
April 2024

Prison Labor in America: History, Race, and State Power

Blake S. Rutherford
rutherford.blake@gmail.com

Follow this and additional works at: <https://ir.law.utk.edu/rgsj>



Part of the [Law Commons](#)

Recommended Citation

Rutherford, Blake S. (2024) "Prison Labor in America: History, Race, and State Power," *Tennessee Journal of Race, Gender, & Social Justice*: Vol. 13: Iss. 2, Article 2.

DOI: <https://doi.org/10.70658/2693-3225.1237>

Available at: <https://ir.law.utk.edu/rgsj/vol13/iss2/2>

This Article is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Race, Gender, & Social Justice by an authorized editor. For more information, please visit <https://ir.law.utk.edu/rgsj>.

PRISON LABOR IN AMERICA: HISTORY, RACE, AND STATE POWER

*Blake S. Rutherford**

I. INTRODUCTION

Diverse forms of forced labor are not unique to the United States of America. Slavery and penal labor existed in the ancient world.¹ Serfdom was a function of premodern Europe.² Forced labor was carried to the New World and it spread across the topography from the mountains to southern plantations.³ In colonial Africa, European conquest introduced coercive labor.⁴ In the oppressive era of Apartheid, labor extraction and forced labor can be traced to similar colonial strategies experienced across Africa.⁵ To be sure, Joseph Stalin’s forced labor camps—known as Gulags, which registered a total inmate population of 100,000 from the 1920s well into the 1950s—are one of two very famous modern examples.⁶ The other, of course, is Adolph Hitler’s Nazi labor and extermination camps.⁷ Together, these stand, as one scholar observed, “horrific examples of forced labor in the modern world.”⁸

*Blake S. Rutherford received a BA from Middlebury College, a JD from the University of Arkansas School of Law, and an LL.M from Michigan Law School. Previously, he served as chief of staff and special advisor to three state attorneys general.

¹ ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 186* (1996).

² See Arcadius Kahan, *Notes on Serfdom in Western and Eastern Europe*, 33 J. ECON. HIST. 86, 86 (1973) (“Discussing the problem of profitability of serfdom in various countries, as in the case of slavery, that serfdom at the time of its abolition was still profitable to many serf owners when measured in terms of private returns and did not disappear as an economic institution when it ceased to be socially profitable.”).

³ LICHTENSTEIN, *supra* note 1, at 186.

⁴ See B.J. Berman & J.M. Lonsdale, *Crises of Accumulation, Coercion and the Colonial State: The Development of the Labor Control System in Kenya, 1919-1929*, 14 CAN. J. AFR. STUD. 55, 55–56 (1980) (“Colonialism, however, involved an equally important and no less dramatic transformation of the forms of political domination and control.”).

⁵ See Moitsadi Moeti, *The Origins of Forced Labor in the Witwatersrand*, 47 PHYLON 276, 276 (1986) (“Europeans in the Transvaal were concerned with the recruitment of large numbers of very cheap laborers. This was a necessary condition for the profitable extraction of gold.”).

⁶ See generally ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO, 1918 – 1956: AN EXPERIMENT IN LITERARY INVESTIGATION* (Thomas P. Whitney trans., 1st ed. 1974).

⁷ Eugen Kogon & R.A. Gutman, *Hitler’s Concentration Camps: An Examination of Conscience*, 9 REV. POLI. 34, 35 (1947) (“Disguised in glittering nationalist trappings he led them into the apocalyptic bomb and fire rain of recent years. Thrown into the abyss of misery and degradation, they finally awoke, in the midst of debris and corpses, to a vague new realization. What had happened? How could it have happened?”).

⁸ LICHTENSTEIN, *supra* note 1, at 186.

Involuntary servitude also maintains a relationship to international business. For example, the Spanish enslaved indigenous persons in the New Mexico territory in the seventeenth century.⁹ It was a well-recognized aspect of imperial Brazil as well.¹⁰ In Italy, merchants intending to do business in Spain during the reign of Fernando and Isabel and in the age of Christopher Columbus engaged in myriad forms of enslavement.¹¹ In the eighteenth century, slavery was rampant in the Caribbean.¹² These are just a few examples of an international landscape that embraced slavery and forced labor. Furthermore, the exploration of the New World, the arrival of Europeans, and the conquest of land and indigenous peoples informed attitudes about slavery, particularly as it pertained to races deemed by the Europeans to be inferior.¹³

This historical arc informs attitudes about slavery in American colonies, the rise of the plantation South, and the advent of the Civil War.¹⁴ As Professor Alex Lichtenstein observed,

One of the persistent themes of American history has been an abiding faith in progress and development; and one of the persistent themes of southern history has been the necessity for federal intervention to extend the benefits of progress to the nation's less "developed" region. Whether carried out by the Union Army, carpetbaggers, northern capital, technocratic "experts," the judiciary, or, today, the forces of postindustrial economic change,

⁹ Anton Daughters, "Grave Offenses Worthy of Great Punishment": *The Enslavement of Juan Suñi, 1659*, 54 J. SW. 437, 437 (2012) ("[T]he practice of sentencing Indians to enslavement was as common in New Mexico as it was in other parts of New Spain.").

¹⁰ Peter M. Beattie, *Slaves, Crime, and Punishment in Imperial Brazil*, 45 LUSO-BRAZILIAN REV. 191, 191–93 (2008) (book review).

¹¹ Helen Nader, *Desperate Men, Questionable Acts: The Moral Dilemma of Italian Merchants in the Spanish Slave Trade*, 33 SIXTEENTH CENT. J. 401, 402 (2002) ("Slaving was inextricably bound to that most Italian of business practices, credit, and to credit's disreputable cousin, usury.").

¹² Arthur L. Stinchcombe, *Freedom and Oppression of Slaves in the Eighteenth-Century Caribbean*, 59 AM. SOCIO. REV. 911, 913 (1994) ("One main argument here is that the degree to which law and political authority ferreted out incipient slave liberties or patches of freedom and relentlessly invented laws to suppress them, was itself shaped by the determinants of planter power.").

¹³ See Alvin O. Thompson, *Race and Colour Prejudices and the Origin of the Trans-Atlantic Slave Trade*, 16 CARIBBEAN STUD. 29, 30 (1976) (finding that race and color prejudices in Europe began as early as 1600).

¹⁴ JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (2003); Gerald Gunderson, *The Origin of the American Civil War*, 34 J. ECON. HIST. 915, 916 ("Slavery can be explained entirely by its monetary return without reference to other objectives which might have encouraged slave ownership. Second, slavery was viable. In the absence of emancipation by such forces as the Civil War, it would have been economically profitable indefinitely.").

this process has frequently revolved around the inseparable issues of labor and race.¹⁵

As the attitudes and memories shifted after the Civil War, the American approach to Reconstruction fashioned problematic elements that still inform approaches to forced labor today.¹⁶ While free labor triumphed over slavery in the Civil War, efforts by many to reshape the American South—whom some have described as “prophets of [the] New South”—had a profound impact on the future of forced labor in the region.¹⁷ Memory, particularly among those eager to move beyond the mass casualties of war and encourage a romantic view of the pre-and-post Civil War South, played an essential role in what Professor David Blight described as the “reminiscence industry.”¹⁸ This led to Black people occupying “a marginal place . . . in white Civil War memory.”¹⁹ The intersection of competing attitudes about the past further complicated the manner in which Black people were characterized in history. As Frederick Douglass and W.E.B. Du Bois struggled to keep the idea of freedom of color alive while reclaiming agency in history and the present, Booker T. Washington was urging his people to forget the past, including slavery, and work towards meaningful progress.²⁰ In terms of reconciling the past, this presented a complex dynamic. And while the long shadow of slavery would never dissipate, Black people in America faced new and challenging dynamics as the American South attempted to rebuild and white attitudes shifted towards the acquisition of cheap labor as a means of economic survival. As Professor Erin Hatton noted, “Work is not only a centerpiece of American culture, it is a centerpiece of American inequality: a splitting wedge used to marginalize, exploit, and exclude some groups of workers while advantaging others.”²¹

Work is not only a centerpiece of American culture, it is a centerpiece of American punishment.²² This has its roots, as with broader concepts of forced labor, in Europe. As Michel Foucault observed,

¹⁵ LICHTENSTEIN, *supra* note 1, at 187.

¹⁶ See James Oakes, *Capitalism and Slavery and the Civil War*, 89 INT’L. LAB. & WORKING-CLASS HIST. 195, 195 (2016) (book review) (“There are actually two distinct debates about capitalism and slavery, one over whether the slave trade and the profits of plantation slavery played a significant role in the Industrial Revolution, and the other about whether plantation slavery was or was not capitalist.”).

¹⁷ LICHTENSTEIN, *supra* note 1, at 187–89.

¹⁸ DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001).

¹⁹ *Id.* at 300–38.

²⁰ *Id.*

²¹ Erin Hatton, *Working Behind Bars: Prison Labor in America*, in *LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON* 18 (Erin Hatton ed., 2021).

²² See *id.*

Several polemics that took place under the Restoration and the July Monarchy throw light on the function attributed to penal labour. First, there was the debate on the subject of wages. The labour of prisoners was remunerated in France. This posed a problem: if work in prison is remunerated, that work cannot really form part of the penalty; and the prisoner may therefore refuse to perform it. Moreover, wages reward the skill of the worker and not the improvement of the convict: ‘The worst subjects are almost everywhere the most skilful workers; they are the most highly remunerated, consequently the most intemperate and least ready to repent.’²³

Labor, as seen in Europe and later in America, was an essential component of prisons. The Thirteenth Amendment to the Constitution of the United States reads, “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.”²⁴ But prisoners have found no relief from the federal judiciary’s interpretation of this amendment. Beginning with the *Slaughter-House Cases*, courts have held that the primary purpose of the Thirteenth Amendment was to abolish chattel slavery.²⁵ In a long line of federal case law, prisoners have not been able to avail themselves of Thirteenth Amendment protection and instead have had to rely on Eighth Amendment considerations.²⁶

It is difficult to separate American prisons and race. In ways I discuss later in this paper, the relationship between prisons, race, and labor has a long and unsavory history in America.²⁷ David Oshinsky—in his history of the Parchman

²³ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 240 (1979).

²⁴ U.S. CONST. amend. XIII, § 1; see also Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451, 1452 (2009) (“The meaning of the Thirteenth Amendment has diverged widely at different moments in history—emphasizing the right to contract during the Lochner era, New Deal labor and economic rights in the 1930s and 1940s, and desegregation and antidiscrimination during the civil rights era of the 1960s.”); William M. Carter, Jr., *The Promises of Freedom: The Contemporary Relevance of the Thirteenth Amendment*, 85 TEMP. L. REV. 867, 869 (2013) (The framers of the Thirteenth Amendment believed “that they were constitutionalizing the permanent end of chattel slavery. They believed that they were outlawing any form of forced labor akin to slavery. But they also, to quote the framers’ words, believed they were not only ending slavery itself, but acting so as to obliterate the last lingering vestiges of slavery in America.”).

²⁵ 83 U.S. 36, 37 (1872).

²⁶ See *Ruiz v. Estelle*, 503 F. Supp. 1265, 1303–05, 1328–31 (S.D. Tex. 1980) (compiling rulings of courts’ application of the Eighth Amendment to prisoners).

²⁷ DAVID OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

Farm in Mississippi—observed, “Emancipation had ended slavery but had not destroyed the assumptions on which slavery was based.”²⁸ Prejudices about labor informed white approaches to prison labor. In the aftermath of the Civil War, many Black people abandoned their plantations. To white people this “simply reinforced the image of the lazy, indolent field hand shuffling aimlessly through life. In white eyes, the Negro viewed his freedom in typically primitive terms – as a license to roam the countryside in search of pleasure and trouble.”²⁹ This also informed a pattern of legislation at the municipal level across the South that ignited a pattern of incarceration of Black people.³⁰ As Professor Hatton stated, “Through the late nineteenth and early twentieth centuries, hundreds of thousands of African Americans (including children) were incarcerated in the American South, often on trumped-up charges of ‘vagrancy’ (levied against those who could not prove employment at any given moment).”³¹ This began a period of the Black Codes, which, in Mississippi for example, listed specific crimes for the “free negro.”³² These offenses included “‘mischief,’ ‘insulting gestures,’ ‘cruel treatment to animals,’ and the ‘vending of spiritous or intoxicating liquors.’”³³ Free Black people were also prohibited from keeping firearms and from cohabitating with white people.³⁴ The penalty for intermarriage was “confinement to the state penitentiary for life.”³⁵

To understand the rise of mass incarceration of Black people in the New South is to understand the Mississippi Vagrancy Act.³⁶ Herbert Hill, in *Black Labor and the American Legal System: Race, Work, and the Law*, argued that plantation owners in the South “intended to keep ‘free’ Negro labor under permanent control.”³⁷ Prior to 1867, these Black Codes were vigorously enforced. This

²⁸ *Id.* at 17.

²⁹ *Id.* at 17–18.

³⁰ RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 785 (1999) (relating vagrancy ordinances of the post-Civil War South to anti-gang loitering ordinances in Chicago in the late 1990s).

³¹ Hatton, *supra* note 21, at 18–19.

³² OSHINSKY, *supra* note 27, at 21.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Martha Mitchell Bigelow, *Public Opinion and the Passage of the Mississippi Black Codes*, 33 NEGRO HIST. BULL. 11, 11 (1970) (“Of all the problems that have fascinated historians of the reconstruction, none has been more puzzling than why the Southern states, so recently defeated, would fly in the face of Northern opinion by the passage of the Black Codes.”).

³⁷ HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 66 (1985).

resulted in a substantial number of cases, often overseen by the sheriff.³⁸ If the vagrant did not have fifty dollars to pay his fine, he could be hired out to any white man willing to pay for him.³⁹

In 1867, the U.S. Congress passed a substantial Reconstruction Act which, for a short period of time, transformed the South.⁴⁰ As Oshinsky noted, “By 1870, black Republicans in Mississippi were serving as sheriffs, mayors, and state legislators. Their ranks included John R. Lynch, the first black Speaker of the Mississippi House of Representatives, and Hiram B. Revels, the first Negro to serve in the U.S. Senate.”⁴¹ Progress was short-lived and soon violence overwhelmed Mississippi.⁴² White people used the onset of violence to reinforce long-standing stereotypes about Black people. Law enforcement became focused on “keeping ex-slaves in line.”⁴³ This pivotal post-Reconstruction shift transformed the American prison landscape and sparked the beginning of an era of mass incarceration that persists today.

This paper examines the status of prison labor in America. Part II considers the advent of the Thirteenth Amendment and the “except as punishment for a crime” clause. Part III examines post-Thirteenth Amendment society from the advent of convict leasing in the late 1800s to establishment of chain gangs, to the creation of profitable state-run prison systems, commonly known as farms. Part IV reviews notable evolutions in the prison system from 1974 to 1995, including the Nixon-era “War on Drugs,” the Prison Industries Enhancement Certification Program, and the Clinton-era “Violent Crime and Law Enforcement Act of 1994.” Part V examines the politics of incarceration, including profits, protections, and the rise of private prisons from 1970 to the present. Finally, Part VI offers suggestions for reform at the state and federal level to address inequality, disparity, and violence in prison labor.

II. A BRIEF HISTORY OF THE THIRTEENTH AMENDMENT’S PUNISHMENT CLAUSE

The Thirteenth Amendment prohibits slavery and involuntary servitude “except as punishment for a crime whereof the party shall have been duly

³⁸ OSHINSKY, *supra* note 27, at 21.

³⁹ *Id.*

⁴⁰ James M. McPherson, *The Dimensions of Change: The First and Second Reconstructions*, 2 WILSON Q. 135, 136 (1978) (“For half a century after 1900, the *dominant* interpretation reflected a Southern viewpoint. It portrayed Reconstruction as an era of fraud and repression imposed on the prostrate white South – with vengeful northern radicals and rapacious carpetbaggers using ignorant black voters as dupes in an orgy of misgovernment and plunder.”).

⁴¹ OSHINSKY, *supra* note 27, at 22.

⁴² *Id.* at 23.

⁴³ *Id.* at 33.

convicted.”⁴⁴ To this day it remains somewhat of a mystery why it was included. Consider, for example, that by the time the Northwest Ordinance was enacted in 1787, penal servitude had arrived in the American colonies.⁴⁵ There was an attitude among the founders that labor seemed to be a suitable alternative to prior royal British practices of inflicting death and suffering for minor offenses.⁴⁶ This informs why, over time, a punishment exception was common in state slavery bans that drafters considered it as essentially boilerplate language.⁴⁷ Looking beyond the text of the amendment itself and consider the circumstances at the time, it is believed that prison populations in the North and South were quite small.⁴⁸ Much attention was still focused on the Civil War, and thus there was not a great deal of consideration for how the amendment could be circumvented or abused.⁴⁹

Many members of Congress envisioned the amendment as a charter for labor freedom.⁵⁰ Explaining the intent of the amendment generally, Professor Lea VenderVelde observed,

A careful examination of this labor vision reveals a structure formed by three types of statements. The first group addresses the historical need to rid employment relations of the master’s patriarchal dominion over all laborers in his household and to accord the employee a realm of family and personal privacy free from employer control. The second describes the core concept of autonomy for laborers in their social and economic relations with employers. The final group condemns certain specific labor practices as inconsistent with the spirit of labor autonomy. This three-part configuration is useful in exploring the amendment’s reach in restructuring the modern employment relation.⁵¹

⁴⁴ U.S. CONST. amend. XIII, § 1.

⁴⁵ REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941* 31 (2008).

⁴⁶ *Id.* at 19–20.

