (Oct. 7, 2020), <https://theappeal.org/13th-amendment-abolish-slavery/>, archived at <https://perma.cc/36XH-KTJY> [hereinafter Goodwin, *We Can't Be Free*].

²⁴⁵ See, e.g., Bennis, *supra* note 242.

²⁴⁶ Goodwin, *We Can't Be Free*, *supra* note 244.

²⁴⁷ *Id.*

women, children, and men criminals and convicts and the broader white society their victims.²⁴⁸

Today, the United States mires in a blatant prison problem. This flagrant prison problem exposes the unfinished business of addressing racism in criminal justice that dates to slavery, Reconstruction, and Jim Crow—and the harm beget by the Thirteenth Amendment’s loophole.²⁴⁹ Today’s prison problem is the crisis of color line predicted by sociologist W.E.B. DuBois more than a century ago in *The Souls of Black Folks* and later in *Black Reconstruction in America, 1860–1880*.²⁵⁰ In both works, he predicts that the tragedy of American democracy will manifest along the color-line with lingering racial attitudes that result in the disparate treatment of Black Americans.²⁵¹

In chapter sixteen of *Black Reconstruction*, DuBois paints the picture of a movement “back toward slavery,” wherein an ongoing civil war never produces the equality that Black people seek,²⁵² and that the Constitution guarantees. Rather, he argues, the “South . . . overthrew Reconstruction” in its “determined effort to reduce black labor as nearly as possible to a condition of unlimited exploitation and build a new class of capitalists on this foundation.”²⁵³ This is a lawlessness memorialized and legitimized in law through the Thirteenth Amendment’s Punishment Clause as well as the various Black Codes drafted to catch Black prey into the criminal justice system.

Reconstruction formally began after ratification of the Thirteenth Amendment in 1866, which marked the end of the traditional forms of American slavery.²⁵⁴ It lasted until 1877. However, the typical images and imaginings of slavery, memorialized by etchings and later photographs of Black people in cotton and tobacco fields, represent only the early iteration of slavery. The Punishment Clause provided for the repackaging and reimagining of slavery.²⁵⁵ With traditional slavery decreed away, Southern white profiteers on Black labor “no longer apologize to the world for a system they were powerless to change or reconstruct.”²⁵⁶ Like slavery imagined

²⁴⁸ *Id.*

²⁴⁹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 21–22 (Revised ed. 2011).

²⁵⁰ DUBOIS, *SOULS OF BLACK FOLKS*, *supra* note 202, at 10; DUBOIS, *BLACK RECONSTRUCTION*, *supra* note 29, at 707.

²⁵¹ See DUBOIS, *SOULS OF BLACK FOLKS*, *supra* note 202, at 10; DUBOIS, *BLACK RECONSTRUCTION IN AMERICA*, *supra* note 29, at 707.

²⁵² DUBOIS, *BLACK RECONSTRUCTION IN AMERICA*, *supra* note 29, at 670–71.

²⁵³ *Id.* at 670.

²⁵⁴ LIBRARY OF CONGRESS, *The African American Odyssey: A Quest for Full Citizenship: Reconstruction and Its Aftermath*, <https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html>, archived at <https://perma.cc/ZL2R-8HTS>.

²⁵⁵ See, e.g., Rogers & Ward, *supra* note 241 (detailing the convict leasing system that emerged after slavery’s abolition).

²⁵⁶ DUBOIS, *BLACK RECONSTRUCTION IN AMERICA*, *supra* note 29, at 670–71.

by Judge Ruffin in *State v. Mann*, it simply existed on its own—with rules no man or judge could alter.²⁵⁷

Yet, emancipation and the Thirteenth Amendment provided cover for Southern political, judicial, and social recalcitrance. The Southern economy—based on a brutal, racialized system of disenfranchisement—transformed into one of blatant lawlessness, violence, and policing to secure Black labor. It punished those that resisted. Quoting Carl Schurz’s written testimony to the United States Senate, DuBois writes:

Some planters held back their former slaves on their plantations by brute force. Armed bands of white men patrolled the county roads to drive back the Negroes wondering about. Dead bodies of murdered Negroes were found on and near the highways and byways. Gruesome reports came from the hospitals—reports of colored men and women whose ears had been cut off, whose skulls had been broken by blows, whose bodies had been slashed by knives or lacerated with scourges. A number of such cases, I had occasion to examine myself. A veritable reign of terror prevailed in many parts of the South.²⁵⁸

Predicting the poverty into which white people would be thrust, framers of the Punishment Clause innovated, birthing slavery 2.0 into law. After all, who would plant the corn, till the seeds, cultivate the tobacco and sugar cane? As DuBois notes, “Emancipation left the planters poor, and with no method of earning a living, except exploiting black labor on their only remaining capital—their land.”²⁵⁹

The Punishment Clause was a powerful, constitutional shield for Southerners who coercively imposed criminal punishments to extract Black labor. After the Thirteenth Amendment’s ratification, slavery could be justified and rationalized as a condition that Black people brought upon themselves due to their lawlessness and criminality, making innocent victims of the white people who then benefited once more from their uncompensated labor.

Unlike pre-Reconstruction slave-based labor, the Punishment Clause introduced this reimagined slavery nationwide. In this light, the Confederacy did make its way north through the Thirteenth Amendment’s Punishment Clause, which reintroduced slavery into northern states that previously abolished it and introduced it into states that previously rejected it.

²⁵⁷ *State v. Mann*, 13 N.C. 263, 263 (1829).

²⁵⁸ DuBois, BLACK RECONSTRUCTION IN AMERICA, *supra* note 29, at 671.

²⁵⁹ *Id.*

A. *Race-Based Policing*

Today, although the Black Codes have been repealed, their legacy serves as the foundation for policing in America and the current misdemeanor system²⁶⁰—from stop and frisks²⁶¹ to “broken windows”²⁶² policing that uses minor infractions to pull people into a system where their rights, freedoms, and even lives quickly vanish.²⁶³ Importantly, like the Thirteenth Amendment’s Punishment Clause, these harms instantiate and emanate from law. Professor Devon Carbado speaks to the Supreme Court’s role in what today manifests in disparate, racialized policing:

At this point, it bears repeating that my criticism of Justice Warren is not just that he ruled [in *Terry v. Ohio*] that police officers may use reasonable suspicion to stop-and-frisk people when officers are concerned about their safety or the safety of others. The problem is also that the Chief Justice did not prohibit police officers from using reasonable suspicion to stop-and-question people when officers have no concerns about their safety or the safety of others.²⁶⁴

Punishments in criminal law enforcement unequally materialize and land on Black people in the United States.²⁶⁵ In a glaring report, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Professor Elizabeth Hinton offers an empirical view:

²⁶⁰ See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 173–76 (2018).

²⁶¹ Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1533 (2017) [hereinafter Carbado, *From Stop and Frisk*] (“It was one thing for Justice Warren to note that the exclusionary rule cannot stop the ‘wholesale harassment’ of African Americans. It was quite another for him to put in place a legal regime that effectively provided police officers with a constitutional mechanism to engage in that very practice.”); David Rudovsky & David Harris, *Terry Stops-and-Frinks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO STATE L. J. 501, 501 (2018).

²⁶² Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271 (2006).

²⁶³ Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017).

²⁶⁴ Carbado, *From Stop and Frisk*, *supra* note 261, at 1533.

²⁶⁵ ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM, 1 (May 2018) <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>, archived at <https://perma.cc/QR3T-EEWL> (“This discrimination continues today in often less overt ways, including through disparity in the enforcement of seemingly race-neutral laws. For example, while rates of drug use are similar across racial and ethnic groups, black people are arrested and sentenced on drug charges at much higher rates than white people.”).

Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated. One in three black men born today can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men. Black women are similarly impacted: one in 18 black women born in 2001 is likely to be incarcerated sometime in her life, compared to one in 111 white women. The underlying reasons for this disproportionate representation are rooted in the history of the United States and perpetuated by current practices within the nation's justice system.²⁶⁶

The results of racialized, specifically anti-Black, criminal justice manifest not only in disparate policing, arresting,²⁶⁷ charging,²⁶⁸ convictions,²⁶⁹ and lengthier sentences,²⁷⁰ but also in violence from the state, directed at Black people.²⁷¹ The Innocence Project underscores this tragedy: “[t]he disproportionate incarceration of Black people today is borne directly out of that dark history and the brutality of the Jim Crow era. Black people account for 40% of the approximately 2.3 million incarcerated people in the U.S. and nearly 50% of all exonerees—despite making up just 13% of the US population.”²⁷²

Similarly, in a report to the Inter-American Commission on Human Rights, the American Civil Liberties Union issued a written submission, *Racial Disparities in Sentencing*, highlighting glaring racial injustice in sentencing, explaining, “[s]entences imposed on Black males in the federal system are nearly 20 percent longer than those imposed on white males convicted of similar crimes.”²⁷³ Moreover, Black and Latinx defendants receive

²⁶⁶ *Id.* at 1.

²⁶⁷ Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (June 10, 2020) [hereinafter Balko, *Overwhelming Evidence*], <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>, archived at <https://perma.cc/NK4U-842H> (“A 2019 study of police stops in Cincinnati found that black motorists were 30 percent more likely to be pulled over than white motorists. Black motorists also comprised 76 percent of arrests following a traffic stop despite making up 43 percent of the city's population.”).

²⁶⁸ See, e.g., DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP'T 4 (Mar. 4, 2015) (finding that Black people in Ferguson, Missouri accounted for 85% of motor vehicle stops, even while comprising only 67% of the population and received 95% of jaywalking tickets).

²⁶⁹ Daniele Selby, *How Racial Bias Contributes to Wrongful Conviction*, INNOCENCE PROJECT (June 17, 2021), <https://innocenceproject.org/how-racial-bias-contributes-to-wrongful-conviction/>, archived at <https://perma.cc/2Q8K-6PM9>.

²⁷⁰ Am. C.L. Union, Written Submission to the Inter-American Commission on Human Rights on Racial Disparities in Sentencing (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf, archived at <https://perma.cc/658U-GP28>.

²⁷¹ Carbado, *From Stop and Frisk*, *supra* note 261, at 1513–15.

²⁷² Selby, *supra* note 269.

²⁷³ Am. C.L. Union, *supra* note 270, at 1.

lengthier sentences in federal courts than white counterparts “for the same offenses and with comparable criminal histories.”²⁷⁴

From Vermont to California, disparate racial policing takes place, including for jaywalking, driving, and other daily activities.²⁷⁵ In the town of Florissant, Missouri—near Ferguson—“71% of the motorists pulled over by police in 2013 were black” even though “Blacks [made] up 27% of the town at the time”²⁷⁶ Radley Balko and others now refer to this as “profit[ing] from poverty.”²⁷⁷ In a copious review of empirical studies, directly connecting anti-Blackness racism to policing, Radley Balko offers representative nationwide data points:

- A 2019 survey of traffic tickets in Indianapolis and its suburbs found that in the city, black drivers received 1.5 tickets for every white driver. In the suburban town of Fishers, the disparity grew to 4.5 tickets, and in the wealthy suburb of Carmel, black motorists received 18 tickets for every ticket issued to a white motorist.²⁷⁸
- . . . [In Charlottesville], black men were 8.5% of the population, but comprised more than half the arrests. In the county, black men were 4.4% of the population, but comprised 37.6% of arrests.²⁷⁹
- A 2020 report on 1.8 million police stops by the eighth largest law enforcement agencies in California found that blacks were stopped at a rate 2.5 times higher than the per capita rate of whites.²⁸⁰
- . . .
- A study of 542,000 traffic stops in Connecticut . . . found that blacks were more likely to be searched after stops for registration, license, seatbelt and cellphone violations. The study found that about 19% of searches of black motorists turned up contraband, vs. 29% of the searches of white motorists.²⁸¹

As research in implicit and explicit biases show, disparate racial police stops, car searches, and more cannot be explained by disproved stereotypes that Black people are more prone to violence, use of drugs, noncompliance with law enforcement, or predisposed to criminality.²⁸² Importantly, dispa-

²⁷⁴ *Id.*

²⁷⁵ Balko, *Overwhelming Evidence*, *supra* note 267.