⁴⁷ ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 46 (2019).

⁴⁸ *See, e.g.*, MARGARET WERNER CALAHAN, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES 1850-1984* 27 (1986); *see also* MCLENNAN, *supra* note 45, at 65 (noting that “the antebellum Southern prison population was as little as one-tenth the size of the North’s”).

⁴⁹ MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 58–59 (2001).

⁵⁰ ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11 (1970).

⁵¹ Lea S. VenderVelde, *The Labor Vision of the Thirteenth Amendment*, 13 U. PA. L. REV. 437, 439 (1989).

In an 1850 letter, U.S. Representative Thaddeus Stephens expressed fear that slavery would interfere with white working conditions.⁵² He said, “[t]he people will ultimately see that laws which oppress the black man and deprive him of all safeguards of liberty, will eventually enslave the white man.”⁵³ Arguably, many in Congress saw the abolition of slavery as a necessity—preserving white working conditions was vital in their eyes.⁵⁴ Stephens’s perspective has been echoed by historical scholars, although it extended beyond labor. William M. Brewer, writing in 1930, observed, “There was a groping of class consciousness among the poor whites of antebellum days, which was based on instructive self-interest. The enslavement of the Negro determined the position of the poor whites in the Old South. To these lowly people, slavery offered what they considered a defense of their self-respect.”⁵⁵ According to Professor VanderVelde, the language of the Thirteenth Amendment “assumed mythical proportions because in the Reconstruction debates because it was attributed to Thomas Jefferson.”⁵⁶ Furthermore, she noted that members of Congress “took solace in the fact that although they were amending a sacred document, they did so with the language of one of its original architects.”⁵⁷

On January 31, 1865, the United States House of Representatives voted to approve the Thirteenth Amendment.⁵⁸ Representative John Ashley of Ohio chaired the final debate over the amendment and, as Professor Rebecca Zietlow noted, Ashley and his contemporaries “believed that the Thirteenth Amendment not only ended slavery but also established fundamental human rights for freed slaves and other people in the United States.”⁵⁹ Similar to Stephens’s point of view, “Ashley’s theory is an idealistic vision based on a pragmatic view of the way in which class and race oppression interact to contribute to the subordination of all workers.”⁶⁰

To-date there is no consensus as to why the “punishment clause” or, to others, the “exception clause,” was included in the Thirteenth Amendment. After

⁵² HANS L. TREFOUSSE, *THE RADICAL REPUBLICANS* 56 (1969).

⁵³ *Id.*

⁵⁴ Brian Kelly, *Emancipations and Reversals: Labor, Race, and the Boundaries of American Freedom in the Age of Capital*, 75 *INT’L. LAB. & WORKING-CLASS HIST.* 169, 170 (2009) (book review) (“Partly owing to Du Bois’s enduring influence, emancipation remains the site for an extraordinary fruitful examination of the relationship between changing class relations and the tumultuous series of clashes over the reconfiguring of freedom in the aftermath of slavery.”).

⁵⁵ William M. Brewer, *Poor Whites and Negroes in the South Since the Civil War*, 15 *J. NEGRO HIST.* 26, 26 (1930).

⁵⁶ VanderVelde, *supra* note 51, at 450.

⁵⁷ *Id.*

⁵⁸ *CONG. GLOBE*, 38th Cong., 2nd Sess. 531 (1865). The United States Senate approved the amendment the previous spring. *CONG. GLOBE*, 38th Cong., 1st Sess. 1940 (1865).

⁵⁹ Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 *COLUM. L. REV.* 1697, 1697 (2012).

⁶⁰ *Id.* at 1698.

all, scholars reflecting on its 160-year lifespan have concluded that the amendment has “delivered remarkably little beyond the initial elimination of African American chattel slavery.”⁶¹ To that end, the U.S. Supreme Court has interpreted the Thirteenth Amendment narrowly, as the Court demonstrated in *United States v. Kozminski*.⁶² In that case, Justice Sandra Day O’Connor noted that “the primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose.”⁶³ Thus, O’Connor concluded, “[O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion.”⁶⁴ However, she also reasoned that “[t]he guarantee of freedom of involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.”⁶⁵ As Professors Jack Balkin and Sanford Levinson stated, “It is worth emphasizing how narrow this interpretation is.”⁶⁶ Parsing the essential text of the Thirteenth Amendment, other scholars have observed that the Thirteenth Amendment outlawed not involuntary work, but involuntary servitude.⁶⁷

III. THE PENAL SYSTEM OF THE POSTBELLUM SOUTH.

A. Convict Leasing

Throughout the South, emancipation placed enormous strains on what was once a modest prison system.⁶⁸ For example, the penitentiary in Jackson, Mississippi, had been burned to the ground.⁶⁹ With the flood of new Black

⁶¹ Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1460 (2012).

⁶² 487 U.S. 931, 944 (1988).

⁶³ *Id.* at 942. Justice O’Connor appears to have embraced the view of Republican Senator Edgar Cowan of Pennsylvania who argued at the time of the amendment’s adoption that it did nothing more than end the institution of slavery. See VanderVelde, *supra* note 51, at 476–77. In debates over the 1866 Civil Rights Act, Senator Cowan re-affirmed his position. “That Amendment, everybody knows, and nobody dare deny, was simply made to liberate the Negro slave from his master. That is all there is of it.” See CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Edgar Cowan). This was the minority viewpoint in the Reconstruction Congress. Far more salient was the free labor view that ending slavery would improve the conditions of all workers and guarantee them freedom from undue exploitation. See Zietlow, *supra* note 59, at 1704.

⁶⁴ *Kozminski*, 487 U.S. at 944.

⁶⁵ *Id.*

⁶⁶ Balkin & Levinson, *supra* note 61, at 1461.

⁶⁷ For a detailed discussion of the legislative history of the Thirteenth Amendment, see James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1473 (2019).

⁶⁸ OSHINSKY, *supra* note 27, at 35.

⁶⁹ *Id.*

prisoners, the penal system in the postbellum South was unequipped to handle them.⁷⁰ In 1868, a Mississippi businessman named Edmund Richardson struck a deal with federal authorities to provide felons to work on his Yazoo Delta plantation.⁷¹ He promised to feed them, clothe them, guard them, and treat them well.⁷² For that he was paid \$18,000 along with additional money for transportation.⁷³ Richardson was also permitted to keep all the profits he derived from the convict labor.⁷⁴ While there is evidence that prisons in the North contracted with private entrepreneurs for prison labor, what made the system in the South unique is that the state gave up its control of the convict population to the contractor.⁷⁵ This system essentially allowed planters to transform the Black people convicted of crimes into an “agricultural proletariat with a gamut of labor relations ranging from tenancy to sharecropping to debt-peonage.”⁷⁶ This system afforded contractors with the ability to define their own conditions for work, meaning “a generation of black prisoners would suffer and die under conditions far worse than anything they had ever experienced as slaves.”⁷⁷ In Mississippi, for example, the exclusive right to lease state convicts became the most coveted political contract.⁷⁸ Despite the North’s victory in the Civil War, the convict leasing system suggested that identity and ideology of southern white people had not changed and, in fact, their desire to maintain a system of white supremacy in labor as well as politics.

Convict leasing would persist across the South into the twentieth century, but by 1915 remained alive only in Alabama and Florida.⁷⁹ There was a hint of progressivism in Arkansas as early as 1908 when Governor George Donaghey announced his opposition to the convict leasing system.⁸⁰ It would take several years to overcome opposition from planters and coal mine operators, but the state legislature eventually abolished the system by 1913.⁸¹ Arkansas moved 1,200 convicts to a penal farm operated by the state.⁸² But progressivism may be too

⁷⁰ LICHTENSTEIN, *supra* note 1, at 3.

⁷¹ OSHINSKY, *supra* note 27, at 35.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ LICHTENSTEIN, *supra* note 1, at 3.

⁷⁶ *Id.* at 4.

⁷⁷ OSHINSKY, *supra* note 27, at 35. Historical records in Mississippi illustrate that convict laborers experienced considerable brutality and neglect. They often ate and slept on bare ground without blankets, mattresses or even clothes. They were physically punished with lashings for a variety of arbitrary offenses. Disease was rampant. Convict laborers died from pneumonia, malaria, sunstroke, dysentery, gunshot wounds, and shackle poisoning. *Id.* at 45.

⁷⁸ *Id.* at 43.

⁷⁹ *Id.* at 70.

⁸⁰ *Id.* at 67.

⁸¹ *Id.* at 69.

⁸² *Id.*

favorable of a label, as Alex Lichtenstein observed, because it merely shifted the exploitation of convict labor from the private to public sectors.⁸³ In Georgia, for example, “[t]he abolition of the convict lease pitted Progressive reformers, the labor movement, the good roads movement, and agrarian and commercial interests against the [contractors].”⁸⁴ While the practice of leasing out convicts to private contractors for use faded away, the state itself took over the exploitation of convict labor to develop a transportation infrastructure.⁸⁵

B. The Chain Gang and the Good Roads Movement

It seems peculiar in hindsight, but the concept of Black convicts working the roads of the South in the 1920s was seen as a step forward.⁸⁶ However, as the South continued to recover from the Civil War, the idea of connecting industry with markets compelled the need for substantial transportation infrastructure. To accomplish this, the South needed a large and efficient labor force—something that was elusive at the time.⁸⁷ Thus, the concept of the chain gang was born.

The concept of the chain gain became so popular that it threatened to displace all other penal systems in the South.⁸⁸ Road work was defended as being appropriate to southern conditions because “blacks were perceived as suited to the heavy, unskilled labor it required and the discipline of coerced outdoor labor was perceived as beneficial to blacks.”⁸⁹ It was not long, however, before reports of systemic abuse were reported across the South.⁹⁰ Throughout the 1920s, 1930s, and 1940s, convicts continued to labor, eat, and sleep with chains around their ankles.⁹¹ The pace of work was considerable from sunup to sundown. The food was often bug infested or rotten, sleeping conditions were unsanitary, medical care was practically non-existent, and corporal punishment and torture were rampant.⁹² These factors, and because a vast majority of the convicts were Black, led the chain gain to become inextricably linked with a racist and perverse sense of southern justice.⁹³ John L. Spivak offered this picture of life on a South Carolina chain gang:

⁸³ LICHTENSTEIN, *supra* note 1, at 14–15.

⁸⁴ *Id.* at 15.

⁸⁵ *Id.* at 15.

⁸⁶ Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: “The Negro Convict is a Slave,”* 59 J. S. HIST. 85, 85 (1993) [hereinafter Lichtenstein Roads].

⁸⁷ *Id.* at 87.

⁸⁸ *Id.* at 105.

⁸⁹ *Id.* at 106.

⁹⁰ *Id.* at 92.

⁹¹ *Id.* at 93.

⁹² *Id.* at 93. Convicts were often beaten with rifle butts and clubs, whipped with a leather strap, confined to a sweatbox, and hung from stocks and bars.

⁹³ Robert E. Ireland, *Prison Reform, Road Building, and Southern Progressivism: Joseph Hyde Pratt and the Campaign for “Good Roads and Good Men,”* 68 N.C. HIST. REV. 125, 125 (1991).

In Buzzard's Roost [a Georgia chain gang] there were vermin and stench, cursings and beatings and stocks but out of Slatternville seventeen Negroes went into the wilderness of the South Carolina hills in a floating cage, a cage drawn by four mules, a swaying, creaking, rumbling prison of thick wood with no bars or windows for air on nights that choked you, and bunks of steel with rungs for master chains to lock you in at night. Bedbugs slept with you in that cage and lice nestled in the hair of your body and you scratched until your skin bled and the sores on your body filled with pus. Meat for the floating kitchen wrapped in burlap bags, stinking meat swarming with maggots and flies, and corn pone soaked by fall rains, slashing rains that beat upon the wooden cage through the barred door upon the straw mattresses until they were soggy.⁹⁴

In 1932, Robert Burns published *I am Fugitive from a Chain Gang!* which was subsequently adapted as a feature film.⁹⁵ This captured the attention of many people, particularly from outside the South, and sparked a dialogue about the cruel and inhumane nature of chain gangs.⁹⁶ This outrage shined another light on the South's peculiar penal system and aligned this method of labor and punishment with sharecropping, segregation, and lynching.⁹⁷ This did not bring an end to the chain gang, but what had allowed it to thrive before the film and afterwards was the alliance of racial ideology, the belief in progressive penology, and the desire for economic modernization that only transportation could provide.

The mere threat of the chain gang had an oppressive identity to it. Southern Black Americans were compelled to remain in their labor contracts for fear that switching jobs, contract breaches, failing to pay debts, or the impression of idleness would result in criminal sanctions.⁹⁸

Perhaps it was reasonable at the time to believe that the chain gain was a suitable progression from convict leasing, however it remains that the prevailing sentiment was not humane penology, but political economy. Justifications for chain gains were easier to justify in the eyes of the state because the work being performed was considered "for the common welfare."⁹⁹ Indeed, the attitudinal

⁹⁴ JOHN L. SPIVAK, *GEORGIA NIGGER* (1932), later retitled *HARD TIMES ON A SOUTHERN CHAIN GANG*.

⁹⁵ David A. Davis, "*I Am a Fugitive from a Chain Gang!*" and the Materiality of Southern Depravity, 63 *MISS. Q.* 399, 399 (2010).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era* (pt. 2: *The Peonage Cases*), 82 *COLUM. L. REV.* 646, 653 (1982).

⁹⁹ Lichtenstein Roads, *supra* note 86, at 107.

distance between the convict lease and the chain gang was minimal and relative. Both systems operated on the foundational belief that Black people only worked effectively under the threat of punishment.¹⁰⁰ This racist view informed penal attitudes towards punishment as well, which is why, in part, convicts in leasing programs and on chain gangs experienced tremendous brutality.¹⁰¹ Yet, much of the economic modernization of the postbellum South is aligned with a distinctly anti-modern notion: forced labor of Black men and women.¹⁰² This is one of the many strange contradictions of the South in the decades following the Civil War. Modernity and a lack thereof existed in symbiotic fashion to drive the region forward.

Despite the abhorrent conditions and the tether to convict leasing, slavery chain gangs would persist in the South until the late 1950s and early 1960s.¹⁰³ As Professor Alex Lichtenstein observed,

Despite the scandal generated by *I am a Fugitive*, the southern convict road gang, like its predecessor the convict-lease, eventually began to succumb to economic and social forces which redefined the place of penal labor in the South's political economy, rather than to the renewed clamor for humanitarian penal reform.¹⁰⁴

Yet, on May 3, 1995, chain gangs returned to Alabama.¹⁰⁵ This was an idea that developed during the 1994 gubernatorial campaign when Republican Forrest “Fob” James presented the idea on a local radio show, and it was met with swift public approval.¹⁰⁶ It did not take long for serious problems to develop. On May 15, 1996 an inmate and member of a chain gang, Abraham McCord, was shot and killed by a prison guard after McCord, after being unshackled, attacked another

¹⁰⁰ *Id.* at 109.

¹⁰¹ *Id.*

¹⁰² While chain gangs were made up predominantly of Black men, Black women—but not white women—were also assigned to chain gangs. In 1912, a woman named Hattie Johnson was imprisoned on a chain gang for larceny. She was pregnant at the time of her incarceration, but despite petitioning for clemency, Johnson spent several months doing hard labor. See Sarah Haley, “*Like I Was a Man*”: *Chain Gangs, Gender, and the Domestic Carceral Sphere in Jim Crow Georgia*, 39 *J. WOMEN CULT. & SOC.* 54, 62 (2013); Stephanie Hong, *Say Her Name: The Black Woman and Incarceration*, 19 *GEO. J. GENDER & L.* 619, 622 (2018) (“The laws did not serve to protect black women from physical or sexual abuse, but instead, served to prosecute black women who defended themselves against their abusers.”).

¹⁰³ Jaron Browne, *Rooted in Slavery: Prison Labor Exploitation*, 14 *RACE, POV. & ENVIRO.* 42, 43 (2007). It appears that the last chain gang was dismantled in Georgia in the early 1960s. See Booth, *infra* note 105.

¹⁰⁴ LICHTENSTEIN, *supra* note 1, at 190.

¹⁰⁵ William Booth, *The Return of Chain Gangs*, *WASH. POST*, May 4, 1995.

¹⁰⁶ Brent Staples, *The Chain Gang Show*, *N.Y. TIMES MAG.*, Sept. 17, 1995, at 62.

prisoner with a bush ax.¹⁰⁷ By June of that year, Alabama had ended the practice of chaining prisoners together.¹⁰⁸ Ultimately, compelled by factors influenced by history, gender, and simply poor ideation, the concept ended.¹⁰⁹

Of course, Alabama was not alone. Chain gangs re-emerged in Arizona, Florida, Iowa, Oklahoma, Tennessee, and Wisconsin.¹¹⁰ The most notorious of these endeavors involved Joe Arpaio, the former sheriff of Maricopa County, Arizona—which includes Phoenix—who instituted separate chain gangs for men, women, and juveniles.¹¹¹ Arpaio, who was later pardoned by President Donald Trump in the first pardon of his presidency, was convicted of criminal contempt for disregarding a court order in a racial-profiling case.¹¹² One of Arpaio’s tactics was to limit television to the Weather Channel “so that these morons will know how hot it’s going to be while they are working on my chain gangs.”¹¹³

Joe Arpaio is no longer the sheriff of Maricopa County, and many of his tactics have been dismantled by his successor.¹¹⁴ Largely, the chain gang has disappeared from the roads of the South.¹¹⁵ The evolution of the prison, which will be addressed later in this paper, has taken on an entirely different personality. But

¹⁰⁷ See *State Changes Restraints for Chain Gang Inmates*, MONTGOMERY ADVERTISER, May 25, 1996, at 3F.

¹⁰⁸ Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CALL. L. REV. 441, 456–57 (1997).

¹⁰⁹ Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama’s Experience Raises Eighth Amendment Concerns*, 15 MINN. J. L. & INEQ. 127, 135 (1997). The chain gang concept cratered when Alabama’s Commissioner of Prisoners stated that women would be placed on chain gangs, which Governor James immediately disputed. The Commissioner was demoted and public decline for the concept accelerated from there.

¹¹⁰ *Id.* at 136.

¹¹¹ *60 Minutes Footage Shows Arpaio When He was Ruthless “Joe the Jailer,”* CBS NEWS (Aug. 26, 2017, 8:52 AM), <https://www.cbsnews.com/news/60-minutes-footage-shows-arpaio-when-he-was-ruthless-joe-the-jailer/>; Jacques Billeaud, *With Latest Payout, Former Arizona Sheriff Joe Arpaio Cost Taxpayers \$100 Million*, L.A. TIMES (Oct. 29, 2021, 6:03 AM), <https://www.latimes.com/world-nation/story/2021-10-29/arizona-sheriff-joe-arpaio-cost-taxpayers-100-million#:~:text=The%20payout%20takes%20to%20%24100,and%20immigration%20raids%20on%20businesses.>

¹¹² Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017, 2:32 AM), <https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html>.

¹¹³ William Finnegan, *Sheriff Joe*, NEW YORKER (July 13, 2009), <https://www.newyorker.com/magazine/2009/07/20/sheriff-joe>.

¹¹⁴ *Crews Begin Dismantling Joe Arpaio’s Controversial “Tent City” Complex in Arizona*, CBS NEWS (May 24, 2017, 10:59 PM), <https://www.cbsnews.com/news/tent-city-arizona-crews-dismantling-jail-yards-sheriff-paul-penzone/#textThe20sheriffs20office20said20itmoved20in20the20coming20months.>

¹¹⁵ U.S. Representative Charlie Crist, a Democratic candidate for governor of Florida in 2022, was once nicknamed “Chain Gang Charlie,” for his efforts while as a State Senator to revive chain gangs as a component of Florida penology. See Burley, *supra* note 109, at 137–38.

before that evolution occurred, prisons in the South, aside from chain gangs, implemented the concept of the profitable penal farm as another evolution in convict labor and punishment.

C. The Penal Farm

By 1904, Mississippi had purchased more than 20,000 acres for the construction of several prison farms.¹¹⁶ James K. Vardman was the governor at the time and believed that a good prison, like an efficient slave plantation, could serve to socialize Black inmates.¹¹⁷ He noted, “You cannot create something when there is nothing to build on, but they can be well trained, and that is the best that be done with the genuine negro.”¹¹⁸ By the early 1900s, a substantial percentage of Mississippi’s convicted felons had been delivered to Parchman State Penitentiary, or commonly known as Parchman Farm.¹¹⁹ In 1917, 90 percent of the prison population was Black.¹²⁰

Parchman Farm was unique in its formulation. There were no walls or guard towers and no cell blocks or stockades.¹²¹ In their place were cattle barns, vegetable gardens, mules, and rows and rows of cotton.¹²² There was little even by way of boundary: a few strands of barbed wire marking the boundary between the prison and the free world.¹²³ Parchman Farm covered its 20,000 acres across forty-six square miles.¹²⁴ Inmates were housed in a long wooden barrack with barred windows where they ate and slept.¹²⁵ By 1915, Parchman Farm contained a sawmill, a brick yard, a slaughterhouse, a vegetable canning plant, and two cotton gins.¹²⁶ Parchman Farm’s design even “resembled an antebellum plantation with convicts in place of slaves.”¹²⁷

One of the unique aspects of Parchman Farm was its reliance on the “trusty system,” which functioned as a means of self-policing.¹²⁸ In other words, selected inmates, known as “trusty-shooters,” watched over the regular convicts.¹²⁹ Trusty-shooters comprised about 20 percent of the prison population, lived apart from the

¹¹⁶ OSHINSKY, *supra* note 27, at 109.

¹¹⁷ *Id.* at 110.

¹¹⁸ *Id.* (citing SENATE JOURNAL, MISSISSIPPI 25 (1908)).

¹¹⁹ *Id.* at 137.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 138.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 140.

¹²⁹ *Id.*

rest of the prison population, dressed differently, and carried .30-.30 Winchesters while on duty.¹³⁰ Their only allegiance was to the sergeant who promoted them.¹³¹

Work conditions on Parchman Farm were considerable for an inmate who had no familiarity with picking cotton. For example, most quotas called for inmates to pick 200 pounds of cotton per day often in grueling, unbearable heat.¹³² This approach caused one Northern penologist to conclude, “Their cotton is very profitable, but that profit is secured by reducing the men to a condition of abject slavery.”¹³³ This was the consequence of life at Parchman Farm. As Oshinsky observed, “Blacks came to Parchman as field workers and left the same way. That was their lot in life. Anything more was anathema in a culture white supremacy and unskilled Negro labor went hand in hand. In Mississippi rehabilitation was a dangerous word.”¹³⁴

Parchman Farm was not the only prison farm in the South. In 1902, Cummins Farm opened along the Arkansas River, in Lincoln County, Arkansas, roughly 70 miles southeast of Little Rock, the state’s capital.¹³⁵ Cummins Farm was a place of isolation, and an improbable escape for inmates: most who tried to swim the Arkansas River boundary drowned.¹³⁶ Cummins Farm was 16,000 acres, and Arkansas later opened the 5,500 acre Tucker Farm.¹³⁷ On these farms, prisoners worked ten to fourteen hours a day, six or seven days a week, growing crops like cotton, rice, and strawberries.¹³⁸ The farms brought in an average \$1.4 million per year in revenue, which added hundreds of thousands of dollars to the state treasury.¹³⁹ Consistent with treatment in convict leasing and chain gang systems, prisoners at Cummins and Tucker received insufficient food and clothing and were beaten with clubs, leather straps, or whatever was at hand for falling behind on their work.¹⁴⁰ In later years, an investigation into Tucker Farm would discover that, to punish prisoners, prison officials would take inmates to the Tucker hospital, strip

¹³⁰ *Id.*

¹³¹ *Id.* at 141. Oshinsky noted, “The sergeant’s trust in his shooters was essential. They were his complete security staff: the men who guarded the cage and the fields, the men who protected his home and his family.”

¹³² *Id.* at 143.

¹³³ *Id.* at 147.

¹³⁴ *Id.* at 224.

¹³⁵ Colin Woodward, “There’s a Lot of Things that Need Changin’”: *Johnny Cash, Winthrop Rockefeller, and Prison Reform in Arkansas*, 79 *ARK. HIST. Q.* 40, 41 (2020).

¹³⁶ *Id.* at 44; see also Calvin R. Ledbetter Jr., *The Long Struggle to End Convict Leasing in Arkansas*, 52 *ARK. HIST. Q.* 1 (1993) (discussing the political arc of convict leasing in Arkansas which foreshadowed the rise of the prison farm).

¹³⁷ SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* 219 (2018).

¹³⁸ *Id.*

¹³⁹ *Id.* at 219–20.

¹⁴⁰ *Id.* at 220.

them naked, strap them to a table and attach electrodes to their big toe and penis.¹⁴¹ When the crank was turned, an electric shock was sent through their body.¹⁴²

It is essential to understand the role that profit played in the Arkansas prison farm system. Tom Murton, an administrator at Tucker Farm who had progressive attitudes, attempted to reverse many of the policies that reckoned to the days of slavery, including the profitability of the prison farm.¹⁴³ During Murton's tenure, prison farms operated at a loss.¹⁴⁴ He was fired in 1968 following political pressure from the Arkansas General Assembly.¹⁴⁵ Despite eliminating whipping and other forms of corporal punishment as well as the "trustee system,"¹⁴⁶ the Arkansas Department of Corrections could not justify running the Cummins and Tucker farms at a loss. To change this dynamic, women were compelled to work in the fields for the first time.¹⁴⁷ Murton's reforms were summarily reversed, and not only were prisoners pulled from education classes to work in the fields; they were also beaten and chained to a fence for several days at a time if they protested work.¹⁴⁸

By the late 1960s there were only two other prison farms in the United States to rival the size of Parchman Farm and Cummins: Angola, in Louisiana, and Ramsey, in Texas.¹⁴⁹ Cummins, however, had a uniquely harrowing decade. Between 1963 and 1994, inmates at Cummins were paid seven dollars each time they donated blood, which the prison system could sell for more than \$100.¹⁵⁰

¹⁴¹ *Id.* at 220–21.

¹⁴² *Id.*

¹⁴³ See TOM MURTON & JOE HYAMS, *ACCOMPLICES TO THE CRIME: THE ARKANSAS PRISON SCANDAL* (1969).

¹⁴⁴ BAUER, *supra* note 137, at 225.

¹⁴⁵ *Id.*

¹⁴⁶ See ROBERT CHASE, *infra* note 156, at 95 (In 1967, "Cummins prison farm, the largest in Arkansas, had 145 armed trustee guards, 155 unarmed trusties, 105 'do-pops' half trusties to oversee a prison population of 845 'rank men' who were unarmed prisoners subject to the arbitrary corporal punishment of armed prisoner trusties.").

¹⁴⁷ BAUER, *supra* note 137, at 226; see also Riley Kovalcheck, *The Modern Plantation: The Continuities of Convict-Leasing and an Analysis of Arkansas Prison Systems*, 7 *CLA J.* 96, 113 (2019) (stating that women were subject to the same abuse as men).

¹⁴⁸ BAUER, *supra* note 137, at 226.

¹⁴⁹ *Id.*

¹⁵⁰ Sophia Chase, *The Bloody Truth: Examining America's Blood Industry and its Tort Liability Through the Arkansas Prison Plasma Scandal*, 3 *WM. & MARY BUS. L. REV.* 597, 613–18 (2012). Blood scandals in Arkansas prisons would persist through the 1980s and 1990s. The prison blood plasma programs, which did contain adequate screening protocols, also resulted in more than 1,000 Canadians becoming infected with HIV and 42,000 or more with Hepatitis C. The programs were finally discontinued in 1994. See *id.* at 614 ("Arkansas newspapers described the prison system as a 'fiefdom' or a 'cartel' run by three prominent politicians: state Senator Knox Nelson of Pine Bluff, state Representative William F. 'Bill' Foster of England, and Arkansas Department of Corrections Director A.L. 'Art' Lockhart."); Mara Leveritt, *Bloody Awful: How Money and Politics Contaminated Arkansas's Prison Plasma Program*, *ARK. TIMES* (Aug. 16, 2007, 1:00 AM), <https://arktimes.com/general/top-stories/2007/08/17/bloody-awful>; FACTOR 8: THE

Arkansas did not pay its inmates for their labor, so the only way they could earn money at the time was to sell blood to the prison blood bank.¹⁵¹ Laura Appleman observed,

Profits were a common motive in prisoner experiments. In the early to mid-sixties, inmates in Alabama, Arkansas, and Oklahoma prisons were used in poorly designed blood-plasma trials, which studied transfusions using large amounts of plasma, or plasmapheresis. In the Oklahoma prison, a unit of blood was removed from each prisoner, the plasma removed, and then the remaining cells reinjected. Proper sanitary measures were not kept and, at one institution, twenty-eight percent of the subjects developed hepatitis. Instances of transfusions of the wrong blood types were reported and an undetermined number of other inmates died from these procedures. Although the plasma experiments eventually ceased, Dr. Austin Stough, who oversaw the research, personally profited to the tune of over \$2 million.¹⁵²

By 1969, inmates at Cummins and Tucker, at an apex of mistreatment, filed a class action lawsuit alleging that (1) the use of forced and uncompensated labor violated the Thirteenth Amendment, (2) the conditions and treatment inside the prisons violated the Eighth Amendment prohibition of cruel and unusual punishment, and (3) prison segregation violated equal protection under the Fourteenth Amendment.¹⁵³ The following year, more lawsuits were filed.¹⁵⁴ The prisoners prevailed in 1970, and Arkansas became the first state to have its entire prison system declared cruel and unusual.¹⁵⁵ This development caused then-governor Dale Bumpers to make a change in prison leadership. He turned to

ARKANSAS PRISON BLOOD SCANDAL (Concrete Films 2005); Suzi Parker, *Blood Money*, SALON (Dec. 24, 1998, 6:08 PM), https://www.salon.com/1998/12/24/cov_23news/.

¹⁵¹ *Holt v. Sarver*, 300 F. Supp. 825, 829 (E.D. Ark. 1969). This same year, Johnny Cash, a Kingsland, Arkansas native and the biggest country music star in America at the time and who had also become a crusader for prison reform, held a concert at Cummins Farm. During the show, Cash debuted a new song, “When I Get Out of Cummins,” which included the famous lyric, “There’s a lot of things that need changin’, Mr. Legislator Man.” See Rex Nelson, *Cash at Cummins*, ARK. DEMOCRAT GAZETTE (Oct. 25, 2020, 8:49 AM), <https://www.arkansasonline.com/news/2020/oct/25/cash-at-cummins/>.

¹⁵² Laura I. Appleman, *The Captive Lab Rat: Human Medical Experimentation in the Carceral State*, 61 B.C. L. REV. 1, 19–20 (2020).

¹⁵³ *Holt*, 300 F. Supp. at 826.

¹⁵⁴ *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

¹⁵⁵ BAUER, *supra* note 137, at 226.

Texas's Ramsey prison farm¹⁵⁶ and hired Terrell Don Hutto, who would later become a significant fixture in the rise of America's private prison system, to run Arkansas's prison system.¹⁵⁷

By 1972, with Hutto in charge of the system and living full-time on Cummins Farm, he began a prison rodeo.¹⁵⁸ Prisoners with little experience and dressed in cartoonish fashion rode broncos.¹⁵⁹ Prisoners chased a greased pig for a small cash prize.¹⁶⁰ Other prisoners tried to seize a pouch containing seventy-five dollars that was tied between the horns of an enraged bull.¹⁶¹ Spectators bought tickets to the rodeo, which was one of avenue towards profitability.¹⁶² Hutto re-instituted harsh labor conditions and punishments that would be considered torture under international humanitarian law.¹⁶³

More lawsuits followed during the Hutto era, in 1976¹⁶⁴ and 1977.¹⁶⁵ As a result of these lawsuits, Arkansas's prison system found itself back under court supervision, eventually finding its way to the United States Supreme Court.¹⁶⁶ Writing for the majority, Justice John Paul Stephens supported the determination

¹⁵⁶ For a description of life on Ramsey Prison Farm in Texas, *see* ROBERT T. CHASE, WE ARE NOT SLAVES: STATE VIOLENCE, COERCED LABOR, AND PRISONERS' RIGHTS IN POSTWAR AMERICA 61–93 (2020) [hereinafter ROBERT CHASE].

¹⁵⁷ BAUER, *supra* note 137, at 226.

¹⁵⁸ *Id.* at 242; *see, e.g.*, BRUCE JACKSON, INSIDE THE WIRE: PHOTOGRAPHS FROM TEXAS AND ARKANSAS PRISONS 22–23 (2013).

¹⁵⁹ BAUER, *supra* note 137, at 243.

¹⁶⁰ *Id.* at 244.

¹⁶¹ *Id.*

¹⁶² *Id.* at 243.

¹⁶³ *Id.* at 244–45. According to one prisoner's account, prisoners were stripped naked and left in an unlit cell for more than twenty-five days for refusing to go work on the prison farm. *Id.* at 244. Guards used air-conditioning to make the cells unsuitably cold and did not provide any form of cover for the prisoners to stay warm. *Id.* at 245. Guards also provided prisoners with only bread, water, and "grue" as food. *Id.* If a prisoner failed to pick his quota of cotton, he was "forced to stand with his forehead against a wall and his toes several feet away with his hands [tied] behind his back" and left there for six hours, maybe naked and maybe without food. *Id.* This was also perhaps instituted as punishment for even smaller situations. *See* ROBERT CHASE, *supra* note 156, at 115–16 ("African American prisoners were frequently being punished for small infractions by being cuffed and left hanging from cell bars with toes barely touching the floor for hours at a time."). Others testified that they "were cuffed, put on the hood of a truck, and driven at high speeds through the plantation." *Id.* There were other times "guards would shoot guns at [juvenile prisoners'] feet" and chase them with cars. *Id.* These actions by prison guards and officials make up just some of those that might be considered torture. *See* ICRC, PROHIBITION AND PUNISHMENT OF TORTURE AND OTHER FORMS OF ILL-TREATMENT 1–3 (June 2014), available at <https://www.icrc.org/en/document/prohibition-and-punishment-torture-and-other-forms-ill-treatment> (listing and describing punishment types that violate international humanitarian law).

¹⁶⁴ *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976).

¹⁶⁵ *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977).

¹⁶⁶ *Hutto v. Finney*, 437 U.S. 678 (1978).

that Arkansas's prison system was cruel and unusual under the Eighth and Fourteenth Amendments and that subsequent district court orders to remedy that circumstance were not made in error.¹⁶⁷ Arkansas's prison system would remain under federal court supervision until 1982.¹⁶⁸ Still, during Hutto's tenure, Cummins Farm returned to profitability, and—despite the mistreatment of prisoners, lawsuits, and federal supervision—Governor Dale Bumpers, who would many years later deliver the closing argument in the impeachment trial of President Bill Clinton,¹⁶⁹ supported Hutto because he believed the prisoners worked hard for him.¹⁷⁰ Hutto left Arkansas in 1976 to run Virginia's prison system, and Cummins Farm would never be profitable again.¹⁷¹ As Malcolm Feeley and Edward Rubin explained in their book, judicial action changed the way state prison farms were run.¹⁷²

Their dynamics in America were changing in the mid-1970s. Prison populations began to rise. From 1974 to 2001, for example, the total number of incarcerated persons in America rose at a steady rate from 1.8 million to 5.6 million.¹⁷³ In the following section, I examine the factors that influenced the rise of incarceration rates and the impact that rise had on prison labor, particularly in the face of calls for reform.