²⁷⁶ *Id.*

²⁷⁷ Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>, archived at <https://perma.cc/8FTX-B96S>.

²⁷⁸ Balko, *Overwhelming Evidence*, *supra* note 267.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See, e.g., L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037 (2011); Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135–39 (2012); see gener-

rate racial policing—whether in the criminal or civil sphere²⁸³—are forms of state violence. This type of violence from the state results in disparate rates of incarceration. And incarceration and the conditions of incarceration magnify and create new forms of violence and coercion, including involuntary prison servitude.

B. *The Punishment Clause: Slavery 2.0*

More than a century later, the burdens of America’s penchant for prisons still fall disproportionately on Black people, their families,²⁸⁴ and their communities.²⁸⁵ The more than two million people incarcerated in the United States account for 25% of all prisoners in the world, even though the United States “has only 5% of the world’s population.”²⁸⁶ To address this, in 2013, Eric Holder, the former United States Attorney General, issued an urgent call for drug-law reform in an effort to address disparate sentencing laws and the larger phenomenon of over policing Black men.²⁸⁷

In 2014, at the national meeting of the National Association for the Advancement of Colored People (NAACP), President Barack Obama issued a similar call to action for penal reform.²⁸⁸ For both men, the face of disparate policing and incarceration presented as Black and male or even Latino and male.²⁸⁹ To applause, President Obama remarked, “The bottom line is that in too many places, black boys and black men, Latino boys and Latino men experience being treated differently under the law.”²⁹⁰ To further applause, he added, “African Americans are more likely to be arrested. They are more likely to be sentenced to more time for the same crime . . . And one of the consequences of this is, around one million fathers are behind bars.”²⁹¹

ally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 949 (2006); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 7 (1995).

²⁸³ See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001) (explaining how Black parents are more likely to be surveilled by the state and their children involuntarily removed from the home).

²⁸⁴ *Id.*

²⁸⁵ HINTON, HENDERSON & REED, *supra* note 265, at 1.

²⁸⁶ Dan Roberts & Karen McVeigh, *Eric Holder Unveils New Reforms Aimed at Curbing US Prison Population*, GUARDIAN (Aug. 12, 2013), <https://www.theguardian.com/world/2013/aug/12/eric-holder-smart-crime-reform-us-prisons>, archived at <https://perma.cc/XH29-SHLH>.

²⁸⁷ 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>, archived at <https://perma.cc/S9CY-UX9X>.

²⁸⁸ President Barack Obama, Remarks at the NAACP Conference (July 14, 2015, 4:40 PM), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>, archived at <https://perma.cc/6HEK-PJ3X>.

²⁸⁹ *Id.*; see Holder, Remarks at ABA Meeting *supra* note 287.

²⁹⁰ *Id.*

²⁹¹ *Id.*

Citing an alarming statistic, he informed the audience, “Around one in nine African American kids has a parent in prison.”²⁹²

President Obama and Attorney General Holder were not wrong but neither were they completely right, because Black women suffer significant injustices in the carceral system too.²⁹³ The United States incarcerates more women than any other nation in the world.²⁹⁴ As reported by the Prison Policy Initiative, “Only 5% of the world’s female population lives in the U.S., but the U.S. accounts for nearly 30% of the world’s incarcerated women.”²⁹⁵ Their research further shows, “the [is] not only incarcerating women far more than nearly all other nations, but we are also incarcerating women far more than we have done in the recent past.”²⁹⁶

For example, “The sudden growth of [women’s] incarceration in our country has been staggering; our incarceration rate nearly tripled between 1980 and 1990.”²⁹⁷ Even as the study’s authors attribute the troubling rise in the rates of women’s incarceration to “regrettable policy choices by federal, state and local officials in the last three decades,”²⁹⁸ it is worth taking a longer view to understand the historical underpinnings of women’s incarceration and their racialized implications. Moreover, the problematically high rates of women’s incarceration in the United States carry significant implications from a policy perspective—related to labor behind bars,²⁹⁹ sexual

²⁹² *Id.*

²⁹³ The population of women in prison grew by 832% in the period from 1977 to 2007—twice the rate as that of men during that same period. WOMEN’S PRISON ASS’N, QUICK FACTS: WOMEN & CRIMINAL JUSTICE – 2009 (2009) [hereinafter QUICK FACTS 2009], <https://healthforward.org/wp-content/uploads/2015/11/Women-in-Prison-Stats.pdf>, archived at <https://perma.cc/WHK7-SSPU>.

²⁹⁴ Aleks Kajstura & Russ Immariageon, *States of Women’s Incarceration: The Global Context*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/global/women/>, archived at <https://perma.cc/LV94-5KP9>

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ 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, archived at <https://perma.cc/79JA-ZP4Q>.

safety,³⁰⁰ physical health,³⁰¹ reproductive health,³⁰² psychological health,³⁰³ and parenting.³⁰⁴ According to the Bureau of Justice Statistics:

Mothers were more likely than fathers to report living with at least one child. More than half of mothers held in state prison reported living with at least one of their children in the month before arrest, compared to 36% of fathers. More than 6 in 10 mothers reported living with their children just prior to incarceration or at either time, compared to less than half of fathers.³⁰⁵

More than one million women are incarcerated in jail or prison or are shackled to the criminal justice system as a parolee or probationer in the United States.³⁰⁶ Here too, glaring racial disparities persist. The United States incarcerates more women than China, India, and Russia combined.³⁰⁷ That is, American women comprise the largest group of female inmates in the world. They, especially Black women, too are part of the prison economy and are directly implicated in it.³⁰⁸

In a compelling graphic, the Prison Policy Initiative charts the global women's incarceration rates based on the premise if "every U.S. state were a country," and notes that states such as Indian, Colorado, Virginia, Alaska, and at least a dozen others have higher incarceration rates of women than Thailand, China, El Salvador, Rwanda, Brazil, Saudi Arabia, and all other nations. Unfortunately, the glaring reality of women's incarceration is "overshadowed and often lost in the data" of men's incarceration.³⁰⁹

Relying on those incarcerated to provide free or below-poverty-wage labor, padding the coffers of both states and private corporations, cannot be

³⁰⁰ Ayelet Waldman, *Sentenced to Rape—Behind Bars in America*, DAILY BEAST (Nov. 10, 2011), <https://www.thedailybeast.com/sentenced-to-rapebehind-bars-in-america>, archived at <https://perma.cc/783J-Y52X> ("Shackles, sexual violence, humiliation. Sounds like a medieval torture chamber, but it's modern life for many women in prisons across America.").

³⁰¹ Peter Eisler, Linda So, Jason Szep & Grant Smith, *As More Women Fill America's Jails, Medical Tragedies Mount*, REUTERS (Dec. 16, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-women/>, archived at <https://perma.cc/46JH-XSWX>.

³⁰² Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFRICAN-AMERICAN L. & POL'Y 117, 126 (2013).

³⁰³ Eisler *et al.*, *supra* note 301 ("Most suffer from mental illness – at far higher rates than their male counterparts – and they're more likely to experience drug and alcohol addiction.").

³⁰⁴ See Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV., 311–14 (2014); see also Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, U.S. Dep't of Justice, *Parents in Prison and Their Minor Children 1–2* (2008).

³⁰⁵ GLAZE & MARUSCHAK, *supra* note 304, at 4.

³⁰⁶ QUICK FACTS 2009, *supra* note 293.

³⁰⁷ ROY WALMSLEY, INST. CRIM. POL'Y RSCH., WORLD FEMALE IMPRISONMENT LIST 2 (4th ed. 2017).

³⁰⁸ See Michele Goodwin, *Invisible Women: Mass Incarceration's Forgotten Casualties*, 94 TEX. L. REV. 353, 374 (2015); see also Eisler *et al.*, *supra* note 301 ("The casualties disproportionately affect Black women. Blacks comprise less than 14% of the U.S. population, but at least 24% of the 914 female victims identified by Reuters were Black.").

³⁰⁹ Kajstura & Immarigeon, *supra* note 294.

described as rehabilitation. Rather, the history of purposeful, disparate punishment for crimes roots in post-emancipation slavery that survived Jim Crow and now is preserved, even if transformed.³¹⁰

C. *Vestiges Not Yet Vanished*

Today, the vestiges of slavery live on *in slavery*. In Louisiana, unpaid, prison slave labor is framed as a “necessary evil,”³¹¹ by its advocates who desire its continuation. Like plantation owners two centuries prior, they claim helplessness to reimagine Black labor. Wardens argue that if not for the system’s profitability, they would make changes. However, those changes now come at a cost. From both a legal and a historical perspective, in these former chattel slavery communities, uncompensated Black servitude is embedded in the foundations of law and society.

According to Sheriff Steve Prator, an opponent to Louisiana prison labor reforms, “[i]n 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.”³¹² Arguably, the purpose of incarceration is not to run sweatshops or car washes, but rather “to keep the community safe and to make sure that nobody is incarcerated any longer than necessary.”³¹³

However, in Alabama, incarcerated people earn no pay for what are referred to as “non-industry jobs,” although work programs facilitated by Alabama aid private industries (making couches, barbecue grills, and other items). Workers there can earn \$0.25 to \$0.75 per hour, according to data collected by the Prison Policy Initiative in 2017.³¹⁴

Neither Arkansas nor Georgia pay for either non-industry or private industry jobs.³¹⁵ States that pay for “non-industry” jobs do so with the most meager of wages: as little as \$0.15 per hour in Arizona or \$0.04 in Louisiana.³¹⁶ Private industry jobs in these states might fetch less than \$1.00 per

³¹⁰ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

³¹¹ Eli Rosenberg, *Louisiana Sheriff Argues Against Releasing “Good” Prisoners Needed for Money-Saving Menial 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>, archived at <https://perma.cc/2PH2-WXWG>.

³¹² 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, archived at <https://perma.cc/D26D-LPZH>.

³¹³ *Id.*

³¹⁴ Prison Pol’y Initiative, *State and Federal Prison Wage Policies and Sourcing Information*, (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html, archived at <https://perma.cc/LAW5-ZVMB>.

³¹⁵ *Id.*

³¹⁶ *Id.*

hour.³¹⁷ In 2014, lawyers for the state of California resisted a court order to reduce prison populations by arguing that doing so would cut into the cheap labor available to clear trash, maintain parks, and fight forest fires—“a dangerous outcome while California is in the middle of a difficult fire season and severe drought,” the lawyers wrote.³¹⁸

According to Lt. Keith Radey, “[a]ny fire you go on statewide, whether it be small or large, the inmate hand crews make up anywhere from 50 to 80 percent of the total fire personnel.”³¹⁹ Even when incarcerated individuals labor for private, multi-million and billion-dollar industries, they still earn meager or “slave-like” wages. Famously, in the 1990s, inmates sewed the merchandise sold by J.C. Penney and Victoria’s Secret.³²⁰

Today, Victoria’s Secret no longer uses prison labor to make garments incarcerated women would not be permitted to use. However, numerous corporations invest in prison labor. A list from 2017 included:

Whole Foods,³²¹ McDonalds,³²² Wal-Mart,³²³ 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,³²⁴ IBM, Boeing, Motorola, Microsoft, AT&T, Wireless, Texas Instrument, Dell, Compaq, Honeywell, Hewlett-Packard, Nortel, Lucent Technologies, 3Com, Intel, Northern

³¹⁷ Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>, archived at <https://perma.cc/Y2LR-D8CV>.

³¹⁸ Jackie Kucinich, *Kamala Harris’ A.G. Office Tried to Keep Inmates Locked Up for Cheap Labor*, DAILY BEAST (Feb. 11, 2019, 10:24 PM), <https://www.thedailybeast.com/kamala-harris-ag-office-tried-to-keep-inmates-locked-up-for-cheap-labor>, archived at <https://perma.cc/Q7R5-SJDB>.

³¹⁹ 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., archived at <https://perma.cc/N56U-X8LJ>.