IV. DRUGS, POLITICS, AND THE ACCELERATION OF CARCERAL PUNISHMENT: 1974-1995

A. The War on Drugs

It is very difficult to consider the evolutionary aspects of American life, particularly considering political policies and law enforcement attitudes in the 1970s. This has much to do with the urbanism of America, poverty, and the introduction of illegal drugs, from marijuana to cocaine. The contemporary American battle against illegal drugs began in 1971 when President Richard Nixon declared an official “war on drugs,” although most scholars consider the real “war”

¹⁶⁷ *Id.* at 678–79.

¹⁶⁸ See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 78 (1998) (“On August 20, 1982, . . . Judge Eisele gave the department a clean bill of health. Seventeen years after the writ writers at Cummins Farm had sent their desperate complaint against Superintendent Stephens to Judge Henley, the case unceremoniously came to a conclusion.”).

¹⁶⁹ See DALE BUMPERS, THE BEST LAWYER IN A ONE LAWYER TOWN 277–93 (2003).

¹⁷⁰ BAUER, *supra* note 137, at 245.

¹⁷¹ *Id.* at 246.

¹⁷² See *id.* at 246 (Angola, in Louisiana, Parchman, in Mississippi, and Ramsey, in Texas, would also operate in the red.); FEELEY & RUBIN, *supra* note 168, at 13–17.

¹⁷³ THOMAS P. BONCZAR, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 2 (2003), available at <https://bjs.ojp.gov/content/pub/pdf/piusp01.pdf>.

to have begun during the Reagan administration.¹⁷⁴ To be sure, this “war” had a devastating effect on Black communities nationwide. The evidence speaks for itself: Black men, women, and children have been disproportionately impacted by drugs over the past 50 years, resulting in more investigations, arrests, and convictions—especially from the mid-1970s to the beginning of the twenty-first century.¹⁷⁵

Nixon’s embrace of a “war on drugs” was a natural extension of Senator Barry Goldwater’s adoption of the “Operation Dixie” and “law and order” platforms.¹⁷⁶ By 1974, funding to combat drugs in America was \$257 million, an increase from \$36 million just four years before in 1969.¹⁷⁷ The impact of this funding was felt immediately. From 1975 to 1980, for example, increased forty-two percent.¹⁷⁸ The Regan era saw a dramatic rise in police power to combat illegal drugs through federal legislation. The 1984 Comprehensive Crime Control Act permitted federal detention, eliminated federal parole, established mandatory minimum sentences, and provided for greater asset forfeiture.¹⁷⁹ The 1986 Anti-Drug Abuse Act appropriated another \$1.7 billion towards the war on drugs and established new mandatory minimum sentences without the possibility of parole. Most notably, it established a five-year minimum sentence for possession of 500 grams of powdered cocaine or 5 grams of crack cocaine.¹⁸⁰ The 1988 Anti-Drug Abuse Act established the use of the federal death penalty for drug related killings and established the position of “drug czar” to coordinate between law enforcement, military, and intelligence agencies.¹⁸¹ The budgets of the Federal Bureau of Investigation doubled in Regan’s first term,¹⁸² and by the time Regan left office, in 1989, the American prison population had doubled.¹⁸³

¹⁷⁴ Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995, 998 (2003).

¹⁷⁵ Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381, 381 (2002).

¹⁷⁶ See, e.g., ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS* 4–9 (2021).

¹⁷⁷ Richard Nixon, President, Message to the Congress Transmitting Reorganization Plan 2 of 1973 Establishing the Drug Enforcement Administration (Mar. 28, 1973), in AM. PRESIDENCY PROJECT, available at <https://www.presidency.ucsb.edu/documents/message-the-congress-transmitting-reorganization-plan-2-1973-establishing-the-drug>.

¹⁷⁸ Tony Platt, *U.S. Criminal Justice in the Reagan Era: An Assessment*, 29 CRIME & SOC. JUST. 58, 59 (1978).

¹⁷⁹ Comprehensive Crime Control Act of 1984, Pub L. No. 98-473, 98 Stat. 1837 (1984), available at <https://www.congress.gov/bill/98th-congress/senate-bill/1762>.

¹⁸⁰ Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

¹⁸¹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

¹⁸² Platt, *supra* note 178, at 59.

¹⁸³ Sawyer Like, *Burning the Melting Pot: American Policing and the Internal Colonization of African Americans*, 22 RUTGERS RACE & L. REV. 333, 365 (2021).

George H.W. Bush was elected president in the autumn of 1988, and soon thereafter even more federal money was allocated to fighting the war on drugs. Consider, for example, that the federal drug control budget was \$5 billion when he took office and eclipsed \$12 billion on the day he left.¹⁸⁴ This was the sharpest escalation of federal government spending in the history of the drug war.¹⁸⁵ It is important to note, however, that Black voters supported the efforts by presidents Reagan and Bush (they would also support President Bill Clinton’s efforts, too).¹⁸⁶ National American media grabbed a hold of the story. On CBS News, in a two-hour special titled “48 Hours on Crack Street,” Dan Rather examined America’s drug crisis, in 1986 New York City and its suburbs, at the height of the Reagan era.¹⁸⁷ Instead of attempting to understand the underlying causes of drug use, Rather’s report was generally criticized for being assembled too hastily.¹⁸⁸ Be that as it may, President Bush believed at the time that the answer to America’s drug problem was “more prisons, more jails, more courts, [and] more prosecutors.”¹⁸⁹

If Bush saw this as a mixture of good policy and good politics, his successor, Arkansas governor Bill Clinton—a Democrat—did as well. Most notably, the 1994 Violent Crime Control and Law Enforcement Act continues to linger in public discourse about incarceration and labor.¹⁹⁰ Crime legislation was the central focus of Clinton’s 1994 agenda.¹⁹¹ Perhaps its most significant provision was what was

¹⁸⁴ Matthew R. Pembleton, *George H.W. Bush’s Biggest Failure? The War on Drugs*, WASH. POST (Dec. 6, 2018, 6:00 AM), <https://www.washingtonpost.com/outlook/2018/12/06/george-hw-bushs-biggest-failure-war-drugs/>.

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., JAMES FOREMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

¹⁸⁷ *48 Hours on Crack Street* (CBS News television broadcast Sept. 2, 1986).

¹⁸⁸ See, e.g., Tom Shales, *The Traffic on ‘Crack Street,’* WASH. POST, Sept. 2, 1986; Steve Daley, *CBS Gets Libel Jitters*, CHI. TRIB., Sept. 30, 1986.

¹⁸⁹ Pembleton, *supra* note 184.

¹⁹⁰ Then-Senator Joseph R. Biden Jr. was the lead drafter of the Senate version of the bill, in 1993. By the time of its passage in the Senate, on November 19, 1993, the bill began to be referred to colloquially as the “Biden Crime Bill” by the American press. See German Lopez, *The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained*, VOX (Sept. 29, 2020, 10:25 AM), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration>. As public attitudes shifted over the next two decades, perceptions about this bill changed despite that it included a federal assault weapons ban, the Violence Against Women Act, and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹⁹¹ Nancy E. Marion, *Symbolic Policies in Clinton’s Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 81 (1997).

known as the “three strikes and you’re out” provision.¹⁹² This provision caused a lot of consternation, particularly as states adopted concurrent provisions.¹⁹³ And, to be sure, there were myriad questions about due process and equal protection.¹⁹⁴ For example, Bidish J. Sarma and Stephanie Cull argued that life without parole for nonviolent offenses, a creature of the Reagan drug era and perpetuated for consecutive administrations, was unconstitutional under an Eighth Amendment analysis.¹⁹⁵ And while the courts have not adopted their analysis, there has been considerable public attention paid, at least in the modern era, about the nature of crime and punishment.¹⁹⁶

Ronald Kramer and Raymond Michalowski noted that for the past 25 years, before the Clinton presidency, the pursuit of punitive crime control policies was the purview of conservative administrations.¹⁹⁷ Professor Steven Levitt acknowledged that crime decreased during the Clinton administration, however one the four factors he attributed to that decline was “the rising prison population.” He offered this perspective, which is worth quoting at length:

The 1990s was a period of enormous growth in the number of people behind bars, After many decades of relatively stable imprisonment rates, the prison population began to expand in the mid-1970s. By 2000, more than two million individuals were incarcerated at any point in time, roughly four times the number locked up in 1972. Of that prison population growth, more than half took place in the 1990s. The increase in prisoners can be attributed to a number of factors, the most important of which were the sharp

¹⁹² See David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J. L. & PUB. POL’Y 557 (2000) (considering the complexities and nuances of the “three strike” policy).

¹⁹³ California adopted the harshest juvenile punishment system in America following the federal government’s lead, in 1994. See Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes Against as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581 (2012).

¹⁹⁴ See Randal S. Jeffrey, *Restricting Prisoners’ Equal Access to the Federal Courts: The Three Strikes Provision of the Prison Litigation Reform Act and Substantive Equal Protection*, 49 BUFF. L. REV. 1099, 1106–07 (2001).

¹⁹⁵ Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Analysis Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 CASE W. RES. L. REV. 525, 548–49 (2015). The American Civil Liberties Union estimates that 3,278 persons are serving sentences of life without parole for nonviolent offenses. Sixty-five percent of those prisoners are Black. See ACLU, *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES* (2013), available at <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses>.

¹⁹⁶ See, e.g., Bruce Gilchrist, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1121–24 (1979).

¹⁹⁷ Ronald Kramer & Raymond Michalowski, *The Iron Fist and the Velvet Tongue: Crime Control Policies in the Clinton Administration*, 22 SOC. JUST. 87, 88 (1995).

rise in incarceration for drug-related offenses, increased parole revocation and longer sentences for those convicted of crimes.

The theory linking increased imprisonment to reduced crime works through two channels. First, by locking up offenders, they are removed from the streets unable to commit further crimes while incarcerated. This reduction in crime is known as the incapacitation effect. The other reason prisons reduce crime is deterrence—the increased threat of punishment induces forward-looking criminals not to commit crimes they otherwise would find attractive. Empirical estimates of the impact of incarceration on crime capture both of these effects.

The evidence linking increased punishment to lower crime rates is very strong. Typical estimates of elasticities of crime with respect to expected punishment range from 2.10 to 2.40, with estimates of the impact on violent crime generally larger than those for property crime. But most of these estimates are based on simple correlations. Given the clear endogeneity between crime and imprisonment (when crime is rising, the prison population will also rise if expected punishment per crime is held constant), one might suspect that such correlations estimates would understate the true impact of imprisonment on crime. Indeed, Levitt obtains estimates at the high end of the range when using prison overcrowding litigation as an instrument for the size of the prison population. Court decisions in prison overcrowding lawsuits are a plausible instrument for the prison population because these decisions have a large impact on the growth rates in state prison inmates, but there is little reason to believe that such litigation affects crime rates, except through the impact on the number of people incarcerated. Surveys of prison inmates yield estimates of reductions in crimes due to incarceration that are consistent with the econometric studies.

....

... First, a dollar spent on prisons yields an estimated crime reduction that is 20 percent less than a dollar spent on police, suggesting that on the margin, substitution toward increased police might be the efficient policy. Second, it seems quite plausible that substantial indirect costs are associated with the current scale of imprisonment, such as the adverse societal implications of

imprisoning such a large fraction of young African American males. Finally, given the wide divergence in the frequency and severity of offending across criminals, sharply declining marginal benefits of incarceration are a possibility. In other words, the two-millionth criminal imprisoned is likely to impose a much smaller crime burden on society than the first prisoner. Although the elasticity of crime with respect to imprisonment builds in some declining marginal returns, the actual drop off may be much greater. We do not have good evidence on this point. These caveats suggest that further increases in imprisonment may be less attractive¹⁹⁸

There are myriad attitudinal perspectives about incarceration. For the purposes of this component of the paper, the concept of proportionality is of great interest.¹⁹⁹ Of course, it is very difficult to get beyond, as a senior law partner once advised, “what the statute says,” because that is the ultimate exercise of legislative prerogative as elected representatives of the people.²⁰⁰ That said, proportionality is a central concept in public international law and perhaps should have a relationship to America’s consideration of punishment, particularly as it pertains to nonviolent drug offenses.

B. America’s Carceral Drug Punishment Practices, Proportionality, and Public International Law

In the years between 1980 and 2000, America’s incarceration rate increased 300 percent, which outpaced Russia.²⁰¹ Despite considerable attention being paid to crime in the United States, there developed a new penology attitude, substantiated through scholarship, that inmates were to be managed.²⁰² There is, in this context, a good legal argument rooted in public international law that considers proportional balancing.²⁰³ Alec Sweet and Jud Mathews observed this regarding proportionality analysis (“PA”) in justice systems,

¹⁹⁸ Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177–79 (2004) (internal citations omitted).

¹⁹⁹ See generally Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005).

²⁰⁰ See, e.g., *Ewing v. California*, 538 U.S. 11 (2003).

²⁰¹ Daniel Patten, *The Mass Incarceration of Nations and the Global War on Drugs: Comparing the United States’ Domestic and Foreign Drug Policies*, 43 SOC. JUST. 85, 85 (2016).

²⁰² *Id.* at 86.

²⁰³ Alec Stone Sweet & Jud Mathews, *Proportional Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 86 (2008).

From German origins, PA has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems-Canada, South Africa, New Zealand, and via European law, the U.K.-and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA.²⁰⁴

Proportionality is an analytical structure and a decision-making structure that aids in dealing with tensions between interests and values.²⁰⁵ To accomplish this, systems consider the “least restrictive means” test which, according to Sweet and Mathews, ensures that the “measure does not curtail the right any more than is necessary for the government to achieve its stated goals.”²⁰⁶ This begs the following question: in terms of incarceration, why is the difference between America and the rest of the democratized world so profound? Consider that the incarceration rate in the United States is four-and-a-half times that of the United Kingdom.²⁰⁷ In Canada, France, and Germany incarceration rates are even lower than in the U.K.²⁰⁸ And among Nordic countries the incarceration figures are astoundingly low.²⁰⁹ An important distinction, Professor James Whitman observed, is that Europe, prisoners are considered “particularly troubled and challenged social welfare clients” rather than irredeemable individuals.²¹⁰ Of course, the issue far more complicated than Professor Whitman describes. In a study of penal policy in Denmark, Norway, Sweden, and Finland, where incarceration rates have remained consistently low for decades, Tapio Lappi-Seppala determined that the factors underlying this distinction are not the differences in crime but rather “public sentiments (fears, levels of trust, and punitiveness), the extent of welfare provision, differences in income inequality, political structures, and legal cultures.”²¹¹ This analysis, Lappi-Seppala determined,

²⁰⁴ *Id.* at 74.

²⁰⁵ Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574, 579 (2004).

²⁰⁶ Sweet & Mathews, *supra* note 203, at 75.

²⁰⁷ Bettina Muenster & Jennifer Trone, *Why is America So Punitive? A Report on the Deliberations of The Interdisciplinary Roundtable on Punitiveness in America (excerpted)*, 28 FED. SENT’G REP. 340, 341 (2016).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* (citing James Q. Whitman, *Presumptions of Innocence or Presumptions of Mercy* (2015) (unpublished manuscript) (on file with the author)).

²¹¹ Tapio Lappi-Seppala, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 219 (2007).

[S]upports the view that Scandinavian penal model has its roots in consensual and corporatist political culture, high levels of social trust and political legitimacy, and a strong welfare state. The welfare state has sustained less repressive policies and has made it possible to develop workable alternatives to imprisonment. Welfare and social equality have also promoted trust and legitimacy and acceptance (instead of sentence severity). These characteristics of the social system also reduce political pressures to resort to symbolic penal gestures. These political cultures are, first of all, more “welfare friendly,” compared with other majoritarian democracies. Consensual politics also lessen controversies, produce less crisis talk, inhibit dramatic volte-faces, and sustain long-term consistent policies.²¹²

This analysis amplifies the issue of American incarceration. The long legacy of slavery, segregation, ghettoization, and stigmatization has informed prison culture since the Civil War. The war on drugs, as noted in the previous section of this paper, has been cruel and unforgiving. The drug war’s key players were bipartisan. Then-Senator Joe Biden, at the height of the Cold War, said, “Crime is a national defense problem. You’re in as much jeopardy in the streets as you are from a Soviet missile.”²¹³ Drugs were not the only factor. The Reagan administration also ignited a war on the welfare state. In the Reagan era, 500,000 people were eliminated from the welfare rolls, 1 million were eliminated from food stamps, and 2.6 million children were eliminated from school lunch programs.²¹⁴ Concurrently, gangs developed, in part, to circumvent the rampant expansion of drug arrests, and established sophisticated crime networks that carried “Uzis, Mac-10 machine guns, and semiautomatic rifles.”²¹⁵ Instead of focusing on the rise of gangs in the context of failing urban public schools, unemployment, poverty, and the frequent encounters with the police, federal officials and law enforcement viewed it as a result of lax enforcement.²¹⁶ Across the nation, states began to

²¹² *Id.*

²¹³ ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 310 (2016).

²¹⁴ *Id.* at 314.

²¹⁵ *Id.* at 322. As Hinton observed, despite President Reagan’s claim that the War on Drugs would target kingpins, “Federal policymakers imposed the War on Drugs as a local priority by tying federal grants to drug-related arrests and offering patrol officers training in narcotics investigations to enhance their ability [to] make those arrests. Discretionary law enforcement assistance has been measured by arrest rates during the era of the War on Crime, and most of this funding went to urban areas. Beginning in the 1980s, police departments across the United States received special drug control grants.” *Id.* at 318.

²¹⁶ *Id.*

criminalize gang participation. For example, California passed the Street Terrorism and Enforcement Prevention (“STEP”) Act of 1988. The law stated that anyone who “willfully promoted or assisted” in any criminal activity with any gang member could be sent to state prison.²¹⁷

This enhanced approach to gangs as crime was not unique and it was not germane to the American South. In 1971, for example, Detroit, Michigan launched the “Stop the Robberies, Enjoy Safe Streets” (“STRESS”) effort.²¹⁸ While it only lasted three years, it was an especially dark and violent period in Detroit’s history.²¹⁹ Police violence, particularly towards Black people, dates to World War II. In 1948, a Detroit police officer shot Leon Moseley, a 15-year-old, in the back after he led police on a high-speed chase in a stolen car.²²⁰ The officer was acquitted, and the judge chastised the NAACP from the bench for conspiring with communists to hurt the police.²²¹ This was the beginning of several decades of police brutality, harsh tactics, and racial tension in the Motor City.

By the 1970s, at the inception of STRESS, which was an undercover decoy unit, Detroit was already highly polarized along racial lines.²²² Confrontations in the city rose, STRESS officers killed twenty-four people, almost all of which were Black.²²³ Attitudes between the Black community and police would never recover despite efforts to modernize and integrate the Detroit police force.²²⁴ As Professor Hinton observed, “By introducing greater numbers of white police officers in the nation’s most isolated urban areas, federal policymakers polarized both residents and law enforcement officers.”²²⁵ Only four percent of sworn police officers who fought the War on Crime during the second half of the 1960s and through the 1970s were of African American descent.”²²⁶

²¹⁷ *Id.* at 322–25. For an analysis of California’s STEP Act and its implications, see generally Sara Lynn Van Hofwegen, *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 SO. CAL. INTERDISC. L.J. 679 (2009).

²¹⁸ See Austin McCoy, *Detroit Under Stress: The Campaign to Stop Police Killings and the Criminal State in Detroit*, 7 J. CIV. HUM. RTS. 1, 1–34 (2021).

²¹⁹ See DETROIT UNDER S.T.R.E.S.S. (Fat Hendrick Productions 2016).

²²⁰ Bill McGraw, *DPD’s Troubled Relationship with Black Detroiters Spans Decades*, DET. FREE PRESS (June 14, 2020, 6:00 AM), <https://www.freep.com/in-depth/news/local/michigan/detroit/2020/06/14/detroit-police-department-black-residents/5334470002/>.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Undercover units in Los Angeles, California and Cleveland, Ohio operated predominantly in Black neighborhoods, impersonating gang members and drug dealers. These efforts were paid for by crime control grants and money from undercover drug sales were funneled back into police department coffers. The goal, however, was to identify and eventually confine Black people who were drug users and dealers by whatever means necessary. See HINTON, *supra* note 213, at 329–31.

²²⁵ *Id.* at 338.

²²⁶ *Id.*

The focus of this comparison is to showcase attitudes towards punishment. The contrast between Europe and America is stark, and these attitudes inform the lengths Americans will go to perpetuate and substantiate the carceral state. As Professor Hinton stated, “Ending the War on Drugs will not resolve the nation’s policing and prison problems. Even if all the citizens serving time for drug convictions were released, the United States would still be home to the largest penal system in the world.”²²⁷ Furthermore, America’s attitudes towards incarceration, as the evidence demonstrates, has a considerable amount to do with race.²²⁸ Michelle Alexander, in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, argued that mass incarceration has less to do with crime than the way we, as Americans, have chosen to respond to those issues when “black and brown people are framed as the problem.”²²⁹

We cannot ignore the economic factors that informed urban life in America. Deindustrialization, globalization, and technological investment transformed urban life. As the nation transformed to a service economy, industrial factories in America’s largest cities closed and urban ghettos, populated substantially by Black residents, developed.²³⁰ As Alexander observed, “the collapse of inner-city economies collided with conservative backlash against the Civil Rights Movement, creating the perfect storm.”²³¹ This had a devastating effect on Black men most notably, but also their families.²³² As civil society in urban centers eroded, crime, violence, and incarceration exploded. Unlike Europe, America experienced a profound period of poverty in and segregation of the Black community that correlates to this rise.²³³

²²⁷ *Id.* at 340.

²²⁸ See DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* 3 (2015) (“[P]ostbellum white supremacist law set its sights on those putatively soulless subjects whose slavery and social death rested at the very foundation of free/white social, civil, and cultural life since its inception as a genocidal colony of the British Empire.”).

²²⁹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* xxxiv (New Press 3rd ed. 2020).

²³⁰ *Id.* at 271.

²³¹ *Id.*

²³² Alexander stated, “When men are locked up, the women who love them are sentenced too – to social isolation, depression, grief, shame, costly legal fees, far-away prison visits (often with children in tow), and the staggering challenges of helping children overcome parental incarceration. When loved ones are released from their cages, it is often women who are faced with the daunting task of supporting them as they struggle and often fail in a system rigged against them.” *Id.* at xxii.

²³³ Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1203 (1995) (“Unless desegregation occurs, this cycle of violence is likely to continue; however, the perpetuation of violence paradoxically makes desegregation less likely by increasing the benefits to whites of black residential isolation.”). While it is not the focus of this paper, it is also worth noting that the COVID-19 pandemic

There are aspects of American life, particularly related to fair housing, employment, public education and access to social services, that have complicated the American carceral system. To be sure, attitudes in the United States differ vastly from those in Europe, particularly Scandinavian countries. Michelle Alexander has argued that the American system operates “much more like a caste system than a system of crime prevention or control.”²³⁴ The decline of urban America did not harm Black people or communities singularly, but a critical aspect of this time period in America, particularly the 1970s, was what W.E.B. Du Bois described as “the public and psychological wage” paid to white people who depended on their status to compensate for similar disparaging conditions and economic plight.²³⁵ This psychology permeated America, especially in the South in the postbellum era. The goal of white elites, Alexander argued, was “to make all whites think in racial than class terms.”²³⁶

The American penal system has performed consistent with these terms.²³⁷ The facts stipulate that criminal punishment has been doled out disproportionately to detriment of Black men and women.²³⁸ Foucault noted that racism is the bedrock principle of power and in that context it is much more than the white hatred towards persons of different race, ethnicity, or skin color.²³⁹ And scholars have argued that

exacerbated the cycle of poverty. Millions of Americans lost their jobs, which led to the highest unemployment levels since the Great Depression. The pandemic also placed considerable public health exposure on prisoners. See Eric Reinhart & Daniel L. Chen, *Association of Jail Decarceration and Anticontagion Policies With COVID-19 Case Growth Rates in US Counties*, 4 JAMA NETWORK OPEN 1, 1–13 (2021), available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783680>; Rachel Aviv, *Punishment by Pandemic*, NEW YORKER (June 15, 2020), <https://www.newyorker.com/magazine/2020/06/22/punishment-by-pandemic> (examining COVID-19 outbreaks and treatments at Cummins Prison in Arkansas).

²³⁴ ALEXANDER, *supra* note 229, at xxvi.

²³⁵ W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880* 700 (1935). Alexander argued that “time and time again, poor and working class whites were persuaded to choose their racial status over their common economic interests with blacks, resulting in the emergence of new caste systems that only marginally benefitted whites but were devastating for African Americans.” ALEXANDER, *supra* note 229, at 318–19.

²³⁶ ALEXANDER, *supra* note 229, at 319.

²³⁷ See Christina Carrega, *Black Americans are Incarcerated at Nearly Five Times the Rate of Whites, New Report on State Prisons Finds*, CNN (Oct. 13, 2021, 10:43 AM), <https://www.cnn.com/2021/10/13/politics/black-latinx-incarcerated-more/index.html>.

²³⁸ For an important discussion of female convict labor, see TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE SOUTH* (2015); SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* (2016).

²³⁹ See MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE, 1975-76 (David Macey trans., New York: Picador 2003) (1976).

prisons have, since their American inception, been a catalyst to soothe white fears of urban unrest.²⁴⁰

The following section examines the rapid rise of the politics of incarceration, the growth of the private prison system, and the impact on prison labor. The intersection of American political attitudes towards crime, the business prospects of incarceration, and the on-going desire to manage the prison population informed changes to the way American policymakers at the state and federal level approached prisons and, by extension, prison labor.

V. THE POLITICS OF INCARCERATION, PROFITS, PROTECTIONS, AND THE RISE OF PRIVATE PRISON: 1970-PRESENT

A. The 1970s and the Pro-Incarceration Movement

The 1970s brought about profound change regarding prisoners' rights. In 1970, the American Bar Association ("ABA") founded the Commission on Correctional Facilities and Services for the purpose of advancing prison reform.²⁴¹ The ABA's Resource Center for Correctional Law and Legal Services became a clearinghouse for research and a means for prisoners' rights advocates and attorneys to coordinate their efforts.²⁴² By 1974, twenty-four state bar associations had formed prisoners' rights committees.²⁴³ The ABA and other entities produced legal periodicals on prisoners' rights.²⁴⁴ For the first time, there was a professionalized effort to address constitutional rights in America's prisons.²⁴⁵

This, of course, led to a rise in litigation. During this important decade, the United States Supreme Court issued several consequential decisions that would shape legal attitudes towards prisoners' rights for decades to follow. In *Pell v. Procunier*, the Supreme Court determined that a regulation prohibiting media interviews with certain inmates was constitutional.²⁴⁶ The Court held that restrictions on inmates' right to free speech must be balanced with the state's legitimate interest in confining prisoners to deter crime, protecting society by

²⁴⁰ See, e.g., Micol Seigel, "Convict Race": *Racialization in the Era of Hyperincarceration*, 39 SOC. JUST. 31, 34 (2014); Earl Smith & Angela Hattery, *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, 15 RACE, GENDER & CLASS 79 (2008); Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325 (1996).

²⁴¹ James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 CRIME & JUST. 429, 438 (1980).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974).

quarantining criminal offenders while applying rehabilitative procedures, and maintaining the internal security of penal institutions.²⁴⁷ That same year, in *Wolff v. McDonnell*, the Court addressed the types of procedural protections prisoners are entitled to at disciplinary hearings.²⁴⁸ Justice White, writing for the majority, observed, “[t]hrough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”²⁴⁹ In *Estelle v. Gamble*, the Court determined that the deliberate indifference to the medical needs of prisoners constituted cruel and unusual punishment under the Eighth Amendment, which was a victory for prisoner rights advocates.²⁵⁰ Three years after *Wolff*, in *Jones v. North Carolina Prisoners’ Labor Union*, the Supreme Court curtailed the ability of prisoners to organize when it held that a state regulation prohibiting the soliciting of members did not violate freedom of speech and assembly rights under the First Amendment.²⁵¹ In 1978, as I have discussed previously, the Court in *Hutto* placed the Arkansas prison system under court supervision for prisoner mistreatment.²⁵² Finally, in *Bell v. Wolfish*, the Supreme Court upheld a New York prison prohibition on receiving books and magazines from any source other than a publisher, as well as restrictions on receiving packages, double bunking, unannounced cell searches, and mandatory visual inspection of body cavities.²⁵³

These cases resulted in victories and defeats for both sides of the prisoners’ rights debate. Their consequences reverberated across the nation. According to Professor Lawrence Bershad,

[a]gency heads in most of the large cities and states find themselves having to anticipate the persuasive impact that a major prison law decision made elsewhere will have on their jurisdictions. As corrections move sharply toward a legal due process and away from the familiar and untrammelled authority inherent in the correctional chain of command, subject only to the dictates of the governor and the legislature, most wardens and administrators find themselves in the position of reacting to and coping with court decisions.²⁵⁴

²⁴⁷ *Id.* at 822–24.

²⁴⁸ *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

²⁴⁹ *Id.*

²⁵⁰ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

²⁵¹ *Jones v. N.C. Prisoners’ Lab. Union*, 433 U.S. 119 (1977).

²⁵² *Hutto v. Finney*, 437 U.S. 678 (1978).

²⁵³ *Bell v. Wolfish*, 441 U.S. 520 (1979).

²⁵⁴ *Id.*

Concurrent with these legal developments, Congress took two noticeable policy actions. The first, in 1978, was the repeal of the Hawes-Cooper Convict Labor Act of 1929, which allowed states to prohibit the sale of prison-made goods, even if the goods were made in another state.²⁵⁵ Next, Congress passed the Justice System Improvement Act the following year, which lifted the Sumners-Amhurst Act's ban on interstate trade of prison labor products. These policies seemingly paved the way once again for prison labor.²⁵⁶ Included in this legislation was the creation of the Prison Industry Enhancement Certification Program ("PIECP"), which lifted restrictions on the private use of prison labor.²⁵⁷ According to the Bureau of Justice Assistance at the U.S. Department of Justice, the programs "place people who are incarcerated in realistic work environments, pay them prevailing wages, and give them a chance to develop marketable skills that will increase their potential for rehabilitation and meaningful employment on release."²⁵⁸

Meanwhile, Thorsten Sellin published *Slavery and the Penal System in 1976*.²⁵⁹ Despite being generally overlooked by historians and criminologists, Sellin had produced a work of scholarship that, for the first time, argued that the American prison system had its roots in the slave societies of antiquity, as opposed to modernity.²⁶⁰ His opinion was in stark contrast with other prison scholars, including, notably, Foucault, who instead linked the evolution of the prison system to enlightened modernity and the rise of capitalism.²⁶¹ Controversially, Sellin argued that the purpose of the penal system was to enforce an unjust social order.²⁶² It is likely that Sellin's work was influenced by W.E.B. Du Bois.²⁶³ According to Shaun Gabbidon, Du Bois's influence on Thorsten Sellin is first evidenced by his

²⁵⁵ Hawes-Cooper Act, 49 U.S.C. §11507 (1929). For a discussion of issues related to the Hawes-Cooper Act, see Paul R. Kach, *Prison Problems Under the Hawes-Cooper Act*, 41 COM. L.J. 539 (1936).

²⁵⁶ Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827, 93 Stat. 1167, 1215 (1979). The program was made permanent in the Crime Control Act of 1990. Crime Control Act of 1990, Pub. L. No. 101-647, § 2906, 104 Stat. 4789, 4914-15 (1990).

²⁵⁷ Justice System Improvement Act of 1979, *supra* note 256; Crime Control Act of 1990, *supra* note 256.

²⁵⁸ *Prison Industry Enhancement Certification Program (PIECP)*, BUREAU JUST. ASSISTANCE (Feb. 20, 2012), <https://bja.ojp.gov/program/prison-industry-enhancement-certification-program-piecp/overview>.

²⁵⁹ J. THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* (1976). This followed scholarship in which Sellin examined works related to prison history. See Thorsten Sellin, *A Look at Prison History*, 31 FED. PROB. 18 (1967) ("The evolution of the penal law until the old slave punishments – death, mutilation, whipping, etc. – were gradually incorporated into the penal law and applied generally . . .").

²⁶⁰ See J.M. Moore, *Built for Inequality in a Diverse World: The Historic Origins of Criminal Justice*, 16 BRIT. SOC'Y CRIMINOLOGY 38 (2016).

²⁶¹ *Id.*

²⁶² SELLIN, *supra* note 259, at 145-46.

²⁶³ SHAUN L. GABBIDON, *W.E.B. DU BOIS ON CRIME AND JUSTICE* 78 (2017).

reference to Du Bois's 1928 classic publication, 'The Negro Criminal.'"²⁶⁴ Sellin and Du Bois also corresponded with one another for decades, as Sellin often asked Du Bois to review books for the *Annals of the American Academy of Political and Social Science*.²⁶⁵ The broader significance of this fact is that Sellin's embrace of Du Bois helped change scholars' perception of incarceration in the United States.²⁶⁶ The focus was no longer on America's progressivism, but rather how America perpetuated attitudes and sentiments that harkened back to the days of slavery.²⁶⁷

B. From Forced Labor to Sex Trafficking to Organized Prison Gangs

In 1978, a different set of circumstances came to light in the context of prison slavery.²⁶⁸ Until now, attention had been focused on working conditions, but there was another form of slavery taking hold.²⁶⁹ In a 1978 letter to W.J. Estelle, the Texas Department of Corrections director, a prisoner named David Ruiz endeavored to expose that the shift in prison housing from dormitories to cells "hid the extent to which southern prison administration relied on state-orchestrated violence."²⁷⁰ Mr. Ruiz, then a twenty-three-year-old prisoner, was repeatedly raped by a building tender, Charles Robertson, in the Eastham prison in Texas.²⁷¹ For several weeks he was forced to engage in coerced sexual activity.²⁷² According to Mr. Ruiz:

Robertson began to fondle me all over and when I failed to get an erection, he got angry. He told me that since I was not going to cooperate with him, he would get his pleasure in other ways. He hit me several times in the stomach and chest and knocked me back into the commode. Robertson then told me to bend over on the commode, I hesitated and he hit me again. He pulled me to my feet and spun me around; grabbed my pants and pulled them down. I

²⁶⁴ *Id.*

²⁶⁵ *See, e.g.*, Letter from Annals of the American Academy of Political and Social Science to W.E.B. Du Bois (Apr. 1, 1944) (on file with the University of Massachusetts Amherst Libraries); Letter from Thorsten Sellin to W.E.B. Du Bois (Mar. 7, 1942) (on file with the University of Massachusetts Amherst Libraries); *see also* 1–3 W.E.B. DU BOIS, THE CORRESPONDENCE OF W.E.B. DU BOIS (Herbert Aptheker ed., Univ. Mass. Press 1997); DAVID LEVERING LEWIS, W.E.B. DU BOIS: A BIOGRAPHY 1868-1863 (Holt Paperbacks 1st ed. 2009).