³²⁰ 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, archived at <https://perma.cc/A45U-ZY38>.

³²¹ 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>, archived at <https://perma.cc/EE3B-BHQ6>.

³²² Rebekah Barber, *Nationwide Prison Strike Draws Attention to Unpaid Labor*, FACING S. (Sept. 16, 2016), <https://www.facingsouth.org/2016/09/nationwide-prison-strike-draws-attention-unpaid-labor>, archived at <https://perma.cc/EJ4Y-REDL>.

³²³ *Id.*

³²⁴ *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>.

Telecom, TWA, Nordstrom's, Revlon, Macy's, Pierre Cardin, and Target Stores.³²⁵

As explained elsewhere, prison slavery extracts more than labor from incarcerated people, especially women.³²⁶ For women, 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.³²⁷ Even more devastating are the illegal instances in which prison systems rent out men and women as sexual slaves to guards and other prisoners.³²⁸

Prison officials make claims that labor for public and private purposes is voluntary. Yet, it should not be ignored that incarcerated individuals are expected to work.³²⁹ Federal policy mandates this: “convicted inmates confined in Federal prisons, jails, and other detention facilities shall work.”³³⁰ Similar policies exist in each state, governing state prison facilities.³³¹ Some states even coerce universities to purchase products made from prison industries.³³²

³²⁵ Vicky Peláez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RES. (June 14, 2020), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>, archived at <https://perma.cc/32WG-327F>.

³²⁶ See generally Goodwin, *supra* note 34.

³²⁷ See Katie Warren, *200 Female Inmates Are Fighting Fires in California*, NBC L.A. (Oct. 11, 2017, 3:39 PM), <https://www.nbclosangeles.com/news/local/The-Female-Inmates-Fighting-Fires-in-California-450438783.html>, archived at <https://perma.cc/3MDR-YWGA>; ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 5 (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#>, archived at <https://perma.cc/Z9F6-JQ7X>.

³²⁸ 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>, archived at <https://perma.cc/53GV-MRQ3>.

³²⁹ See Caroline Winter, *What Do Prisoners Make for Victoria's Secret?*, MOTHER JONES (Jul.–Aug. 2008), <http://www.motherjones.com/politics/2008/07/what-do-prisoners-make-victorias-secret/>, archived at <https://perma.cc/BB4G-5WNP>.

³³⁰ Crime Control Act of 1990, Pub. L. No. 101–647, § 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.>, archived at <https://perma.cc/7UHA-TP35>.

³³¹ Hanna Kozłowska, *U.S. Prisoners Are Going on Strike to Protest a Massive Forced Labor System*, QUARTZ (Sept. 9, 2016), <https://qz.com/777415/an-unprecedented-prison-strike-hopes-to-change-the-fate-of-the-900000-americans-trapped-in-an-exploitative-labor-system/>, archived at <https://perma.cc/QPY4-PLNC>.

³³² Lilah Burke, *Public Universities, Prison-Made Furniture*, INSIDE HIGHER EDUC. (Feb. 14, 2020), <https://www.insidehighered.com/news/2020/02/14/public-universities-several-states-are-required-buy-prison-industries>, archived at <https://perma.cc/9WMM-YLJ4> (“Public universities in several states are obligated to buy furniture and other products made in state prisons, which some students call exploitative.”).

A report published by *Inside Higher Education* explains that “public universities in Virginia are required to buy from Virginia Correctional Enterprises, a state-owned company that employs inmates in state prisons.”³³³ Likewise, “all campuses of the University of Wisconsin system are required to purchase products from Badger State Industries, Wisconsin’s prison-labor company.”³³⁴ Similarly, state university systems in Maryland and New York “are required to use their state’s correctional enterprise as a ‘preferred source’ along with state industries that employ the blind. Furniture is one of the most popular correctional enterprises products. At Mary Washington, VCE has partnered with the administration to create a furniture showroom.”³³⁵

D. Prison Labor During a Pandemic

Today’s prison crisis involves uncompensated labor and a deadly, global health crisis. As in civilian life, the global pandemic reveals underlying institutional and infrastructural inequalities. In prisons and jails the inequalities manifest by way of uncompensated or poorly compensated labor, coerced labor, and deaths. Despite the global pandemic, prison labor persisted, even under dangerous and arduous conditions.³³⁶ In fact, most states utilized the labor of incarcerated persons during the pandemic.³³⁷ Prison officials in Missouri designated prison labor for the production of hand sanitizer, which at the beginning of the pandemic was in short supply.³³⁸ Additionally, they deployed prison labor for manufacturing toilet paper and protective gowns.³³⁹

Similarly, journalist Carlee Purdum reports in Arkansas and Arizona that these states used the labor of incarcerated people in the fight against the pandemic.³⁴⁰ In Connecticut, Florida, and Texas, incarcerated people made masks and plastic face shields.³⁴¹ In Missouri³⁴² and Oregon³⁴³ prison offi-

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Carlee Purdum, *States are Putting Prisoners to Work Manufacturing Coronavirus Supplies*, U.S. NEWS & WORLD REP. (Apr. 21, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-21/states-are-putting-prisoners-to-work-manufacturing-coronavirus-supplies>, archived at <https://perma.cc/P8QR-P8W2>.

³³⁷ *Id.* (“To date, nearly every state in the U.S. has announced that its incarcerated populations are contributing labor to the pandemic response.”).

³³⁸ Lauren-Brooke Eisen, *Covid-19 Highlights the Need for Prison Labor Reform*, BRENNAN CTR. FOR JUST. (Apr. 17, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/covid-19-highlights-need-prison-labor-reform>, archived at <https://perma.cc/7F8Q-9QCE>.

³³⁹ *Id.*

³⁴⁰ Purdum, *supra* note 336.

³⁴¹ Hannah Dreier, ‘A Recipe for Disaster’: American Prison Factories Becoming Incubators for Coronavirus, WASH. POST (Apr. 21, 2020), <https://www.proquest.com/news/docview/2392860971/20D20659EA124B79PQ/1?accountid=14509>, archived at <https://perma.cc/HRL9-T3DT>.

³⁴² Purdum, *supra* note 336.

cials directed people serving time to wash laundry for hospitals. Similarly, in Pennsylvania, incarcerated men and women produced masks, antibacterial soap, and medical gowns.³⁴⁴ Most of this work was invisible to the American public; out of sight and out of mind. Yet troublingly, much of what the incarcerated produced, they were not permitted to use.

In New York, in addition to making hand sanitizer, Governor Cuomo assigned incarcerated persons to dig mass graves for COVID-19 victims.³⁴⁵ In California, incarcerated people not only prepared protective equipment³⁴⁶ but were also made to work as firefighters to combat the raging wildfires.³⁴⁷

As reports show, the labor performed by incarcerated persons was not isolated to coronavirus response. Rather, most states continued the normal use of prison labor, while adding COVID-19 supply production. In states throughout the United States, prison labor persisted while jails and prisons became hotspots of COVID-19 illnesses and deaths. Not unlike pre-COVID-19 conditions, incarcerated men and women in Florida, Louisiana,³⁴⁸ Illinois,³⁴⁹ Washington,³⁵⁰ Arizona, and North Carolina³⁵¹ worked in the food industry.

³⁴³ Cindy Wu & Prue Brady, *If Prison Workers Are Essential, We Should Treat Them Like It: Prison Labor in the US, Part I*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2020), <https://corpaccountabilitylab.org/calblog/2020/8/5/if-prison-workers-are-essential-we-should-treat-them-like-it-prison-labor-in-the-us-part-i->, archived at <https://perma.cc/L984-P6PT>.

³⁴⁴ Purdum, *supra* note 336.

³⁴⁵ Wu & Brady, *supra* note 343; Emily Russel, *The Prison Where New York Inmates Are Bottling Hand Sanitizer Now Has a Coronavirus Outbreak*, NCPR (May 15, 2020), <https://www.northcountrypublicradio.org/news/story/41416/20200515/the-prison-where-new-york-in-mates-are-bottling-hand-sanitizer-now-has-a-coronavirus-outbreak->, archived at <https://perma.cc/MF8N-MDDU>.

³⁴⁶ Mark Wilson, *California Prison Factories Fined for Exposing Unwitting Workers to COVID-19*, PRISON LEGAL NEWS (Apr. 1, 2021), <https://www.prisonlegalnews.org/news/2021/apr/1/california-prison-factories-fined-exposing-unwitting-workers-covid-19/>, archived at <https://perma.cc/2UJD-GU99>. Wilson states that a sewing factory ran fourteen hours a day to make facemasks, and a CALPIA spokesperson “acknowledged that ‘essential critical enterprises’ such as food, laundry, and the manufacture of masks and hand sanitizer” continued through the pandemic. *Id.*

³⁴⁷ Eliyahu Kamisher, *Prison Labor is on the Frontlines of the COVID-19 Pandemic*, APPEAL (Oct. 5, 2020), <https://theappeal.org/prison-labor-is-on-the-frontlines-of-the-covid-19-pandemic/>, archived at <https://perma.cc/2REC-HJ5R>.

³⁴⁸ Dreier, *supra* note 341 (“In Arizona, 140 inmates have been sent to live at an egg farm so they can continue working despite a prison lockdown to prevent the virus from getting in. Inmates in Louisiana continued to work at a chicken plant even after a civilian worker there fell sick.”).

³⁴⁹ Andrew Adams, *Illinois Will No Longer Sell Products Made in Prisons to State Agencies, Private Groups*, HERALD & REV. (Aug. 4, 2021), https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&t=country%3AUSA%21USA&sort=YMD_date%3AD&maxresults=20&f=advanced&val-base-0=%22prison%20labor%22&fld-base-0=alltext&bln-base-1=and&val-base-1=2021&fld-base-1=YMD_date&docref=news/1842FBA69D444B58.., archived at <https://perma.cc/KZ5R-4B56>.

³⁵⁰ H. Claire Brown, “Essential” and Exploitable: Prison Factories Stayed Open During the Pandemic. People Got Sick, COUNTER (May 27, 2021 12:39 PM), <https://thecounter.org/essential-and-exploitable-prison-factories-stayed-open-during-pandemic/>, archived at <https://perma.cc/V8DA-MH3Z>.

³⁵¹ Wu & Brady, *supra* note 343.

From making candy to manufacturing military jackets, incarcerated people were among the few who had to show up physically rather than work remotely as those jobs cannot be performed remotely. In 2021, when faced with a worker shortage, candy-maker Russell Stover hired incarcerated people to work at its Kansas candy facility.³⁵² As they had in pre-COVID-19 conditions, incarcerated people at a federal prison in Miami continued production of military jackets, along with six other prison factories that stayed open to produce military supplies.³⁵³ In California, industries such as food, laundry, furniture manufacturing, and license plate manufacturing remained operational during COVID-19 as if the world had not changed.³⁵⁴ And yet it had.

Covid infections and related deaths continue to occur at alarming rates not only among civilian populations in the United States,³⁵⁵ but also among those incarcerated in U.S. prisons and jails.³⁵⁶ According to a Prison Policy Institute report, “Mass incarceration and the failure to reduce prison and jail populations quickly led directly to an increase in COVID-19 cases, not just inside correctional facilities, but in the communities and counties that surround them.”³⁵⁷ Incarcerated people reported working and being incarcerated under the most fraught conditions.³⁵⁸ In fact, by mid-June 2021, the Marshall Project counted nearly 400,000 people incarcerated in U.S. prisons that tested positive for the Coronavirus.³⁵⁹ And, 2,715 people had died.³⁶⁰

³⁵² Eoin Higgins, *Faced with Worker Shortage at Kansas Facility, Russell Stover Turns to Prison Labor*, FLASHPOINT (June 28, 2021), <https://eoinhiggins.substack.com/p/faced-with-worker-shortage-at-kansas>, archived at <https://perma.cc/XT53-5HB8>.

³⁵³ Dreier, *supra* note 341. The factories mentioned in the article were located in Louisiana, North Carolina, and New York. *Id.*

³⁵⁴ Kiera Feldman, *California Kept Prison Factories Open. Inmates Worked for Pennies an Hour as COVID-19 Spread*, L.A. TIMES (Oct. 11, 2020), <https://www.latimes.com/california/story/2020-10-11/california-prison-factories-inmates-covid-19>, archived at <https://perma.cc/W2HD-3LZG>.

³⁵⁵ See *e.g.*, *COVID-19 Mortality Overview*, CDC, Oct. 23, 2021.

³⁵⁶ See Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POLICY INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covid-spread.html>, archived at <https://perma.cc/U7PG-4ADY>.

³⁵⁷ *Id.*

³⁵⁸ See Elizabeth Weill-Greenberg, *Prisoners in Illinois Describe Dire Conditions Amid Coronavirus Outbreak*, APPEAL (Apr. 7, 2020), <https://theappeal.org/illinois-stateville-prison-conditions-coronavirus-covid-19/>, archived at <https://perma.cc/8ZFT-LL26> (“It took Russell dying just for them to pass out a single extra bar of soap”).

³⁵⁹ Marshall Project, *A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>, archived at <https://perma.cc/ESV8-BXVZ> (July 1, 2021, 1:00 PM); Todd R. Clear, *COVID-19 and Mass Incarceration*, 72 RUTGERS UNIV. L. REV. 1417 (2020).

³⁶⁰ Marshall Project, *supra* note 359.

E. COVID-19 and Prison Inequality

COVID-19 makes incarceration during a pandemic disproportionately severe punishment.³⁶¹ The pandemic exacerbates the systemic inequalities that pervade America's criminal justice system. For example, the COVID Prison Project reports that at least 433,639 incarcerated people in prisons contracted COVID-19 as of October 2021.³⁶² Similarly, the University of California, Los Angeles' COVID Behind Bars Data Project reports a distressing 2,998 contracted cases per 10,000 incarcerated people.³⁶³ Worryingly, for jails, the number of cases is likely underreported because of inconsistent data reporting, sporadic testing, and a lack of tracking of post-release hospitalizations and deaths.³⁶⁴

These trends are troubling. However, the high contraction rates of COVID-19 among those held in governmental custody are not confined to prison and jail populations. Individuals held in immigration detention centers have similarly suffered from high rates of COVID-19 contraction and death. For example, by May 2021, more than 14,000 people had tested positive for COVID-19 while held in I.C.E. detention centers.³⁶⁵ According to data published by the United States Immigration and Customs Enforcement, the COVID-19 infection rates among people in immigration detention climbed as high as 10%.³⁶⁶

Even while conservative in their estimates—not all cases of COVID-19 will be reported or have data readily available—the incoming public health data tracking COVID-19 cases in prisons, jails, and detention facilities are alarming.³⁶⁷ This is particularly so when comparing the prison COVID-19 infection rate with the general population. For example, the *Journal of American Medical Association Network*, in a July 2020 research letter, reported

³⁶¹ Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083, 1116 (2020); see also Lauren Lyons, *Incarceration, COVID-19, and Emergency Release: Reimagining How and When to Punish*, 30 KENNEDY INST. ETHICS J. 291, 294–302 (2020), <https://kiej.georgetown.edu/incarceration-covid-19-special-issue/>, archived at <https://perma.cc/M5LE-Y7WZ>.

³⁶² *National COVID-19 Statistics*, THE COVID PRISON PROJECT, <https://covidprison-project.com/> (last visited Sept. 26, 2021), archived at <https://perma.cc/PK8F-D7P3>.

³⁶³ *Federal Facilities in the United States*, UCLA LAW COVID BEHIND BARS DATA PROJECT, <https://uclacovidbehindbars.org/federal/> (last visited Sept. 18, 2021), archived at <https://perma.cc/NZS6-DMSC>.

³⁶⁴ See Heather Harris & Joseph Hayes, *California Jails and COVID-19*, PUB. POL'Y INST. CAL. (Aug. 11, 2021), <https://www.ppic.org/blog/california-jails-and-covid-19/>, archived at <https://perma.cc/JPF4-K397> (describing the difficulties in obtaining reliable data on the number of COVID cases in California jails).

³⁶⁵ Andrea Allen, Minali Aggarwal & Neal Marquez, *As Long as There Is COVID-19, ICE Detention Centers Will Be Poised for Disaster*, UCLA LAW COVID BEHIND BARS DATA PROJECT, at 1 (July 2021), https://uclacovidbehindbars.org/assets/ucla-cbb-data-project-ice-community-spread_2.pdf, archived at <https://perma.cc/24XQ-QZHG>.

³⁶⁶ *Id.*

³⁶⁷ See Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, 2020 UNIV. CHI. L. REV. ONLINE 4, 20 (2020) (noting the problem of inadequate data on COVID-19 cases in prisons stems from inadequate testing, which has kept official numbers artificially low).

that the COVID-19 case rate among incarcerated populations was more than 5.5 times higher than the case rate among the U.S. population.³⁶⁸

Yet, there is much we do not know. The need for more robust systems to gather and track infection rates in jails and prisons and also provide more systematic and transparent testing within carceral settings is obvious.³⁶⁹ Currently there are poor tracking systems in prisons, jails, and detention centers.³⁷⁰ Data projects aimed at tracking COVID-19 within prisons are now concerned that many states have stopped reporting cases altogether.³⁷¹ Altogether, shoddy tracking at the federal level, resistance to robust documenting at the state level, and underlying substantive concerns related to incarceration conditions add layers of inequality to criminal, civil, and immigration detention.

Even as lawmakers begin to take more aggressive action in 2021 to capture a more accurate picture of the COVID-19 infection rate among prison populations,³⁷² the failures of government cannot be ignored. Further, data collection gaps are just one problem. As with the general population, political failures plague COVID-19 response. For example, the Biden Administration plans to return up to 4,000 people into prisons as the Delta variant of COVID-19 continues to spread throughout the United States and within prisons.³⁷³

Indeed, COVID-19 continues to threaten the safety of incarcerated people, especially with the third wave of the virus—the Delta variant—spread-

³⁶⁸ Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N. 602, 602–603 (2020).

³⁶⁹ See Hope Johnson, Erika Tyagi, Joshua Manson & Neal Marquez, *As the Delta Variant Causes New Outbreaks in Prisons, Now Is the Time for More Transparency, Not Less*, UCLA LAW COVID BEHIND BARS DATA PROJECT (July 30, 2021), <https://uclacovidbehindbars.org/delta-data-transparency>, archived at <https://perma.cc/4BXR-XSQH> (noting that carceral agencies have reported less information about COVID-19 cases and the health of the people who live and work in their prisons, and describing this behavior as “dangerous” because it only takes a few cases to cause an outbreak).

³⁷⁰ See *id.* (noting that carceral agencies have failed to report COVID-19 cases implies that the tracking systems in the detention facilities they operate are inadequate).

³⁷¹ Jennifer Lao & Forrest Behne, *States Halt COVID Data Publication*, THE COVID PRISON PROJECT (Sept. 17, 2021), <https://covidprisonproject.com/blog/data/states-halt-covid-data-publication/>, archived at <https://perma.cc/2RJM-7ZE2>; Johnson et al., *supra* note 369.

³⁷² Henry Kenyon, *Democratic Bill Aims to Collect Detailed COVID-19 Statistics in Prisons*, CQ ROLL CALL (Feb. 11, 2021), 2021 WL 508733. In February 2021 Senators Warren, Wyden, and Merkley announced that they would reintroduce the COVID-19 in Corrections Data Transparency Act because there was a “‘troubling lack’ of comprehensive and publicly available data about the spread and management of coronavirus in [prisons.]” Warren stated that this bill would, “take[] a necessary step towards containing the pandemic and supporting the health and safety of incarcerated individuals, corrections staff, and the general public by strengthening data collection, reporting, and transparency[.]” *Id.*

³⁷³ Syeda Malliha & Kadeisha Weise, *Documents Foreshadow a Grim Future for COVID-19 Spread in Federal Prisons*, ACLU (Aug. 10, 2021), <https://www.aclu.org/news/criminal-law-reform/documents-foreshadow-a-grim-future-for-covid-19-spread-in-federal-prisons/>, archived at <https://perma.cc/W29S-QAVL>.

ing.³⁷⁴ Prison overcrowding, infrastructural problems, and difficulties with social distancing make prisons vulnerable hotspots for COVID-19.³⁷⁵ A recent study conducted by researchers from Northwestern University and the World Bank confirms these concerns and links mass incarceration rates to pandemic vulnerability.³⁷⁶

Equally troubling, in many states prison staff report being unvaccinated, vaccine-hesitant, and vaccine resisters,³⁷⁷ which exacerbates risks for the incarcerated—and the staff themselves.³⁷⁸ This is concerning because the burden of vaccine resistance unequally falls on the incarcerated, who do not have a choice but to interact with facility staff. Fortunately, federal courts now mandate offering incarcerated people the opportunity to be vaccinated.³⁷⁹ But is that enough?

³⁷⁴ Jessica Schulberg, *Delta Is Coming for Jails and Prisons, and the System Isn't Ready to Protect the Incarcerated*, HUFFINGTON POST (Aug. 28, 2021, 8:00 AM), https://www.huffpost.com/entry/prisons-and-jails-not-ready-for-delta-variant-covid-19_n_611e8e4b0e5b5d8e79c24, archived at <https://perma.cc/KHF9-GBC5>; see also Johania Charles, *Miami-Dade County Jails Battle Soaring Delta Variant*, PATCH (Sept. 9, 2021, 7:51 AM), <https://patch.com/florida/miami/miami-dade-county-jails-battle-soaring-delta-variant>, archived at <https://perma.cc/QL3Y-R3SN>; Jeffrey Schaub, *Delta Variant Invades San Quentin as Inmates Test Positive for COVID-19*, KCPBS ALL NEWS (Aug. 22, 2021, 10:24 AM), <https://www.audacy.com/kcbsradio/news/local/delta-variant-invades-san-quentin-as-inmates-test-positive>, archived at <https://perma.cc/MF8H-DKSJ>.

³⁷⁵ *Id.*

³⁷⁶ Eric Reinhart & Daniel L. Chen, *Association of Jail Decarceration and Anticontagion Policies With COVID-19 Case Growth Rates in U.S. Counties*, AM. MED. ASS'N NETWORK OPEN, at 7–8 (Sept. 2, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783680>, archived at <https://perma.cc/ML8A-ZN37>; see Bill Chappel, *Crowded U.S. Jails Drove Millions of COVID-19 Cases, a New Study Says*, NPR (Sept. 2, 2021, 11:00 AM), <https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says>, archived at <https://perma.cc/YPM4-GASZ> (discussing the findings of the Reinhart and Chen study); see also *New Study Finds Crowded Jails Seeded Millions of Covid-19 Cases*, EQUAL JUST. INITIATIVE (Sept. 7, 2021), <https://eji.org/news/new-study-finds-crowded-jails-seeded-millions-of-covid-19-cases/>, archived at <https://perma.cc/8V67-4L8S> (discussing the findings of the Reinhart and Chen study).

³⁷⁷ See, e.g., Conrad Wilson, *Despite Early Access to COVID-19 Vaccines, Oregon Prison Staff Vaccination Rates Lag*, OPB (Aug. 24, 2021, 5:04 PM), <https://www.opb.org/article/2021/08/24/oregon-prisons-covid-19-vaccine-rate-department-of-corrections/>, archived at <https://perma.cc/97JU-2HQJ> (noting that although corrections officers in Oregon were among the first to get access to the vaccine and Oregon Department of Corrections has been “ground zero for some of the largest outbreaks of COVID-19 across the state during the duration of the pandemic,” vaccination rates among corrections staff remains low); Evan Kruegel, *COVID-19 Vaccine Mandate Issued for Colorado Prison Workers, Other State Employees*, Fox 31 News (Aug. 17, 2021, 10:40 PM), <https://kdvr.com/news/coronavirus/covid-19-vaccine/covid-19-vaccine-mandate-issued-for-colorado-corrections-human-services-public-health-employees/>, archived at <https://perma.cc/9ERP-MF3P> (reporting that, due to low numbers of staff members having chosen to receive the COVID-19 vaccine, most staff members with Colorado’s Department of Corrections, Human Services and Public Health and Environment will be required to receive the vaccine or face termination).