²⁶⁶ GABBIDON, *supra* note 263, at 79 ("[B]y influencing Sellin, Du Bois, as suggested before, may have influenced later scholarship by African Americans.").

²⁶⁷ *Id.*

²⁶⁸ ROBERT CHASE, *supra* note 156, at 102–03.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 102.

²⁷² *Id.*

struggled to get away, it was then that Robertson pulled a home-made knife from his pocket. Placing the knife at my throat, he forced me to bend and proceeded to rape me.²⁷³

In Texas, for example, at the dawn of the 1980s, prisoners had to contend with a series of unwritten rules.²⁷⁴ According to Professor Robert T. Chase, “the first was dictated by what the sociologist Gresham Sykes called the ‘total power’ of their keepers, who insisted on prisoner acquiescence to the work hierarchy that separated those who worked in the prison building from those that labored in the field.”²⁷⁵ This system constructed a hierarchy where more vulnerable prisoners were subjected to prison rape and domestic cell service, a process of subjugation that constituted carceral violence.²⁷⁶ This vicious prison sex trade provided for the power to rape other prisoners and buy and sell other prisoners’ bodies.²⁷⁷

Ultimately, the Supreme Court in *Ruiz v. Estelle* held that the state prison system violated the Eighth Amendment’s protection against cruel and unusual punishment.²⁷⁸ In *Ruiz*, the federal court found that conditions in the Texas Department of Corrections were deplorable and noted that inmates were “crowded two or three to a cell or in closely packed dormitories, inmates sleep with the knowledge that they may be molested by their fellows at any time.”²⁷⁹ The Texas prison system, like the Arkansas prison system a few years before it, was placed under court supervision.²⁸⁰ By the mid to the late 1980s, prison systems in thirty-nine states were placed under court supervision.²⁸¹

The *Ruiz* case exposed an odious feature of the internal prison economy, one that has persisted for decades and given rise to the organized prison gang system.²⁸² This system continues to exploit prisoners.²⁸³ As David Skarbek observed in his book, *The Social Order of the Underworld*, which examines the prison gang system, gangs play a vital role in maintaining social order in prisons.²⁸⁴ For example, prison gangs enforce property rights, manage how currency is exchanged, manage trade

²⁷³ *Id.*

²⁷⁴ *Id.* at 103.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 105.

²⁷⁷ *Id.* at 125.

²⁷⁸ *Ruiz v. Estelle*, 503 F. Supp. 1265, 1303 (S.D. Tex. 1980).

²⁷⁹ LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 53 (2018).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² ROBERT CHASE, *supra* note 156, at 343.

²⁸³ DAVID SKARBEK, *THE SOCIAL ORDER OF THE UNDERWORLD: HOW PRISON GANGS GOVERN THE AMERICAN PENAL SYSTEM* (2014).

²⁸⁴ *Id.*

and profits within the prison, and offer a system of protection.²⁸⁵ The evidence Skarbek uncovered suggests rather definitively that the rise of prison gangs occurred as America engaged in a period of mass incarceration despite the absence of “useful data.”²⁸⁶ The stories of prison gang life are as harrowing as what Mr. Ruiz experienced. In December 2010, Juan Pablo Reyes, who was imprisoned for threatening his wife during a domestic dispute, was performing one of his prison labor jobs when he discovered a piece of mail.²⁸⁷ When a deputy saw Reyes holding the piece of mail, he accused him of stealing it.²⁸⁸ When deputies approached him, they asked him to provide names of drug dealers.²⁸⁹ When Reyes could not, he was stripped of his job, beaten, paraded naked, transferred to the wing of the prison where gang members resided, and thrown in a four-person cell with three gang members.²⁹⁰ Two of the gang members were Hispanic, and their “gang code” required them to assault inmates from Central America and Mexico.²⁹¹ The beatings began almost instantly and continued throughout the day.²⁹² At night, they took turns raping Reyes.²⁹³

C. Private Prisons, Political Dynamics, Lobbying, and State-Sanctioned Control

A new situation in the American prison system placed public pressure on elected officials and gave rise to a prominent system: the private prison.²⁹⁴ Across America in the early 1980s, unemployment and crime were on the rise.²⁹⁵ By 1984, the Department of Justice stated that “prison administrators and staff continued to grapple with a shortage of available housing capacity to accommodate the 1983 population.”²⁹⁶ The privatization trend emerged in the mid-1980s as many states faced budget shortfalls associated with their prison systems.²⁹⁷ This also coincided with a change in the federal tax code, in 1981, that encouraged private investment in correctional facilities.²⁹⁸

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 9–10.

²⁸⁷ *Id.* at 13.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 14.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ EISEN, *supra* note 279, at 54.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 55.

Beyond that consideration, economic trends emerged in an age where America was beginning to have different conversations about the purpose and utility of capital.²⁹⁹ Privatization became a trend.³⁰⁰ As Lauren-Brooke Eisen observed, “[t]hree realities coalesced: (1) the rising belief in the potential of the free market, (2) the skyrocketing number of prisoners, and (3) the price tag of mass incarceration.”³⁰¹ In 1983, Corrections Corporation of America (“CCA”), a private prison corporation, was founded by Thomas Beasley, formerly the head of the Tennessee Republican Party, Robert Crants, a businessman, and T. Don Hutto, who served as the director of the corrections departments in Arkansas and Virginia.³⁰² CCA was originally funded with \$10 million from a venture capital firm in Nashville, Tennessee.³⁰³ Private prisons are most profitable when operated at full capacity.³⁰⁴ Additionally, “Private prison corporations benefited from the political challenges state policy makers faced when fundraising to build new prisons quickly enough to meet demand.”³⁰⁵ Scholars have argued that “at the heart of the arguments for prison privatization is the notion that competition from the private sector will inevitably lead to better-quality prison services, at lower costs, across the board.”³⁰⁶ Donna Selman and Paul Leighton noted in their book *Punishment for Sale* that the “debate over prisons included no discussion of alternatives to incarceration; nor did the congressional hearings or the commission’s final report include the word ‘rehabilitation.’”³⁰⁷ As Lauren-Brooke Eisen observed, “[i]n the next decades, corporations would seize the opportunity to make money off of almost every aspect of incarceration.”³⁰⁸

²⁹⁹ See Olivier Jean Blanchard, *Reaganomics*, 2 *ECON. POL’Y* 15, 15 (1987) (“In a country suffering from low growth, inflation and the Carter malaise, the Reagan administration began with promises of a supply-side revolution. Lower inflation, lower taxes and a smaller government were going to boost productivity and growth. Thanks to the Laffer curve, cuts in taxes were going to generate increased revenues and help balance the budget. The dreams did not last long.”).

³⁰⁰ EISEN, *supra* note 279, at 55.

³⁰¹ *Id.*

³⁰² *Id.* at 57.

³⁰³ *Id.*

³⁰⁴ *Id.* at 59 (“For example, approximately the same number of staff members (guards, kitchen staff, janitors, medical staff) are needed whether the facility is running at capacity or 25 percent below capacity. It costs the same amount to operate a facility at 60 or 70 percent capacity as it does to operate a facility that is full. Similar to the business model for hotels, once cleaning staff, front desk personnel, bellmen, and managers are paid, it is far more remunerative to keep the hotel at the highest occupancy rate. So when a private prison company is paid per inmate, it is always more financially profitable to operate at capacity.”).

³⁰⁵ *Id.* at 65.

³⁰⁶ Judith Greene, *Banking on the Prison Boom*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* 5 (Tera Herivel & Paul Wright eds., 2007).

³⁰⁷ DONNA SELMAN & PAUL LEIGHTON, *PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE* 72 (2010).

³⁰⁸ EISEN, *supra* note 279, at 67.

i. *The Birth of the Private Prison Movement: The 1990s*

The 1990s were the peak of prison development. An average of twenty-five new rural prisons opened each year, which was a considerable increase in comparison to the previous two decades.³⁰⁹ In 1991, spending on prison construction, renovations, and major repairs was \$4.6 billion, an all-time high.³¹⁰ In 1996, the United States spent \$22 billion on prisons, including \$1.3 billion on new prison construction.³¹¹ Over the entire decade, a prison was built somewhere in rural America every fifteen days.³¹² From 1990 to 1995, a vast majority of prisons built in the U.S. were public.³¹³ From 1995 through the remainder of the decade, this paradigm shifted in favor of private prison construction.³¹⁴ By the turn of the century, private prisons would vastly outnumber public prisons at a rate of 151 to 2.³¹⁵ Comparatively, spending on K-12 education grew by 69 percent from 1986 to 2013 when adjusted for inflation, whereas corrections spending grew by 141 percent.³¹⁶

This boom in construction invited many essential services, including health care, transportation, telecommunications, Internet, food, beverage, and packaging, to be tied directly to corrections.³¹⁷ This prompted Eric Schlosser, in 1998, to describe this phenomenon as the “prison industrial complex.”³¹⁸ It is estimated that American corrections is an \$80 billion business annually, although some scholars suggest that figure is low.³¹⁹

³⁰⁹ *Id.* at 81.

³¹⁰ *Id.* at 71.

³¹¹ *Id.* at 81.

³¹² *Id.*

³¹³ *Id.* at 67, Figure 3.2.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 73.

³¹⁷ *Id.*

³¹⁸ Eric Schlosser, *The Prison Industrial Complex*, ATLANTIC (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/>.

³¹⁹ EISEN, *supra* note 279, at 70. Prison phone calls alone generate \$1.4 billion annually for telephone companies. Rosalie Chan & Belle Lin, *The High Cost of Phone Calls in Prisons Generates \$1.4 Billion a Year*, BUS. INSIDER (June 30, 2021, 9:30 AM), <https://www.businessinsider.com/high-cost-prison-communications-driving-debt-racial-wealth-gap-2021-6#:~:text=Enterprise-,The%20high%20cost%20of%20phone%20calls%20in%20prisons%20generates%20%241.4,people%20of%20color%20into%20debt&text=The%20correctional%20telecom%20sector%20is,in%20phone%20call%20revenue%20alone>. The cost to send one email is approximately \$0.50. Roby Chavez, *Incarcerated People Face Heightened Costs to Communicate with Families*, PBS (Apr. 7, 2023, 6:40 PM), <https://www.pbs.org/newshour/show/incarcerated-people-face-heightened-costs-to-communicate-with-families>. A family member or loved can send money to an inmate via JPay for a transaction

In the mid-1990s, a company known as Lockhart Technologies (now known as GEO Group, the largest private prison company in the United States), contracted with Wackenhut prison to use prisoners to assemble electronic parts.³²⁰ Concurrent with this boom in prison spending was an effort by the Republican Party – who swept control of Congress in 1994 through the so-called “Republican Revolution”³²¹ – to further curtail prisoner rights.³²² In 1995, Republican Sens. Robert Dole of Kansas and Jon Kyl of Arizona, introduced the Prison Litigation Reform Act (“PLRA”).³²³ The aim of this legislation was to discourage frivolous lawsuits and curtail attorneys’ fees in support of that effort.³²⁴ It also imposed an administrative scheme that forced prisoners to exhaust all internal remedies before they could access federal court.³²⁵

One of the travesties of PLRA is that many prisoners’ claims go unanswered. For example, consider Rodney Hulin who, at the age of sixteen, was sentenced to an adult prison for setting a dumpster on fire.³²⁶ In prison, Mr. Hulin was repeatedly raped and beaten by inmates, yet nothing was done about it.³²⁷ He wrote a letter to prison officials in which he informed them that he was “afraid to go to sleep, to

fee. JPAY, <https://www.jpay.com/Agency-Details/JPAY.aspx> (last visited Feb. 22, 2024). These are just a few examples. As Eisen observes, “This web of complex economic incentives – from prison telephone charges to architectural fees to correctional unions to private prisons – runs deep. The nation’s prison industrial complex relies on a vast infrastructure of financial incentives that create significant hurdles to dismantling a mass incarceration on which the nation has come to rely.” EISEN, *supra* note 279, at 78.

³²⁰ Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 37 (2019).

³²¹ See Randall Strahan & Daniel J. Palazzolo, *The Gingrich Effect*, 119 POLI. SCI. Q. 89, 95 (2004) (arguing that Gingrich’s “increased involvement in legislation, aggressive agenda-setting role, and activist leadership style were consistent with his personal goals and understanding of leadership”).

³²² Ryan Lefkowitz, *Prisoner’s Dilemma – Exhausted Without a Place of Rest(itution): Why the Prison Litigation Reform Act’s Exhaustion Requirement Needs to be Amended*, 20 ST. MARY’S L. REV. & SOC. JUST. 189, 190 (2018).

³²³ *Id.* at 193.

³²⁴ 1 BERNARD D. REAMS JR. & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, PUB. L. NO. 104-134, 110 STAT. 1321 iii (1997).

³²⁵ *Id.*; see also Lynn S. Branham, *The Prison Litigation Reform Act’s Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 484, 513–15 (2001) (arguing against the two rationales for the exhaustion requirement: protection of administrative agency authority and judicial efficiency); Lefkowitz, *supra* note 322, at 189–90 (“The PLRA also disproportionately affects Black and Hispanic citizens; these minority groups comprise the majority of incarcerated individuals. In a society currently seeing increasing numbers of excessive force claims brought by Black citizens against police officers, the PLRA creates a substantial obstacle for Black and Hispanic inmates.”).

³²⁶ Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 J. LEGIS. 129, 132 (2006).

³²⁷ *Id.*

shower, just about everything else.”³²⁸ He wrote, “I might die at any minute. Please sir, help me.”³²⁹ No one came to his aid, and Mr. Hulin hung himself in his cell.³³⁰ He was seventeen years old.³³¹

Perhaps there is no greater modern-day imposition of the power of the state than the PLRA. Stories like that of Rodney Hulin are ubiquitous in today’s prison system, and yet, because of the PLRA’s remedy structure, abused prisoners are never afforded an opportunity to even state a claim.³³² Meanwhile, they continue to suffer profound physical abuse, rape and other forms of sexual assault, exposure to disease, and even death.³³³

ii. *The Influence of Lobbying and Coordinated Legislation: The American Legislative Exchange Council*

That same year, 1995, a little-known political organization, The American Legislative Exchange Council (“ALEC”), introduced and secured passage of the Truth in Sentencing Act in twenty-five states across the nation.³³⁴ This legislation provided “for the employment of inmate labor in state correctional institutions and in the private manufacturing of certain products under specific conditions”³³⁵ and was constructed on the back of the PIECP.³³⁶ It also stipulated that wages taken from inmates to offset the costs of incarceration should be spent on expanding prison industries.³³⁷ In terms of the exploitation of labor and goods, ALEC’s aim was to allow for prison goods to be sold to an in-state third party and then re-sold by that third-party while reaping the benefits.³³⁸

ALEC is a non-profit organization that advertises itself as a “nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets, and federalism.”³³⁹ ALEC was founded in 1973 by Paul Weyrich, Lou Barnett, and Henry Hyde in response to concerns that

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION (Aug. 1, 2011), <https://www.thenation.com/article/archive/hidden-history-alec-and-prison-labor/>.

³³⁵ Presently in Michigan there is a ballot initiative affront to repeal the state’s Truth in Sentencing Law. See Tracy Samilton, *Ballot Initiative Aims for Repeal of Michigan Truth in Sentencing Law*, MICH. RADIO (Feb. 24, 2022, 8:52 AM), <https://www.michiganradio.org/criminal-justice-legal-system/2022-02-24/ballot-initiative-aims-for-repeal-of-michigan-truth-in-sentencing-law>.

³³⁶ Elk & Sloan, *supra* note 334.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See *About Alec*, AM. LEGIS. EXCH. COUNCIL, <https://alec.org/about/>.

Republican President Richard Nixon was favoring big government.³⁴⁰ In an important paper, Rebecca Cooper, Caroline Heldman, Alissa Ackerman, and Victoria Farrar-Meyers examined the relationship between ALEC and hidden corporate profits in the U.S. prison system.³⁴¹ They noted:

ALEC was created specifically to address the missing state-level piece in the burgeoning, national conservative movement that would take the nation by storm in the 1980s with the election of Ronald Reagan, a conservative movement that was also greatly influenced by the Powell Memorandum. Since its founding, ALEC has successfully advocated conservative, pro-corporate interests through model legislation, legislator training, and media campaigns. ALEC boasts membership from nearly 2000 legislators across the country, or nearly one-third of state legislators.³⁴²

ALEC's funding has been derived, since its inception, primarily from large corporate sponsors, such as billionaire Charles Koch and, before his death in 2019, Mr. Koch's brother David.³⁴³ Alexander Hertel-Fernandez determined that over its lifecycle, companies "as diverse as Amazon, UPS, major pharmaceutical firms, private prison operators, Enron, insurance companies, and tobacco manufacturers have worked through ALEC."³⁴⁴ Although other entities promote model state legislation, ALEC's operations are quite distinct from other organizations.³⁴⁵ ALEC's public and private sector members convene each year to draft model bills addressing an array of issues.³⁴⁶ The private industry is intimately involved in this process to ensure that model bills are not "killed at the table."³⁴⁷ Members pay between \$7,000 and \$25,000 in dues annually.³⁴⁸ For the price of \$50,000, private

³⁴⁰ Rebecca Cooper, Caroline Heldman, Alissa Ackerman & Victoria Farrar-Meyers, *Hidden Corporate Profits in the U.S. Prison System: The Unorthodox Policy-Making of the American Legislative Exchange Council*, 19 CONTEMP. JUST. REV. 380, 381 (2016).