³⁷⁸ See Kruegel, *supra* note 377 (stating that vaccinated staff pose less of a risk for being responsible for a COVID-19 outbreak, and that corrections staff have a duty to protect incarcerated people); Reinhart & Chen, *supra* note 376.

³⁷⁹ See, e.g., Conrad Wilson, *Judge Orders Oregon to Offer Prison Inmates COVID-19 Vaccines Immediately*, OPB (Feb. 3, 2021, 5:14 PM), <https://www.opb.org/article/2021/02/03/>

III. PATHS FOR REFORM

Resolving the inequities in the prison system may be a marathon rather than a sprint, even with social movements to abolish prisons. That said, several avenues exist for redress of COVID-19-related harms, including judicial review, legislation, and compassionate release. Pursuing these avenues matter, because “[i]n light of COVID-19, legal visits, jury trials, and various protections afforded under the Speedy Trial Act have been temporarily suspended in many jurisdictions.”³⁸⁰ The concerns are real. As Camila Strassle and Benjamin E. Berkman point out, “there is concern that the accused will experience longer lengths of stay in correctional facilities as they await trial.”³⁸¹

A. *Judicial Review*

In response to these concerns, some federal courts are now reviewing various orders for release and hearing claims charging violations of the Americans with Disabilities Act.³⁸² The increasing number of lawsuits filed on behalf of incarcerated individuals in federal courts include “compassionate release requests, civil rights, federal and state habeas petitions, and habeas petitions filed under the general habeas statute, 28 U.S.C. § 2241.”³⁸³ These cases pursued judicial interventions when internal policy routes failed to offer remedies and where state and federal lawmakers have been slow to act. These cases highlighted the public health vulnerabilities and dangerous conditions of prisons and jails in the United States. The testimonies proved

oregon-prisons-judge-orders-inmate-covid-19-vaccinations/, archived at <https://perma.cc/L8H5-68DC>.

³⁸⁰ Strassle & Berkman, *supra* note 361, at 1113; see also In re: Coronavirus Public Emergency: Sixth Order Concerning Jury Trials and Other Proceedings, Administrative Order 2020-53, 1, 2, (S.D. Fla. Aug. 11, 2020) (ordering that, given the onset of the COVID-19 pandemic, the United States Courthouses in Miami, Fort Lauderdale, West Palm Beach, Fort Pierce, and Key West be open to a level “to maintain essential operations” and continuing all jury trials and trial-specific deadlines in the Southern District of Florida until further notice); In re Coronavirus/COVID-19 Pandemic, Matter Related To: Continuance of Jury Trials and Exclusion of Time Under Speedy Trial Act, Standing Order M10-468, No. 20MISC00154 1, 1–2 (S.D.N.Y. Mar. 13, 2020) (ordering that, given the onset of the COVID-19 pandemic, all civil and criminal jury trials in the Southern District of New York be continued pending further order).

³⁸¹ Strassle & Berkman, *supra* note 361, at 1113.

³⁸² United States v. Calvin Tinsley, Superior Court, District of Columbia, Crim. No. 2007-CF1-029182 (Judge Gerald Fisher, Oct 5, 2020); Abbe David Lowell, Christopher D. Man & Lisa C. Chan, *Analyzing Court Orders Tolling the Speedy Trial Act During COVID-19*, WINSTON & STRAWN LLP (May 7, 2020), <https://www.winston.com/en/thought-leadership/analyzing-court-orders-tolling-the-speedy-trial-act-during-covid-19.html>, archived at <https://perma.cc/2LJW-FY8Z>. But see, Maria, Dinzeo, *Disabled California Prisoners Say Mistreatment Persists Despite Court Orders*, COURTHOUSE NEWS SERVICE (Dec. 8, 2020), <https://www.courthousenews.com/disabled-calif-prisoners-say-mistreatment-persists-despite-court-orders/>, archived at <https://perma.cc/M7K5-TCKT>.

³⁸³ Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and COVID-19*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 131, 135–36 (2020).

crucial in conveying the horrifying conditions that mire many jails in the United States.³⁸⁴ Simply put, the conditions are so inhumane in some contexts that judges find them to be cruel and unusual.³⁸⁵

1. Eighth and Fourteenth Amendment Claims

For example, in *People ex rel. Coleman v. Brann*, five petitioners claimed their confinement during an ongoing pandemic violated their Due Process rights and constituted “cruel and unusual punishment” under the United States and New York constitutions.³⁸⁶ The petitioners filed a petition for writ of habeas corpus seeking temporary release from custody until sentencing.³⁸⁷ The New York Supreme Court held, among other things, that the habeas corpus petitions were a permissible vehicle to seek relief from the threat of infection but that the New York City Department of Corrections was not deliberately indifferent to the health risk posed by COVID-19.³⁸⁸ Some have criticized the court’s analysis of the cruel and unusual punishment question as “grossly too literal and shallow.”³⁸⁹

Similarly, litigation against the California Department of Corrections and Rehabilitation stems from the agency’s decision to transfer a group of incarcerated people from a prison in Chino, California, to San Quentin State Prison.³⁹⁰ This resulted in 2,600 cases of COVID. Twenty-eight incarcerated people and one employee died as a result. Public defender offices brought a case on behalf of 300 incarcerated people arguing that the prison system’s inability to protect them from the virus constituted cruel and unusual punishment.³⁹¹ The case is set for district court review.³⁹²

³⁸⁴ Dolovich, *supra* note 367 (listing cases in which courts heard testimony regarding conditions related to COVID in jails and prisons).

³⁸⁵ Weiss, *supra* note 383, at 153.

³⁸⁶ *People ex rel. Coleman v. Brann*, 126 N.Y.S.3d 315, 317 (N.Y. Sup. Ct. 2020).

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 317, 322; see Bryn T. Sarner, *People ex rel. Coleman v. Brann: Is Our Zest for Punishment Greater than Our Value of Life? A Look at Incarceration in the United States During the COVID-19 Pandemic*, 30 T.U.L. J.L. & SEXUALITY 229, 230 (2021) (stating the holdings of the case).

³⁸⁹ *Id.* at 235.

³⁹⁰ Holly Quan, *San Quentin Inmates Sue Over COVID-19 Outbreak that Killed 29*, KCBS ALL NEWS (May 20, 2021, 11:46 AM), <https://www.audacy.com/kcbsradio/news/local/san-quentin-inmates-sue-over-covid-outbreak-that-killed-29>, archived at perma.cc/9ZXM-ZR63 (describing the facts leading to the litigation); Valerie Ibarra, “Horrible” Testimony in the Habeas Case Against San Quentin & CDCR, S.F. PUB. DEFENDER (June 3, 2021), <https://sfpublicdefender.org/news/2021/06/horrific-stories-of-neglect-heard-in-hearing-about-san-quentin-prison-covid-19-practices/>, archived at <https://perma.cc/3GHH-C2RL>.

³⁹¹ Quan, *supra* note 390.

³⁹² See *id.* (stating that trial for the case began on May 20, 2021); see also Ibarra, *supra* note 390 (stating that testimony began in an evidentiary hearing for the case on May 19, 2021).

Other petitions have included requests for pretrial release or taken on novel strategies,³⁹³ including arguing that violations of the Americans with Disabilities Act (ADA) pervade American prisons and jails. In *Graham v. Allegheny County*, the petitioner argued that present COVID-19 conditions and the treatment of incarcerated individuals with aggravated, underlying health conditions violate the ADA.³⁹⁴ In that case, the petitioner argued that the unsafe public health conditions do not align with Centers for Disease Control and Prevention recommendations.

However, judicial review has yielded mixed results. In *Marlowe v. Leblanc*, the district court concluded that a prison failed to follow its policy statements aimed at preventing the spread of Coronavirus.³⁹⁵ A federal court in D.C. granted preliminary injunctions filed by incarcerated people, ruling that a jail must ensure all incarcerated people in the general population can get medical care within twenty-four hours of reporting health issues; ensure access to confidential legal counseling; and, for people in isolation, the jail must ensure they have access to personal and legal phone calls, regular showers, and clean clothes and linens.³⁹⁶ Additionally, the court ordered that the jail must continue increased testing and report back on implementation of these mandates by a set date.³⁹⁷ A federal judge in Pennsylvania ordered Philadelphia jails to relax some of their most extreme COVID-19 lockdown measures to protect the mental health of the incarcerated individuals confined there.³⁹⁸ Yet, in *Young v. Ledet*,³⁹⁹ a district court dismissed petitioners' claims alleging a failure to implement COVID-19 precautions as "frivolous."⁴⁰⁰ In *George v. Diaz*,⁴⁰¹ the district court took judicial notice of "plans" to address COVID-19 in the prison rather than addressing whether the prison followed the standards in its plans.

³⁹³ See, e.g., *United States v. Boatwright*, No. 2:19-cr-00301-GMN-DJA, 2020 U.S. Dist. LEXIS 58538 (D. Nev. Apr. 2, 2020); *United States v. Clark*, 448 F. Supp. 3d 1152 (D. Kan. Apr. 2, 2020); *United States v. Ryan*, 445 F. Supp. 3d 707 (C.D. Cal. Apr. 14, 2020).

³⁹⁴ *Graham v. Allegheny County*, No. 2:20-cv-00496, 2020 WL 2772398, at *1 (W.D. Pa. May 27, 2020).

³⁹⁵ *Marlow v. LeBlanc*, 810 Fed. App'x. 302, 304 (5th Cir. 2020) (per curiam).

³⁹⁶ Hannah Schuster, *D.C. Jail Must Do More to Protect Inmates from Coronavirus, Federal Judge Rules*, DCIST (June 18, 2020, 5:07 PM), <https://dcist.com/story/20/06/18/d-c-jail-must-do-more-to-protect-inmates-from-coronavirus-federal-judge-rules/>, archived at <https://perma.cc/MV86-KJ7B>.

³⁹⁷ *Id.*

³⁹⁸ Samantha Melamed, *Federal Judge: Philly Jails Must Relax Extreme COVID-19 Lockdown Measures for Sake of Mental Health*, PHILA. INQUIRER (Jan. 14, 2021), <https://www.inquirer.com/news/philadelphia/philadelphia-jail-covid-lockdown-out-of-cell-judge-order-20210114.html>, archived at <https://perma.cc/KL7C-MMKM>.

³⁹⁹ *Young v. Ledet*, No. 20-2165, 2021 U.S. Dist. LEXIS 39485, at *56 (E.D. La. Jan. 15, 2021).

⁴⁰⁰ Ariel Berkowitz, *(Un)Masking the Truth - The Cruel and Unusual Punishment of Prisoners Amidst the COVID-19 Pandemic*, 37 *TOURO L. REV.* 347, 367-369 (2021).

⁴⁰¹ *George v. Diaz*, No. 20-cv-03244-SI, 2020 U.S. Dist. LEXIS 153581 (N.D. Cal. Aug. 24, 2020).

2. Expedited Release

Early release is another strategy pursued during the pandemic. With factual records so compelling and tragic, some courts have ordered early or expedited release of large groups of incarcerated people.⁴⁰² Other courts also prioritized reducing the volume of individuals sentenced to jails and prisons.⁴⁰³ Equally, during the pandemic, federal courts increasingly consider compassionate release motions to protect elderly and at-risk populations throughout the country.⁴⁰⁴

For example, in *Wilson v. Williams*, the Sixth Circuit twice declined to stay the preliminary injunction issued by the district court, taking the case to the Supreme Court. The Sixth Circuit upheld certification of a class and a grant of a preliminary injunction directing Bureau of Prisons officials to create a list of medically vulnerable incarcerated people and, within two weeks, find alternative housing arrangements for the people on it, whether through release to home confinement or transfers to other facilities.⁴⁰⁵ The case detailed egregious conditions for incarcerated people and included compelling facts for the incarcerated individuals bringing the suit, yet the Supreme Court eventually gave the government defendant the relief it sought, and the Sixth Circuit issued an opinion on the merits vacating the preliminary injunction.

Even so, justice through early releases has been mixed at best. For example, “[i]n the early days of the pandemic, advocates around the country began filing petitions in the federal courts, seeking orders requiring the adoption of measures to mitigate viral spread and the release of people

⁴⁰² *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POLY INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/virus/virus-response.html>, archived at <https://perma.cc/D42S-STHM> (describing court orders releasing groups of incarcerated people by state and federal judges around the country, including by judges in California, Hawaii, and Ohio); see, e.g., *United States v. Clark*, 448 F. Supp. 3d 1152, 1154 (D. Kan. Apr. 2, 2020); *United States v. Boatwright*, No. 2:19-cr-00301-GMN-DJA, 2020 U.S. Dist. LEXIS 58538, at *23–*24 (D. Nev. Apr. 2, 2020); *United States v. Ryan*, 445 F. Supp. 3d 707, 709 (C.D. Cal. Apr 14, 2020); see also Jenny E. Carroll, *COVID-19 Relief and the Ordinary Inmate*, 18 OHIO STATE J. CRIM. L. 427 (2021) (connecting the Eighth Amendment concerns to the pre-trial detention and COVID-19).

⁴⁰³ *The Most Significant Criminal Justice Policy Changes*, *supra* note 402.

⁴⁰⁴ BRENNAN CTR. FOR JUST., REDUCING JAIL AND PRISON POPULATIONS DURING THE COVID-19 PANDEMIC (Aug. 23, 2021), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>, archived at perma.cc/PH6P-R4TN (“On June 11, The Marshall Project reported that 31,000 prisoners sought compassionate release during the Covid-19 pandemic. The Federal Bureau of prisons approved just 36.”)

⁴⁰⁵ *Wilson v. Williams*, 455 F. Supp. 3d 467, 481 (N.D. Ohio Apr. 22, 2020); Adam Liptak, *Supreme Court Refuses to Stop Order to Move Inmates from Virus-Ravaged Prison*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/supreme-court-virus-inmates.html>, archived at <https://perma.cc/KPH7-ZK2V> (noting that the U.S. Supreme Court denied a request by the Trump administration to block a trial court ruling that ordered federal prison officials to protect 800 older or medically vulnerable inmates).

whose age or medical condition made them especially vulnerable.”⁴⁰⁶ However, it became clear “that federal courts were not going to be an effective channel for release” despite glaring constitutional violations and the vulnerable circumstances of many incarcerated persons.⁴⁰⁷ Given this, “correctional officials may have felt to take ameliorative steps to avoid possible legal liability” was unnecessary.⁴⁰⁸

According to Sharon Dolovich, some courts indeed granted these “preliminary injunctions or temporary restraining orders directing correctional officials to improve conditions inside or to identify facility residents at highest risk from COVID in preparation for their release.”⁴⁰⁹ However, it is important to point out that petitioners “did not prevail at trial everywhere[,] [a]nd even when they did, it did not take long for the appellate courts to step in on the side of the defendants. In [many cases], appeals courts granted stays of district court orders on grounds strongly suggesting a general lack of sympathy with plaintiffs’ arguments.”⁴¹⁰

B. Legislative Action

Prison labor remains one of the most exploitive markets in the United States. A study done by Worth Rises lists companies that benefit from the prison industry and mass incarceration, and measures the harm done by each company in terms of violations of human rights.⁴¹¹ The organization lists over four thousand companies in its report that profit from prison labor, even if they do not directly engage prison labor.⁴¹² Notably, the sectors ranging from construction, data and information systems, financial services, food, healthcare, and transportation, to telecom.⁴¹³ Perhaps representing a centuries-long battle in raising awareness and shifting attitudes, corporate movements to abolish prison labor are virtually nonexistent.

Thus, if change will not occur from within, what methods might address the concerns raised by this Article?

⁴⁰⁶ Dolovich, note 367, at 20.

⁴⁰⁷ *Id.* at 11.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 20–21 (citing unsympathetic cases).

⁴¹¹ *The Prison Industry: Mapping Private Sector Players*, WORTH RISES (April 2020), <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/5eb26cb17cc82c67c6254da6/1588751538880/The+Prison+Industry+-+2020.pdf>, archived at <https://perma.cc/85XP-F962>.

⁴¹² Ashish Prashar, *American Businesses are Raking in Billions from the Prison-Industrial Complex. It's Time to Get Serious About Dismantling this Disgusting System*, BUSINESS INSIDER (Sept. 14, 2020, 5:27 AM), <https://www.businessinsider.com/prison-industrial-complex-end-business-help-mass-incarceration-2020-9>, archived at <https://perma.cc/T2GS-5CFE>.

⁴¹³ *The Prison Industry*, *supra* note 411, at 4–7.

1. Federal Amendment

In 2021, Oregon Senator Jeff Merkley and Georgia Representative Nikema Williams reintroduced the “Abolition Amendment” as a Joint Resolution to Congress.⁴¹⁴ The legislation seeks to directly address the Punishment Clause and calls for the closing of this “loophole” that permits involuntary servitude in America’s prisons.⁴¹⁵ Notably, their efforts materialized in the wake of social movements examining race, racism, and white supremacy in the United States. Nevertheless, after first being proposed as a joint resolution in December 2020, the Abolition Amendment failed to move forward before the end of the session.⁴¹⁶

The Amendment provides that “[n]either slavery nor involuntary servitude may be imposed as a punishment for a crime.”⁴¹⁷ Merkley was joined in the introduction of the Resolution by eight other senators and sixteen House Representatives.⁴¹⁸ The Resolution has not moved past the introduction stage and has been referred to the Committee on the Judiciary.⁴¹⁹

2. State Legislation

Ballot measures offer another means of reducing the harms of the Punishment Clause by addressing involuntary prison servitude at the state level. For example, in Colorado,⁴²⁰ Utah, and Nebraska,⁴²¹ voters have supported removing the Punishment Clause from their state constitutions through refer-

⁴¹⁴ Terry Tang, *Lawmakers Mark Juneteenth by Reviving ‘Abolition Amendment,’* ASSOCIATED PRESS (June 18, 2021), <https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0>, archived at <https://perma.cc/UA2K-7S5X>.

⁴¹⁵ *How the “Abolition Amendment” Would End Constitutional Loophole that Allows Forced Labor in Prisons*, DEMOCRACY NOW! (June 30, 2021), [https://www.democracynow.org/2021/6/30/abolition_amendment#:~:text=after%20President%20Biden%20signed%20legislation,the%20U.S.%20Constitution%2C%20which%20banned](https://www.democracynow.org/2021/6/30/abolition_amendment#:~:text=after%20President%20Biden%20signed%20legislation,the%20U.S.%20Constitution%2C%20which%20banned,), archived at <https://perma.cc/DV55-A7EU>; Press Release, Jeff Merkley, Senator, *Ahead of Juneteenth, Merkley, Williams Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment* (June 18, 2021), <https://www.merkley.senate.gov/news/press-releases/ahead-of-juneteenth-merkley-williams-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2021>, archived at <https://perma.cc/F88Z-PFN>.

⁴¹⁶ Tang, *supra* note 414.

⁴¹⁷ S.J. Res. 21, 117th Cong. (2021).

⁴¹⁸ Press Release, Merkley, *supra* note 415 (“Merkley and Williams were joined in the introduction by U.S. Senators Richard Durbin (D-IL), Cory Booker (D-NJ), Chris Van Hollen (D-MD), Edward J. Markey (D-MA), Ron Wyden (D-OR), Alex Padilla (D-CA), Mazie Hirono (D-HI), and Bernie Sanders (I-VT), and U.S. Representatives Cori Bush (MO-01), Karen Bass (CA-37), Eleanor Holmes Norton (DC), Henry C. “Hank” Johnson, Jr. (GA-04), Danny K. Davis (IL-07), Jared Huffman (CA-02), Alma S. Adams, Ph.D. (NC-12), André Carson (IN-07), Katherine Clark (MA-05), Emanuel Cleaver, II (MO-05), Bill Foster (IL-11), Ayanna Pressley (MA-07), Bonnie Watson Coleman (NJ-12), Al Green (TX-09), Barbara Lee (CA-13), and Jahana Hayes (CT-05).”).

⁴¹⁹ S.J. Res. 21, *supra* note 417.

⁴²⁰ Steve Almasy, Christina Maxouris & Saeed Ahmed, *Colorado Voters Put End to Slavery in All Cases*, CNN (Nov. 8, 2018, 12:31 AM), <https://www.cnn.com/2018/11/07/us/slavery-vote-in-colorado-trnd/index.html>, archived at <https://perma.cc/3PZA-Q2TY>.

enda. In other states, ballot measures may be on the horizon,⁴²² including in California,⁴²³ Minnesota,⁴²⁴ Ohio,⁴²⁵ Oregon,⁴²⁶ Tennessee,⁴²⁷ and Vermont.⁴²⁸ In Arkansas⁴²⁹ and Wisconsin,⁴³⁰ legislators proposed bills to remove slavery and involuntary servitude from their states' constitutions.

In yet another category of states, slavery is not explicitly condoned or mentioned in their constitution. Nevertheless, legislators have added language that prohibits involuntary servitude as punishment for a crime. These states include Florida, New York, New Jersey, and Texas.⁴³¹ Even with these promising efforts, thirty-eight states and the District of Columbia have not

⁴²¹ Kaelan Deese, *Utah, Nebraska Voters Approve Measures Stripping Slavery Language from State Constitutions*, THE HILL (Nov. 4, 2020, 12:22 PM), <https://thehill.com/homenews/state-watch/524469-utah-nebraska-voters-approve-measure-stripping-slavery-language-in>, archived at <https://perma.cc/TA5G-TMKF>.

⁴²² *Efforts by States to Eliminate the Exception Allowing Slavery or Involuntary Servitude as Punishment for a Crime*, HUMAN TRAFFICKING SEARCH (June 2021), <https://humantraffickingsearch.org/efforts-by-states-to-eliminate-the-exception-allowing-slavery-or-involuntary-servitude-as-punishment-for-a-crime/>, archived at <https://perma.cc/4B88-XLCF>.

⁴²³ California introduced the "Abolition Act" on December 18, 2020, the committee voted it be adopted on August 26, 2021, and a third reading was ordered on August 20, 2021. A Resolution to Propose to The People of The State of California an Amendment to The Constitution of The State, by Amending Section 6 of Article I Thereof, Relating to Involuntary Servitude, Assembly Constitutional Amendment, No. 3, 2021 Sess. (Cal. 2021), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220ACA3, archived at <https://perma.cc/L6VV-KUZC>.

⁴²⁴ Constitutional Amendment Prohibiting Slavery or Involuntary Servitude as a Criminal Punishment for a Crime, S.F. 2974, 91st Sess., (Minn.2020), https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF2974&ssn=0&y=2020&keyword_type=all&keyword=slavery, archived at <https://perma.cc/XE5S-XTVZ>. The bill was introduced in February 2020.

⁴²⁵ H.J.R. 4, 113rd General Assembly (2019–20), <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HJR-4>, archived at <https://perma.cc/2V2P-KEEY>. Ohio introduced a Joint Resolution proposing the same in May 2020, and it was referred to the Committee on State and Local Government in May 2020. No further progress is noted on the legislature's website.

⁴²⁶ Proposing Amendment to Oregon Constitution Relating to Slavery and Involuntary Servitude, S.J.R. 10, 81st Legislative Assembly (Or. 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SJR0010>, archived at <https://perma.cc/P36T-MYXF>. The Resolution was introduced in January 2021 and filed with the Secretary of State on June 26, 2021.

⁴²⁷ H.J.R. 98, 111 General Assembly (Tenn. 2021), <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HJR0098>, archived at <https://perma.cc/L2JP-U4T7>. This proposal was introduced in February 2021, passed in the House and Senate, and is set for ballot in November 2022.