³⁴¹ *Id.* at 380.

³⁴² *Id.* at 382.

³⁴³ Robert D. McFadden, *David Koch, Billionaire Who Fueled Right-Wing Movement, Dies at 79*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/us/david-koch-dead.html>.

³⁴⁴ Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 PERSP. ON POL. 582, 582–83 (2014).

³⁴⁵ *Id.* at 583.

³⁴⁶ *Id.* at 584.

³⁴⁷ *Id.* The phrase "killed at the table" means being defeated at the committee table in a respective state legislature. In most instances, bills that clear committee have a high percentage of passage the larger body. Therefore, proponents and opponents of legislation see the committee votes as the primary battle ground for passing or defeating state legislation.

³⁴⁸ *Id.*

sector companies can sponsor ALEC meetings.³⁴⁹ In turn, state legislators are provided with policy information, experts, pre-approved model legislation, and access to events where they can network with other state legislators, national political figures, and corporate leaders.³⁵⁰ This turn-key approach makes it convenient for conservative legislators to prepare, introduce, and pass legislation to appease core constituencies in general sessions that, in some states, are as short as ninety days every two years.³⁵¹ At the same time, most legislators do not have access to the necessary staffing, research, or experts to inform the policymaking process.³⁵² In that respect, ALEC fills a considerable void, particularly among conservatives.³⁵³ In my state legislative experience, there is no entity on the political left that provides anything comparable to ALEC.

A substantial amount of ALEC's resources and attention has gone towards prison labor. Rebecca Cooper, Caroline Heldman, Alissa Ackerman, and Victoria Farrar-Meyers's examination of more than 800 model bills, ALEC's proverbial "bread-and-butter," concluded: "We find that ALEC seeks to expand the private prison industry in three ways: (1) promoting greater use of private prisons, goods, and services, (2) promoting greater use of prison labor, and (3) increasing the size of the prison population."³⁵⁴

iii. Unfree Labor: UNICOR/Federal Prison Industries, Inc. and Supporting America in a Time of Need

The Federal Prison Industries, Inc. ("UNICOR") is a wholly owned, self-sustaining corporation that sells market-priced services and quality goods produced by inmates.³⁵⁵ According to the Bureau of Prisons, UNICOR is a "life-changing program that has a profound impact on *everyone* in the community."³⁵⁶ The Board of Directors of UNICOR includes representatives from agriculture, industry, retail, labor, defense, and the Department of Justice.³⁵⁷ UNICOR offers 250 categories of products and services through eight business groups: "(1) Clothing and Textiles;

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 585.

³⁵¹ *Legislative Session Length*, NAT'L CONF. STATE LEGISLATURES (July 1, 2021), <https://www.ncsl.org/resources/details/legislative-session-length>.

³⁵² Hertel-Fernandez, *supra* note 344, at 593.

³⁵³ *Id.*

³⁵⁴ Cooper et al., *supra* note 340, at 380.

³⁵⁵ *UNICOR Custody and Care*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor.jsp.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

(2) Electronics; (3) Fleet Management and Vehicular Components; (4) Graphics; (5) Industrial Products; (6) Office Furniture; (7) Recycling; and (8) Services.”³⁵⁸

UNICOR contracts predominantly with the federal government.³⁵⁹ Until 2001, federal procurement regulations required federal agencies to purchase any items listed in the Schedule of Products so long as UNICOR (then doing business as “FPI”) “meets the agency’s delivery schedule needs, the products meet the agency’s requirements, and the prices do not exceed current market prices.”³⁶⁰ These regulations changed following the Consolidated Appropriations Act of 2005, which required procurement officers across all federal agencies to conduct market research before purchasing from UNICOR.³⁶¹ Market research in this context involved price, quality, and time of delivery, which was left to the sole discretion of the contracting officer.³⁶² However, if the UNICOR item was comparable, it must be purchased unless the contracting officer obtains a waiver.³⁶³ One important limitation to the scope of UNICOR, intended to reduce competition with the American private sector, was that Congress limited UNICOR’s access to the public market except for services “that would otherwise be performed outside of the United States.”³⁶⁴ Regardless of the purchaser, UNICOR workers are paid between \$0.23 and \$1.15 per hour for their labor.³⁶⁵ This, in turn, puts hundreds of millions of dollars into the Bureau of Prison coffers.³⁶⁶

UNICOR has been a point of contention over the years. Advocates argue that the program enhances inmates’ employment prospects and diminishes recidivism, although the evidence of that is, at best, mixed.³⁶⁷ Other proponents have argued that labor helps cultivate self-esteem, self-worth, and sense of purpose.³⁶⁸ Scholars

³⁵⁸ John R. McDonald, *Federal Prison Industry Reform: The Demise of Prison Factories*, 35 PUB. CONT. L.J. 675, 678 (2006).

³⁵⁹ *Id.* at 679.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 680.

³⁶² FAR 8.602(a)(1) (2024).

³⁶³ *Id.*

³⁶⁴ McDonald, *supra* note 358, at 682.

³⁶⁵ UNICOR Program Details, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp.

³⁶⁶ UNICOR, FPI SALES REPORT FOR FISCAL YEAR 2021, <https://www.unicor.gov/publications/reports/FY21AnnualSalesReport.pdf>.

³⁶⁷ See Grant Duwe & Susan McNeeley, *The Effects of Prison Labor on Institutional Misconduct, Post-Prison Employment, and Recidivism*, 5 CORR. 89, 89–108 (2020) (“Participation in prison labor significantly improved post-prison employment outcomes, but it yielded mixed results for prison misconduct and had little overall impact on recidivism.”).

³⁶⁸ See Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>.

have observed that there is a broader problem facing prisons, which is the disappearance of prison labor in the context of historical allocation of time.³⁶⁹

It is worth noting that in times of national necessity, the federal government often turns to prison labor. For example, during the American wars in Iraq and Afghanistan, UNICOR made more than 150,000 Kevlar helmets, men's military undershirts, underwear and nightwear, gowns for battlefield surgeons, a variety of components for military weaponry, practice targets, cable assemblies for Prisoner missiles, remote control panels and launchers for guided missile systems, and components to support microphone headsets for soldiers, in addition to services such as clothing repair, pressing, mail sorting, and printing.³⁷⁰ During the COVID-19 pandemic, prison labor across the nation produced hand sanitizer, toilet paper, protective gowns for health care workers, and cloth face masks.³⁷¹

The State of California, which is disproportionately impacted by wildfires across the United States, developed a program where inmates could serve as volunteer wildfire firefighters.³⁷² California operates 35 conservation camps, which are known as fire camps, located in 25 counties across the state.³⁷³ In May of 2021, approximately 1,600 inmates were working at fire camps and 900 of those were fire-line qualified.³⁷⁴ Inmates must have a "minimum custody" status, or the lowest

³⁶⁹ See, e.g., Steven P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339 (1998) (arguing that, while "labor was central to the internal life of the early penitentiary, it has virtually vanished from today's prison").

³⁷⁰ Ian Urbina, *Prison Labor Fuels American War Machine*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 111–13 (Tara Herivel & Paul Wright eds., 2007).

³⁷¹ 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> [hereinafter Eisen Covid]. This is not a particularly positive or healthy development. Many prisoners reported poor working conditions and staff ignorance to public health and worker safety during this time. See Hannah Drier, *'A Recipe for Disaster': American Prison Factories Becoming Incubators for Coronavirus*, WASH. POST (Apr. 21, 2020, 7:40 PM), https://www.washingtonpost.com/national/a-recipe-for-disaster-american-prison-factories-becoming-incubators-for-coronavirus/2020/04/21/071062d2-83f3-11ea-ae26-989cfce1c7c7_story.html (Inmates "don't get to use the sanitizer, the women say, only make it. They say they don't wear masks even though they sit across from one another, face to face. They've been told that if a spark were to ignite, the high alcohol content of the sanitizer would lead to a fast, deadly fire."). This is tethered to the fact that prisoners are excluded from the U.S. Occupational Health and Safety Administration protections that require employers to provide a safe working environment. Letter from Thomas Galassi, Director of Enforcement Programs at the Occupational Safety and Health Administration, to William Linn (Dec. 13, 2011) (on file with the U.S. Dep't of Labor).

³⁷² *Conservation (Fire) Camps Program*, CAL. DEPT. OF CORR. & REHAB., <https://www.cdcr.ca.gov/facility-locator/conservation-camps/>.

³⁷³ *Id.*

³⁷⁴ Matthew Hahn, *Sending us to fight fires was abusive. We preferred it to staying in prison*, WASH. POST (Oct. 15, 2021, 6:55 AM), https://www.washingtonpost.com/outlook/prison-firefighter-california-exploit/2021/10/15/3310eccc-2c61-11ec-8ef6-3ca8fe943a92_story.html.

classification based on sustained good behavior.³⁷⁵ When not fighting fires, incarcerated firefighters perform conservation and community service projects, including clearing brush, sandbagging, reforestation, and flood prevention.³⁷⁶ For this labor, prisoners are paid between \$2.90 and \$5.12 per day, plus \$1 per hour during an active emergency.³⁷⁷ Comparatively, full time California wildfire firefighters earn \$91,000 annually.³⁷⁸ Despite this extraordinary training and dramatically disproportionate pay, upon release, not all members of California's volunteer wildfire firefighters are eligible to become full-time firefighters.³⁷⁹

These are just a few examples of the ways prison labor is utilized to help advance American domestic interests in a time of unique circumstances, and yet, criticism from the private sector follows. In spite of what you might assume, the criticism was not for the low pay, lack of worker protections, or limitations for advancement at the end of their carceral term. Rather, private sector capitalist interests complained about the competition from unfree prison labor.³⁸⁰

iv. Modern Peonage: State Imposition and Enforcement of Post-Carceral Debt

One of the important aspects of peonage that often goes unreported is the extent to which prison systems will attempt to attach debt to prisoners for criminal

³⁷⁵ *Frequently Asked Questions: Conservation (Fire) Camp Program*, CAL. DEPT. OF CORR. & REHAB., <https://www.cdcr.ca.gov/facility-locator/conservation-camps/faq-conservation-fire-camp-program/>.

³⁷⁶ *Id.*

³⁷⁷ Nicole Goodkind, *Prisoners Are Fighting California's Wildfires on the Front Lines, But Getting Little in Return*, FORTUNE (Nov. 1, 2019, 12:03 PM), <https://fortune.com/2019/11/01/california-prisoners-fighting-wildfires/>.

³⁷⁸ *Id.*

³⁷⁹ Nick Sibilla, *Federal Judge: Californians Who Fought Fires in Prison Can't Become Career Firefighters*, FORBES (Feb. 16, 2021, 10:30 AM), <https://www.forbes.com/sites/nicksibilla/2021/02/16/federal-judge-californians-who-fought-fires-in-prison-cant-become-career-firefighters/?sh=3e983d1f170f> (“Nearly all local fire departments require certification as an emergency medical technician (EMT). Yet under California law, EMT certification is off-limits to anyone who has ever been convicted of two or more felonies, has been released from prison for any felony in the past decade, or has been convicted of any two or more drug misdemeanors in the past five years.”).

³⁸⁰ *See, e.g.*, Michael B. Kelley, *More Jobs Lost as the Government Decides to Have Military Uniforms Made by Convicts*, BUS. INSIDER (Sept. 7, 2012, 1:35 PM), <https://www.businessinsider.com/corporate-prison-labor-is-forcing-small-businesses-to-close-factories-2012-9>; Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES (Mar. 14, 2012), <https://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html>; Emily Jane Fox, *Factory Owners: Federal Prisoners Stealing Our Business*, CNN (Aug. 14, 2012, 11:34 AM), <https://money.cnn.com/2012/08/14/smallbusiness/federal-prison-business/>.

justice system costs.³⁸¹ These costs cover a wide range of services, including the cost of incarceration and post-release supervision.³⁸² Thus, workers who are unable to earn a small amount for their prison labor leave, allegedly, having paid their debt to society, but with a bill in hand.³⁸³ If they cannot pay that bill, and the vast majority cannot, they often find themselves reincarcerated.³⁸⁴ This is not an anomaly. In 24 states, prisoners are charged for their own incarceration.³⁸⁵ States pursue this action for four reasons, according to Lauren-Brooke Eisen.³⁸⁶ First, the revenue stream helps offset the prison budget.³⁸⁷ Second, certain state policymakers believe that there should be more punitive measures beyond incarceration, like debt.³⁸⁸ Third, support for “pay-to-stay” fees has political potency.³⁸⁹ And fourth, it diminishes frivolous requests for services by inmates.³⁹⁰

“Pay-to-stay” programs vary from state-to-state and locality-to-locality. Some inmates are charged a “per diem” for each day they spend in prison.³⁹¹ Others are charged for specific items, such as toilet paper, medical co-pays, dental services, meals, clothing, and other necessities.³⁹² For low-level offenders, some prison systems offer “upgrades” for a fee.³⁹³ If a prisoner relies on a public defender, which

³⁸¹ The Eighth Amendment to the Constitution of the United States reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

³⁸² See Chandra Bozelko & Ryan Lo, *You’ve Served Your Time. Now Here’s Your Bill*, HUFFPOST (Sept. 16, 2018, 9:00 AM), https://www.huffpost.com/entry/opinion-prison-strike-labor-criminal-justice_n_5b9bf1a1e4b013b0977a7d74.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [hereinafter Eisen Fines].

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.* This may be particularly unique to California, where, in 2011, the U.S. Supreme Court determined that prison overcrowding was a constitutional violation under the Eighth and Fourteenth amendments because the system was at 157% capacity. See *Brown et al. v. Plata*, 536 U.S. 493 (2011); see also W. David Ball, “A False Idea of Economy”: Costs, Counties, and the Origins of the California Correctional System, 664 ANNALS AM. ACAD. POLI. SCI. 26 (2016) (discussing the challenges with California’s correctional system in the aftermath of overcrowding).

is his or her constitutional right under Sixth Amendment, those fees are often assessed.³⁹⁴ As Levingston observed,

The key to repaying criminal sanctions is having the funds to pay. We know those arrested and prosecuted are often poor and undereducated, with minimal employment histories. For people with a criminal record, it is even harder to land a job and earn the funds to repay criminal sanctions. Potential employers can easily access information about criminal histories using modern technology unearthing information that stops an application dead in its tracks before an applicant is fairly considered.³⁹⁵

This is unquestionably a strange contradiction of American society. We are told that someone pays their “debt to society” when they complete their incarceration. However, this “pay-to-stay” system suggests otherwise. The concept of reimbursing taxpayers for these services places a unique burden on the very people society, notably policymakers, expect to reintegrate successfully to society, remain out of prison, and contribute to a greater enjoyment of public safety through rehabilitation, gainful employment, and a broader acceptance of civil society and the rule of law.³⁹⁶ In the meantime, the pressure on families is considerable, particularly as it pertains to the possibility of re-incarceration of a loved one. However, this time, they face punishment for a debt instead of a crime they committed.³⁹⁷

The prison labor structure does not assuage this system of peonage. Prisoners are not afforded the ability to utilize their labor to earn reasonable wages—if they are able to earn wages at all.³⁹⁸ Furthermore, they are unable to organize or bargain. American prisoners face perpetual political pressure to offset their cost to the state, despite the state maintaining an attitudinal preference towards

³⁹⁴ Kristen D. Levingston, “*Making the Bad Guy Pay*”: *The Growing Use of Cost-Shifting as an Economic Sanction*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* 61 (Tara Herivel & Paul Wright eds., 2007).

³⁹⁵ *Id.* at 73.

³⁹⁶ *Id.*

³⁹⁷ Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 *PERSP. ON POL.* 638, 639 (2015) (“We contend here that the practice of government seizure, while constituting a familiar source of financial stress for poor families who regularly interact with courts, prison, and jails, is an as-yet unrecognized development in the governance of the poor. The radical innovation in this most recent means of poverty governance is the outright cash extraction that draws on ties of family dependency within the poorest stratum of American society. . . . [T]he practice of seizure is a tale of predatory capitalism for the poor.”).

³⁹⁸ 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/>.

mass incarceration.³⁹⁹ This is what Joseph Heller articulated, albeit in a different context, as a Catch-22.⁴⁰⁰

Scholars note that there is a need for more research to understand the breadth of this issue.⁴⁰¹ Consider the following:

The institutionalization of family seizure as an instrument of poverty governance has occurred in the presence of often little-known legislation, judicial rulings, and private contracts. Seizure's rules and regulations, its enmeshment within the private sector are often dispersed, localized and vary by state and even by county. The role of federalism and its multi-level accountability is ripe for further discussion. The highly gendered and racialized character and consequences of seizure are also mostly unexamined. The scale of debt and the amount of family subvention needs to be more precisely quantified.⁴⁰²

This cycle of poverty is a natural extension of debt peonage within America's prison system.⁴⁰³ Although acquiring modern data to substantiate is very difficult, perhaps it is also a reason that organized gang culture has taken hold of many prisons, and labor is no longer the predominant means of order within the carceral system.⁴⁰⁴ It is apparent that the state has chosen to exercise its authority over a disadvantaged and impoverished community in a manner that many public advocates and scholars suggest is unconstitutional, immoral, or both.⁴⁰⁵

³⁹⁹ Eisen Fines, *supra* note 385.

⁴⁰⁰ JOSEPH HELLER, *CATCH-22* (1961) (depicting a dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions).