⁴²⁸ PR.2, Senate Chamber (2019). The Resolution passed in the House and Senate in January 2020 and will be on the ballot in 2022. VT. GEN. ASSEMBLY PR.2, <https://legislature.vermont.gov/bill/status/2020/PR.2>, archived at <https://perma.cc/4Y6H-VVZB>.

⁴²⁹ H.J.R. 1007, 92nd General Assembly (2019). The Resolution died at the House on April 24, 2019. *Bill Status History*, ARK. STATE LEGISLATURE, <https://www.arkleg.state.ar.us/Bills/Detail?ddBienniumSession=2015%2F2015R&measureno=HJR1007>, archived at <https://perma.cc/62PU-MMU4>.

⁴³⁰ S.J.R. 63, Legislature (2017). The Resolution was introduced in 2017 but failed to pass in March 2018. *WI SJR63*, BILL TRACK <https://www.billtrack50.com/BillDetail/885376>, archived at <https://perma.cc/BAQ2-K3AW>.

⁴³¹ *Efforts by States to Eliminate the Exception*, *supra* note 422.

taken action related to the Punishment Clause⁴³² or do not mention slavery in their constitutions.⁴³³

3. Fair Pay Petitions

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Supreme Court held that the state's interest in security outweighs incarcerated people's right to unionize.⁴³⁴ This 1977 holding constrained efforts to unionize among incarcerated workers. Forty-five years later, this remains a potential model for prison labor reform, even though no real attempt by labor unions to advocate on behalf of incarcerated workers has materialized since.⁴³⁵

Nevertheless, the tools of union organizing continue to spring forth, even if rarely in the prison contexts. For example, strikes are one of the main ways incarcerated people advocate for their interests, including better working, living, and health or sanitary conditions. Yet there are significant risks associated with strikes, including violence directed at the incarcerated who are perceived as stepping out of line and being noncompliant.

In 2018, Industrial Workers of the World—one of the few union organizations working with incarcerated individuals and assisting in organizing—helped organize a prison strike. The strike was one of the largest and most recent advocacy actions of its kind.⁴³⁶ In the strike, incarcerated laborers from seventeen states conducted a three-week strike during which they refused to work or eat.⁴³⁷ Their demands included higher pay, better prison conditions, access to rehabilitation, and voting rights.⁴³⁸

⁴³² Alabama, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nevada, North Carolina, and North Dakota. In fact, an amendment proposal was struck down in Louisiana by a House committee in a 9 to 5 vote. Blake Paterson, *This 'Slavery Exception Clause' Won't be Removed From Louisiana Constitution After Proposal Fails*, ADVOCATE (May 11, 2021, 5:45 PM) https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_4b9263e8-b277-11eb-9011-378ff2d13d60.html, archived at <https://perma.cc/8D2A-7NRZ>.

⁴³³ *Efforts by States to Eliminate the Exception*, *supra* note 422.

⁴³⁴ *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119 (1977).

⁴³⁵ Keith Armstrong, “*You May Be Down and Out, but You Ain’t Beaten*”: *Collective Bargaining for Incarcerated Workers*, 110 J. CRIM. LAW & CRIMINOLOGY 593, 600 (2020) (“[T]here is little evidence of the broader labor movement taking up the cause of prison labor in recent years.”).

⁴³⁶ *Id.* at 609 (“The Incarcerated Workers Organizing Committee (IWOC), the entity behind the 2016 and 2018 strikes, is a committee within the IWW that helps support incarcerated people with self-organizing efforts. It seeks to ‘directly challenge prison slavery, work conditions, and the system itself: break cycles of criminalization, exploitation, and the state-sponsored divisions of our working class.’ In addition to organizing strikes and advocating on behalf of prison labor, it makes use of other forms of protest such as work stoppages and hunger strikes.”).

⁴³⁷ Alexia Fernandez Campbell, *The Federal Government Markets Prison Labor to Businesses as the “Best-Kept Secret”*, VOX (Aug. 24, 2018, 10:00 AM), <https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor>, archived at <https://perma.cc/X7SH-Y8RC>.

⁴³⁸ *Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM. (2018) <https://incarceratedworkers.org/campaigns/prison-strike-2018>, archived at <https://perma.cc/UCN4-53G2>.

The strike raised public awareness,⁴³⁹ but material outcomes are not clear. Today, even while union activity may be on the rise, its decline in American social, economic, and political movements and life may portend greater difficulty for incarcerated people who wish to organize. Nor has Congress made substantive efforts to assess the labor and pay gap among incarcerated populations.⁴⁴⁰

4. *Social Movements*

A fourth strategy in addressing prison labor reform relates to on-the-ground, social movement building. To this end, organizations with significant social influence and political savvy, such as Change.org, have sought to raise awareness about fair wages for incarcerated people working as firefighters in California.⁴⁴¹ Among their broader activities involving prison labor, the organization has petitioned for an equitable minimum wage for incarcerated people.⁴⁴² Unfortunately, their campaigns have yet to yield the substantive change for which they advocate, but their efforts are worth recording, particularly as there have been some meaningful successes even if isolated.

For example, university students throughout the United States are sharpening the call for attention to slavery 2.0. As discussed in this Article, colleges and universities purchase products produced by prison labor.⁴⁴³ In

⁴³⁹ *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1514–16 (2019) (noting that incarcerated populations are marginalized and ignored, but strikes can allow “inmates to be visible to and heard by the public at large,” thus bringing attention to issues that need reform); Kim Kelly, *The Fight to Secure Labor Rights for Exploited Prisoners*, TEEN VOGUE (Dec. 9, 2019), <https://www.teenvogue.com/story/prison-labor-us-conditions>, archived at <https://perma.cc/8J4M-TSFR> (“[The demands of the 2018 strike] have not been met. Advocates say that conditions for people in prison have continued to deteriorate, and while the conversation about restoring voting rights . . . has picked up steam . . . we’re still a long way from universal suffrage.”).

⁴⁴⁰ In 1993, the U.S. General Accounting Office prepared a report to Senator Reid that outlined the two perspectives on paying incarcerated persons minimum wage. U.S. GENERAL ACCOUNTING OFFICE, PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE (May 1993), <https://www.gao.gov/assets/ggd-93-98.pdf>, archived at <https://perma.cc/7BC5-7ATE>. The report notes that prison systems argue for low wages to reduce prison costs and the potential for violence through reducing free time. Advocates of reform, on the other hand, argue that incarcerated people should get a work experience that is more like that of the general public. *Id.* at 2.

⁴⁴¹ *Pay California’s Incarcerated Firefighters a Fair Wage*, CHANGE.ORG <https://www.change.org/p/pay-california-s-incarcerated-firefighters-a-fair-wage>, archived at <https://perma.cc/QW58-L3BD>.

⁴⁴² *Establish an Equitable Minimum Wage and Legal Employment Protections for Incarcerated Work*, CHANGE.ORG, https://www.change.org/p/businesses-involved-with-piecp-establish-an-equitable-minimum-wage-and-legal-employment-protections-for-incarcerated-workers?source_location=topic_page, archived at <https://perma.cc/7LTX-E9UU>.

⁴⁴³ Lilah Burke, *Pushing Back on Prison Labor*, INSIDE HIGHER ED (May 4, 2021), <https://www.insidehighered.com/news/2021/05/04/students-cuny-demand-cutting-legally-mandated-ties-prison-labor>, archived at <https://perma.cc/G5NU-W2UZ>; Lilah Burke, *Public Universities, Prison-Made Furniture*, INSIDE HIGHER ED. (Feb. 14, 2020), <https://www.insidehighered.com/news/2020/02/14/public-universities-several-states-are-required->

some states, like New York, the state actually requires that government agencies, including universities, purchase the state-prison-labor-created brand as a preferred source for products.⁴⁴⁴ The same is true of public universities in Virginia, Wisconsin, and Maryland.⁴⁴⁵ These states mandate that their public universities purchase from the companies producing products made through prison labor unless the products do not meet specific requirements, in which case the universities must obtain a release waiver before procuring elsewhere.⁴⁴⁶

Student-led movements to galvanize, raise awareness, and end prison-labor contracting, demonstrate another pathway forward and prove successful on multiple fronts. For example, students have begun pushing back against their universities direct and indirect support of prison labor, directly petitioning their universities to stop using these products.⁴⁴⁷ Some City University of New York (CUNY) students circulated a letter imploring university officials to cut ties with the prison-labor company supplying products to CUNY;⁴⁴⁸ University of Washington's United Students Against Sweatshops club launched a widely-circulated petition, demanding change to the university's prison-labor procurement practices;⁴⁴⁹ the College Socialists club at the College of William and Mary hosted a rally against the use of unpaid prison labor;⁴⁵⁰ and Colorado University students and faculty petitioned the administration to end the contract with the prison-labor company.⁴⁵¹

Thus far, some of these efforts have resulted in change. In 2020, the University of Florida announced it would no longer utilize unpaid prison labor.⁴⁵² This decision likely resulted from two years of petitioning from the

buy-prison-industries, *archived at* <https://perma.cc/HB29-TKCU> (noting that universities in Virginia, Wisconsin, Maryland, New York, California, and Washington, among others, all purchase furniture and other products from prison industries).

⁴⁴⁴ Burke, *Pushing Back*, *supra* note 443. New York requires agencies use "Corcraft," the brand name for "its state prison industry." *Id.*

⁴⁴⁵ Burke, *Public Universities*, *supra* note 443.

⁴⁴⁶ *Id.*

⁴⁴⁷ Burke, *Pushing Back*, *supra* note 443.

⁴⁴⁸ *Id.*

⁴⁴⁹ *UW: Stop Exploiting Incarcerated Workers!*, CHANGE.ORG https://www.change.org/p/university-of-washington-uw-stop-exploiting-prison-labor?utm_content=CL_sharecopy_20168441_en-US%3Av1&recruiter=629735804&utm_source=share_petition&utm_medium=copylink&utm_campaign=share_petition, *archived at* <https://perma.cc/KCQ8-J6PD>.

⁴⁵⁰ Alexandra Byrne, *College Socialists Rally Against Prison Labor Conditions*, FLAT HAT (Sept. 14, 2021), <https://flathatnews.com/2021/09/14/college-socialists-rally-against-prison-labor-conditions/>, *archived at* <https://perma.cc/7AK6-2RDG>. The rally advocated for minimum wage for prison workers, with the ultimate goal of abolition of prisons altogether.

⁴⁵¹ Elizabeth Hernandez, *CU to Re-examine Buying Furniture Made with Prison Labor After Petition from Students, Faculty*, DENVER POST (June 17, 2020), <https://www.denverpost.com/2020/06/17/cu-buying-furniture-prison-labor-petition-students-faculty/>, *archived at* <https://perma.cc/BNP6-9238>.

⁴⁵² Carter Delegal, *The Use of Prison Labor in Universities*, ULOOP (July 6, 2020), <https://www.uloop.com/news/view.php/282894/The-Use-of-Prison-Labor-in-Universities->, *archived at* <https://perma.cc/X3NB-RK9Z>.

Florida Prisoner Solidarity Group, DivestUF, and after the county the University is located in “made the same judgment.”⁴⁵³

The Florida victory is important, but not all student-led efforts have produced such bold results. Students at the University of Washington demanded their administration to cease purchasing prison-labor-created products.⁴⁵⁴ In a letter to President Ana Mari Cauce, students wrote, “It’s time for the University of Washington to acknowledge its role in the prison industrial complex and realign its practices to put communities over profit. . . . We demand that the University of Washington subsequently amends the Supplier Code of Conduct, banning the purchase of furniture from any company that utilizes the labor of incarcerated workers.”⁴⁵⁵ Professors signed the letter as did union leaders.

The response from President Cauce, even though not what the organizers hoped for, sheds light on the decision-making of at least this president. She informed the students that while the university is not legally required to purchase from the corrections industries, the university must adhere to the state’s bidding process—and even more, when selecting bids, one may be from corrections industries and another may be from an off-shore company whose practices may also be in conflict with best practices.⁴⁵⁶

In at least one case, student activism resulted in what might be described as reaching a middle ground. At Colorado University (CU), students could still count a victory even if the pressure to maintain relationships with prison industries prevailed. There, CU decided to adjust its contract with the Colorado Correctional Industries (CCI): it did not end all connections with prison labor, but instead took a middle ground. It expanded its pool of vendors, adjusting such that CCI could become one of many potential vendors.⁴⁵⁷ The University working group acknowledged that prison labor had inherent problems, but considered that if the University “pull[ed] out of CCI entirely, [it would] lose [its] ability to influence change within their system.”⁴⁵⁸

Finally, social movements have galvanized or coalesced with legislative action to end prison slavery. The “Abolition Act” was introduced in the California legislature on December 18, 2020. By August 26, 2021, it advanced through the legislature, and a third reading ordered on August 20, 2021.⁴⁵⁹ This bill is supported by the California Abolition Act Coalition.⁴⁶⁰

⁴⁵³ *Id.*

⁴⁵⁴ Burke, *Public Universities*, *supra* note 443.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *CU Alters Relationship with Colorado Correctional Industries*, CU CONNECTIONS (Aug. 20, 2020), <https://connections.cu.edu/stories/cu-alters-relationship-colorado-correctional-industries>, archived at <https://perma.cc/4AFX-3XMA>.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Efforts by States to Eliminate the Exception Allowing Slavery or Involuntary Servitude as Punishment for a Crime*, HUMAN TRAFFICKING SEARCH (last visited Nov. 2, 2021), <https://humantraffickingsearch.org/efforts-by-states-to-eliminate-the-exception-allowing-slavery-or->

Legislators in Ohio introduced a Joint Resolution proposing the same in May 2020, and it was referred to the Committee on State and Local Government in May 2020.⁴⁶¹ This bill is being advocated for by NAACP.⁴⁶² Similarly, an Oregon Resolution was introduced in January 2021 and filed with the Secretary of State on June 26, 2021.⁴⁶³ It will be on the state's ballot in November 2022.⁴⁶⁴ The Oregon resolution is supported by Oregonians Against Slavery Involuntary Servitude (a student-created coalition),⁴⁶⁵ joined by ACLU of Oregon, Abolish Slavery National Network, and others.⁴⁶⁶ A Tennessee resolution was introduced in February 2021, which passed in the House and Senate. That resolution is set for ballot in November 2022—also with the support of community leadership.⁴⁶⁷ Finally, a Vermont proposal passed in the House and Senate in January 2020 and will also be on the ballot in 2022.⁴⁶⁸ Racial Justice Alliance is working to educate the public on the bill,⁴⁶⁹ along with Abolish Slavery Vermont.⁴⁷⁰

involuntary-servitude-as-punishment-for-a-crime/, archived at <https://perma.cc/T878-M4P4>; *Bill History*, ACA-3 Involuntary Servitude, CA LEGISLATURE (last visited Nov. 2, 2021), https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=202102020ACA3, archived at <https://perma.cc/QP9T-XTDJ>.

⁴⁶⁰ *California Abolition Act Coalition*, ENDSLAVERYINCALIFORNIA.ORG (last visited Nov. 2, 2021), <https://endslaveryincalifornia.org/>, archived at <https://perma.cc/SD26-PFAL>.

⁴⁶¹ H.J.R. No.4, 113rd General Assembly (2019–20). *House Joint Resolution 4*, LEGISLATURE.OHIO.GOV (last visited Nov. 2, 2021), <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HJR-4>, archived at <https://perma.cc/6LQ6-JD2Z>.

⁴⁶² *Advocacy and Litigation*, NAACP (last visited Nov. 2, 2021), <https://naacp.org/issues/advocacy-litigation>, archived at <https://perma.cc/FXA2-BGVK>.

⁴⁶³ S.J.R. 10, 81st Legislative Assembly (2021). *2021 Regular Session*, OR. LEG. INFORMATION (last visited Nov. 2, 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SJR0010>, archived at <https://perma.cc/84ZD-HZF2>.

⁴⁶⁴ *Oregon Remove Slavery as Punishment for Crime from Constitution Amendment (2022)*, BALLOTPEdia (last visited Nov. 2, 2021), [https://ballotpedia.org/Oregon_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_\(2022\)](https://ballotpedia.org/Oregon_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_(2022)), archived at <https://perma.cc/P2U4-GA29>.

⁴⁶⁵ *Marketing & Communications, New Student Coalition Advocates for the Incarcerated, Introduces Legislation*, WILLAMETTE UNIV. (March 5, 2021), <https://willamette.edu/news/library/2021/03/oasis-incarcerated-prisoners.html>, archived at <https://perma.cc/D6T5-VQ8U>.

⁴⁶⁶ *Oregon Remove Slavery*, *supra* note 464.

⁴⁶⁷ H.J.R. 98, 111 General Assembly (2021), TN. GEN. ASSEMBLY, <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HJR0098>, archived at <https://perma.cc/B3YG-QJ8P>; *Efforts by States to Eliminate the Exception*, *supra* note 459.

⁴⁶⁸ PR.2, Senate Chamber (2019), VT. GEN. ASSEMBLY <https://legislature.vermont.gov/bill/status/2020/PR.2>, archived at <https://perma.cc/44RN-E5UA>.

⁴⁶⁹ Pat Bradley, *Effort in Vermont to Update Constitution with Outright Slavery Ban*, WAMC NORTHEAST PUBLIC RADIO (April 7, 2021, 6:24 PM), <https://www.wamc.org/new-england-news/2021-04-07/effort-in-vermont-to-update-constitution-with-outright-slavery-ban>, archived at <https://perma.cc/N5EZ-CP76>.

⁴⁷⁰ *Abolish Slavery Vermont Learning Session*, CCTV (Apr. 7, 2021), <https://www.cctv.org/watch-tv/programs/abolish-slavery-vermont-learning-session>, archived at <https://perma.cc/JZ4T-ZB88>.

CONCLUSION

Slavery is the spectacle that lawmakers sought to preserve and through the Punishment Clause of the Thirteenth Amendment that goal continues to manifest. As discussed in this Article, arguments to preserve slavery even after the Civil War clarify that a) race mattered in the shaping of the Thirteenth Amendment's Punishment Clause; b) perpetuating slavery was the goal of the Punishment Clause; c) punishment and stigmatization of Black people, presumably into perpetuity were the point and vision; and d) Southerners found support for their case by turning to juridical doctrine and founding documents, including the Declaration of Independence and the Constitution. In this way, the past is prologue.

The Punishment Clause proved lucrative in the Southern economy. But who benefits today? Today, federal and state governments preserve slavery even as they transform it through prison labor.⁴⁷¹ It evolves.⁴⁷² It now manifests in a broken criminal justice system that disproportionately surveils,⁴⁷³ arrests,⁴⁷⁴ charges,⁴⁷⁵ and convicts⁴⁷⁶ Black and Latinx people.⁴⁷⁷ With over two million people incarcerated in the United States, there is an ample labor supply. This dynamic is what Reva Siegel describes as “preservation-through-transformation.”⁴⁷⁸

That is, even while the cotton fields of old may no longer be populated by Black laborers from the damp dawn to sweaty dusk, other practices reinforcing slavery persist.⁴⁷⁹ During the COVID-19 pandemic, the incarcerated

⁴⁷¹ 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, archived at <https://perma.cc/66V5-JBWK> (“[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.”).

⁴⁷² *Id.* (“The 13th amendment did not abolish slavery but rather moved it from the plantation to the prison.”).

⁴⁷³ *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/>, archived at <https://perma.cc/2RWB-STHU> (“A Black person is five times more likely to be stopped without just cause than a white person.”).

⁴⁷⁴ *Id.*

⁴⁷⁵ Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html>, archived at <https://perma.cc/GDF5-JZED> (noting that African Americans are arrested and prosecuted at “disproportionately high levels” and account for 38% of cases filed by prosecutors).

⁴⁷⁶ See, e.g., *Blacks Are Overrepresented in Louisiana Prisons and Jails*, PRISON POL'Y INITIATIVE (2010), https://www.prisonpolicy.org/graphs/2010percent/LA_Blacks_2010.html, archived at <https://perma.cc/9657-NLG9> (noting that 66% of Louisiana's prison population is Black).

⁴⁷⁷ *Criminal Justice Fact Sheet*, *supra* note 474 (“African Americans are incarcerated at more than five times the rate of whites.”).

⁴⁷⁸ ALEXANDER, *supra* note 249, at 21.

⁴⁷⁹ 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, 5:51 PM), <https://www.nydailynews.com/news/national/king-13th-amendment-didn-abolish-slavery-article-1.2801218>, archived at <https://perma.cc/T55B-4Y4D> (“[T]he 13th Amendment fell far short

put out dangerous California wildfires for less than two dollars per hour⁴⁸⁰ and sewed COVID-19 masks,⁴⁸¹ which they were not provided.⁴⁸²

In New York, the incarcerated made hand sanitizer, all for no or barely any pay.⁴⁸³ In some states they are not paid anything, and in others, eleven or seventeen cents per hour.⁴⁸⁴ Fortune 500 companies buy their cheap labor, avoiding paying minimum wages to the workers and also failing to advocate for these individuals when they get out and return to society.⁴⁸⁵ And, make no mistake, incarcerated people are expected to pay a premium for the basic goods they use while incarcerated, including basic necessities such as toothpaste, toothbrushes, and soap.⁴⁸⁶ These harsh realities reveal the tenaciousness of American slavery—a system seemingly unwilling to die.

Nevertheless, pathways for reform exist, including repealing the Punishment Clause at the federal level. Additionally, successful referenda efforts in Colorado, Utah, and Nebraska provide state-based models for removing slavery from state constitutions. Finally, judges can and should play an important role starting with expanding compassionate release.

of offering the nation a full, complete and true ban of the practice of slavery. Instead, the institution shape-shifted and morphed in peculiar ways—still primarily on black backs, but inside of less offensive systems and structures. . . .”); Liz Fields, *Hard Labor: Here’s the Weird Shit Inmates Can Do for Work in US Prisons*, VICE NEWS (Sept. 9, 2015, 4:35 AM), <https://news.vice.com/article/hard-labor-heres-the-weird-shit-inmates-can-do-for-work-in-us-prisons>, archived at <https://perma.cc/M6UL-A28U>.

⁴⁸⁰ Goodwin, *supra* note 34.

⁴⁸¹ Feldman, *supra* note 354.

⁴⁸² *Id.*

⁴⁸³ Antonia Noori Farzan, *Inmates are Manufacturing Hand Sanitizer to Help Fight Coronavirus. But Will They be Allowed to Use It?*, WASH. POST (March 10, 2020) <https://www.washingtonpost.com/nation/2020/03/10/hand-sanitizer-prison-labor/>, archived at <https://perma.cc/SF8D-TJFR> (noting that average prison wage is 65 cents per hour).

⁴⁸⁴ The Prison Policy Initiative provides a comprehensive chart of federal and state prison wages. See *Prison Wage Policies*, *supra* note 314.

⁴⁸⁵ *The Prison Industry*, *supra* note 411; *50 Companies Supporting Modern American Slavery*, *supra* note 324; Peláez, *supra* note 325 (listing companies that use and profit from prison labor).

⁴⁸⁶ Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018) <https://www.prisonpolicy.org/reports/commissary.html#:~:text=IT’s%20a%20myth%20that%20incarcerated,is%20spent%20on%20basic%20necessities>, archived at <https://perma.cc/ENP3-8C9S>; Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. TIMES (Dec. 20, 2019) <https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html>, archived at <https://perma.cc/RJA6-WR7X>; Erica Bryant, *Working for Pennies Just to Buy Overpriced Soap in Prison*, VERA INST. OF JUST. (Apr. 30, 2021) <https://www.vera.org/blog/working-for-pennies-just-to-buy-overpriced-soap-in-prison>, archived at <https://perma.cc/86GQ-VLA6> (arguing that the low wages of incarcerated people force them to work so they can afford to buy basic necessities).