⁴⁰¹ Katzenstein & Waller, *supra* note 397, at 648.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ SKARBEK, *supra* note 283, at 4.

⁴⁰⁵ This is not only germane to American attitudes regarding incarceration. Many scholars and policymakers have raised similar questions regarding farm work in America. See Federica Dell'Orto & Judith L. Wood, *Agricultural Workers in Today's America: A Parallel to Modern Slavery*, 67 *FED. LAW* 34, 37 (2020). Federica Dell'Orto and Judith L. Wood have argued, for example, that there is a parallel between agricultural workers and modern-day slavery. *Id.* They observed, "Exploitation and human trafficking are inevitable byproducts of a poorly regulated employment visa program, where cheap foreign labor is imported into the United States with utter disregard to workers' rights, human rights, and the damages caused to the U.S. labor market for American citizens." *Id.*

There are also broader questions about the role of the state, some of which, at least pertaining to details and testimonials surrounding the H-2A Visa program, are beyond the scope of this paper. Be that as it may, the parallels cannot be ignored. Much like efforts to improve prisoner working conditions and prisoners' rights, a similar effort is at work to aid migrant farm workers. See Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant*

VI. A PATH TO REFORM

In 1931, Professor Louis N. Robinson published, *Should Prisoners Work? A Study of the Prison Labor Problem in America*.⁴⁰⁶ In that study, Robinson considered the complicated problem which is the “glaring discrepancy between the accepted theory that prisoners should work and the all too expensive practice of keeping them in idleness.”⁴⁰⁷ In Robinson’s view, “[N]ever can a prison which keeps its inmates in idleness serve society in any but a pitiful and inadequate way.

Farm Workers’ Conditions?, 53 HARV. C.R.-C.L. L. REV. 167, 171 (2018). Manoj Dias-Abey observed, “[F]arm workers have difficulty realizing the few labor rights they have as a result of the consequence of the weak enforcement of labor standards by government agencies. Most scholars agree that ‘proactive enforcement’ through unannounced audits and inspections is the most effective way to detect violations and provide redress for vulnerable workers. However, proactive enforcement of labor rights by public agencies tends to be weak, due to resource constraints, over large mandates, and conflicting political priorities. This is especially the situation in the agricultural sector, where the scale of the problem seems to defeat bureaucratic resolve.” *Id.* One of the important aspects of Dias-Abey’s article is the manner it tracks the means of building rights consciousness to litigation to future organizing to codifying an effective regulatory system that protects all farm workers. *Id.*

This natural scheme has, in my view, a practical application to those that seek prison labor reform. While it may not be a perfect comparison, these two oppressive systems have relied on capitalist stigmas, government oppression or lack enforcement, and public malaise to perpetuate a system that, for centuries now, has been about the perpetuation of a white power structure in agriculture, business, and politics. *See, e.g.*, PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969* (1990); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009); FRANK BARDACKE, *TRAMPLING OUT THE VINTAGE: CESAR CHAVEZ AND THE TWO SOULS OF THE UNITED FARMWORKERS* (2013).

It is also important to consider the impact of the Department of Labor and organized labor on the H-2A visa program. More than a decade ago, Allison K. Guernsey argued that neither the Department of Labor nor organized labor were doing their job to hold the H-2A Visa program accountable. *See* Allison K. Guernsey, *Double Denial: How Both the DOL and Organized Labor Fail Agricultural Workers in the Face of H-2A*, 93 IOWA L. REV. 277, 279 (2007). Since that time, although there has been far more public attention paid to inaction than action, the work of third parties, like the Fair Food Program, has not gone unnoticed. *See* Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497, 509 (2017).

While it is constitutionally inconceivable for prison labor, some scholars have considered how to use the Thirteenth Amendment to protect immigrant workers. *See* Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC’Y 133, 134 (2012). Professor Maria L. Ontiveros argued, “it is time to move from a theoretical approach to an activist one. Drawing on the successes found in the anti-trafficking movement, this article charts a strategic plan to actively use the Thirteenth Amendment to help this group of workers.” *Id.*

⁴⁰⁶ LOUIS N. ROBINSON, *SHOULD PRISONERS WORK? A STUDY OF THE PRISON LABOR PROBLEM IN AMERICA* (1931).

⁴⁰⁷ *Id.* at 289.

Even though it may be extremely difficult to put prison industries on a paying basis financially, they should always be set up as a part of a sane penological program.”⁴⁰⁸ However, because prisons are unnatural places, the concepts of reform are not easy to formulate or implement.

Since the 1930s, sentiments about competition have been pervasive.⁴⁰⁹ Robinson’s study concluded that “it is very unlikely that states with small populations and meager resources can ever keep their prisoners employed if restrictions limit the market to public institutions and agencies, while even large and wealthy states will probably be unable to employ the state-use system exclusively.”⁴¹⁰ Today, attitudes about penology have shifted away from economics and a dedicated focus on labor. I believe that, despite the problems of the past, this has been a detriment to the system.

A. Prioritize Labor Based on Site-Specific Factors

Prison labor cannot and should not be one-size-fits-all. On the one hand, there are obvious manufacturing interests that are reasonable for prison labor (e.g., the production of license plates and furniture for state offices).⁴¹¹ Concurrent with these efforts, states should adopt prison labor reform initiatives that suit both their economic and environmental needs. For example, as the effects of climate change continue to disrupt the planet, America's attention on agriculture, land, forests, and waterways is on the uptick.⁴¹² In places where labor or production resources are scarce, prison labor can be retrofitted to pursue projects that help improve environmental quality.⁴¹³ When deployed strategically, it does not give rise to competition concerns, but rather, provides a necessary and immediate public

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 290.

⁴¹⁰ *Id.*

⁴¹¹ Lilah Burke, *Public Universities, Prison Made Furniture*, INSIDE HIGHER ED (Feb. 13, 2020), <https://www.insidehighered.com/news/2020/02/14/public-universities-several-states-are-required-buy-prison-industries>.

⁴¹² See, e.g., MD. AGRIC. CODE § 2-1901 (2018); *Crop Insurance Discounts Available for Farmers Who Plant Cover Crops*, IOWA DEP’T AGRIC. & LAND STEWARDSHIP (Sept. 30, 2019), <https://iowaagriculture.gov/news/crop-insurance-discounts-available-farmers-who-plant-cover-crops>; N.M. STAT. ANN. § 76-25-1 et seq. (2019); 1994 Mich. Pub. Acts 451; *Reforestation Partnerships*, U.S. FOREST SERV., <https://www.fs.usda.gov/forestmanagement/vegetation-management/reforestation/partnerships.shtml>.

⁴¹³ Jean Paik, *How Prison Labor is on the Front Lines of Environmental Disaster Relief*, 34TH STREET (Sept. 24, 2021, 5:01 PM), <https://www.34st.com/article/2021/09/prison-labor-exploitation-climate-crisis-change-environment-disaster-relief-incarceration-hurricane-flood-fire>.

benefit, as well as new and necessary skills that can be advantageous to individuals after their incarceration term ends.⁴¹⁴

B. Re-Imagining Prison Farming

The tragedy of prison farms in the early to mid-twentieth century is that they were focused on hard labor, production quotas, and unrelenting physical abuse.⁴¹⁵ Today, many prisoners are incarcerated because of a pre-existing condition, such as drug or mental health disorders,⁴¹⁶ and prison work provides a haven from prison violence.⁴¹⁷ That said, many states are plagued with food insecurity.⁴¹⁸ Re-imagining the prison farm as a means of healthy production to help feed those in need is one way to accomplish a necessary public goal. For example, a robust prison farm that produces fruits, vegetables, herbs, dairy, and protein could be combined with additional programs that teach cultivation, food nutrition, and preparation. The produce could then be donated to food banks across the state and region.⁴¹⁹

Furthermore, prisons located in warmer climates with access to thousands of acres of land can develop large-scale flower farms. The United States is the world's largest consumer of cut flowers, but many of those are flown in from Colombia and Ecuador at great economic and environmental cost.⁴²⁰ Large-scale flower farms

⁴¹⁴ Amy E. Lerman et al., *Prisons and Mental Health: Violence, Organizational Support, and the Effects of Correctional Work*, 49 CRIM. JUST. & BEHAV. 181, 181 (2021) (“We find strong associations between violence and symptoms of post-traumatic stress disorder and suicide risk, as well as symptoms of depression, alcohol abuse, anxiety, and sleep disorder. Importantly, we also find a potentially protective role of institutional factors, such as the quality of perceived management and supervision. In line with the perceived organizational support (POS) model, our findings make clear that organizational support can moderate the deleterious effects of prison work.”).

⁴¹⁵ Maurice Chammah, *Prison Plantations*, THE MARSHALL PROJECT (May 1, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/05/01/prison-plantations>.

⁴¹⁶ *Mental Health*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/mental_health/#:~:text=U.S.%20prisons%20and%20jails%20incarcerate,resulting%20in%20violence%20or%20incarceration.

⁴¹⁷ Lerman et al., *supra* note 414.

⁴¹⁸ *Food Insecurity Among Overall (all ages) Population in the United States*, FEEDING AMERICA, <https://map.feedingamerica.org>.

⁴¹⁹ *Bard Prison Initiative Organic Garden at Fishkill Correctional Facility Donates 100 Pounds of Produce to Soup Kitchen in Beacon*, BARD (Sept. 1, 2016), <https://www.bard.edu/news/releases/pr/fstory.php?id=2828>.

⁴²⁰ Ros Davidson, *The Environmental Impact of Cut Flowers? Not So Rosy*, IDEAS.TED.COM (May 5, 2021), <https://ideas.ted.com/the-environmental-impact-of-cut-flowers-not-so-rosy/> (discussing that flowers are often flown on refrigerated planes over thousands of miles and can lose 15 percent of their value for every day spent traveling. Most flowers grown internationally are done so for the intent of export, which contributes to high water use and chemical runoff from mass-scale heated greenhouses).

across America’s southern prisons would provide considerable economic and ecological advantages to small businesses, state economies, and the effort to combat global warming.⁴²¹

C. Incentivize Vocational Training with a Pathway to Guaranteed Employment and Credits

Roughly two-fifths of people entering prisons do not have a high school degree or a Generational Educational Development (“GED”), which is three times higher than the average for adults in the United States.⁴²² Prisons should become incubators for market-driven needs. As Rick Linden and Linda Perry determined, prison education programs are common, but there have been relatively few evaluations carried out.⁴²³ Their review of the literature suggests that programs are most successful if they are intensive, can establish an alternative community within the prison, and offer post release services.⁴²⁴

Prisoners today are far less likely to return to prison if they have steady employment.⁴²⁵ Prisons should mirror vocational schools or two-year colleges and offer training, certification, and degree programs that are tailored to meet the needs of the region. In exchange for executing these programs and delivering highly skilled, well-qualified workers, the prisoners should be guaranteed employment upon release. Additionally, because it is inconceivable to compensate prisoners monetarily for educational training, they should instead be granted commissary credits, telephone credits, and additional visitation privileges for meeting certain benchmarks.⁴²⁶

⁴²¹ Some of America’s most notorious prisons, including San Quentin, in California, and Rikers Island, in New York, have used horticulture therapy to teach landscaping, design, and other skills that can aid prisoners after they complete their sentences. See *Food Justice Education*, PLANTING JUSTICE (last visited Feb. 10, 2024), <https://plantingjustice.org/food-justice-education/>; *Greenhouse and Education Center*, HORTICULTURAL SOC. OF N.Y. (last visited Feb. 10, 2024), <https://www.thehort.org/programs/greenhouse/>.

⁴²² Grant Duwe & Valerie Clark, *The Effects of Prison-Based Educational Programming on Recidivism and Employment*, 94 PRISON J. 454, 454 (2014) (“Obtaining a secondary degree in prison significantly increased the odds of securing post-release employment but did not have a significant effect on recidivism or other employment measures such as hourly wage, total hours worked, or total wages earned. Earning a post-secondary degree in prison, however, was associated with greater number of hours worked, higher overall wages, and less recidivism.”).

⁴²³ Rick Linden & Linda Perry, *The Effectiveness of Prison Education Programs*, 6 J. OFFENDER COUNSELING SERV. REHAB. 43, 43 (1983).

⁴²⁴ *Id.*

⁴²⁵ Duwe & Clark, *supra* note 422, at 454.

⁴²⁶ See Leah Wang, *The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL’Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ (“Prison- and jail-imposed barriers to family contact fly in the face of decades of social science research showing associations

D. A Robust National Economic and Labor Study About Prison Wages

I am not an economist or a labor expert, but it is evident that the American prison system would benefit from a robust examination of the labor force and the market circumstances that inform prisoner compensation. By doing so, we could develop a series of implementable recommendations to address the profound disparities between prison wages and the profits from their labor. This may result in a well-reasoned pay scale that helps prisoners avoid joining prison gangs, participating in the black market, or being forced into a system of criminality. Furthermore, scholars have argued that collective bargaining would advantage prison laborers.⁴²⁷

E. Federal Regulatory Oversight Regarding Prison Services

The cost of services to inmates is extraordinary.⁴²⁸ There is no rational justification for these extreme costs beyond the desire of prisons to reap profits (as a means to appease state officials) and to exercise punitive attitudes towards incarcerated people. Monopolies, price gouging, and other antitrust offenses are antithetical to American values.⁴²⁹ Consider, for example, that Corizon Health, the nation's largest prison health provider, was named in more than six hundred and sixty malpractice lawsuits from 2011-2016.⁴³⁰ As I have noted, the cost of phone calls, emails, and video conferencing for those in prison are considerably higher than what the average American consumer pays for such services.⁴³¹ Why? And perhaps a more important question, which this paper cannot answer, is why it is so important to allow a private enterprise to profit off the prison system and perpetuate an endless cycle of poverty? Black market economies thrive in prisons because, for example, the cost of cereal or can of soup from a prison commissary is five times the retail price.⁴³²

between family contact and outcomes including in-prison behavior, measures of health, and reconviction after release.”).

⁴²⁷ See Keith Armstrong, “*You May Be Down and Out, but You Ain’t Beaten*”: *Collective Bargaining for Incarcerated Workers*, 110 J. CRIM. L. & CRIMINOLOGY 593, 614–22 (2020) (discussing the role of the National Labor Relations Board in potentially influencing the opportunity for collective bargaining in America’s prison system).

⁴²⁸ Bozelko & Lo, *supra* note 382.

⁴²⁹ *Monopolies are Antithetical to Democracy*, OPEN MKTS. INST. (Nov. 4, 2016), <https://www.openmarketsinstitute.org/publications/monopolies-are-antithetical-to-dem>.

⁴³⁰ Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market>.

⁴³¹ EISEN, *supra* note 279, at 70.

⁴³² See Jerry Mitchell, *Mississippi, Companies Profit Off Inmates, Families*, CLARION LEDGER (Nov. 21, 2015, 10:29 PM), <https://www.clarionledger.com/story/news/2015/11/21/mississippi->

Furthermore, private prison companies should be investigated. In 2016, then-Deputy Attorney General Sally Yates stated that the United States would reduce its use of private prisons because they “compare poorly” with government-run institutions.⁴³³ CoreCivic and The GEO Group are the two primary publicly traded private prison operating companies.⁴³⁴ Planatir Technologies is also a publicly traded company founded by technological entrepreneur Peter Theil, a well-known supporter of President Donald Trump.⁴³⁵ Further, Planatir is a government contractor that offers a product to better visualize data.⁴³⁶ During the Trump administration, Planatir’s technology was used to conduct violent workplace raids across the United States in an effort to boost Trump-era deportation figures.⁴³⁷ The GreenDot bank card is the preferred currency in prison, something Shane Bauer discovered in his undercover work.⁴³⁸ These are available at convenience stores.⁴³⁹ Once the people “on the outside” purchase money packs to put on the prepaid cards, they’ll receive a security code, and the people “on the inside” can use these codes to purchase whatever they want.⁴⁴⁰ Their sellers will then call an 1800-number, “give them the code” and have the money downloaded onto their own credit cards.”⁴⁴¹

companies-profit-off-inmates-families/75884224/. It is estimated that prison commissaries generate \$1.6 billion in sales each year, predominantly for one company, Trinity Services Group, which is owned by H.I.G. Capital. *See also* Stephen Rahe, *Paging Anti-Trust Lawyers, Prison Commissary Giants Prepare to Merge*, PRISON POL’Y INITIATIVE (July 5, 2016), <https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger/>.

⁴³³ Memorandum from Sally Q. Yates, Deputy Att’y Gen. to the Acting Dir. Fed. Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download>.

⁴³⁴ Thomas Niel, *These 3 Private Prison Stocks Could Surprise Following Biden’s EO*, NASDAQ (Feb. 10, 2021, 10:00 AM), <https://www.nasdaq.com/articles/these-3-private-prison-stocks-could-surprise-following-bidens-eo-2021-02-10>.

⁴³⁵ *See* MAX CHAFKIN, *THE CONTRARIAN: PETER THEIL AND SILICON VALLEY’S PURSUIT OF POWER* (2021).

⁴³⁶ Planatir has more than \$1.2 billion in federal government contracts in the United States. *See* Marisa Franco, *Planatir Filed to Go Public. The Firm’s Unethical Technology Should Horrify Us*, GUARDIAN (Sept. 4, 2020, 6:23 AM), <https://www.theguardian.com/commentisfree/2020/sep/04/palantir-ipo-ice-immigration-trump-administration>.

⁴³⁷ *Id.*

⁴³⁸ *See* BAUER, *supra* note 137.

⁴³⁹ Giang, *infra* note 450.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

F. Re-evaluation of Prisoner Debt Policies Pursuant to the Fifth Amendment, Eighth Amendment, and the Fair Debt Collection Practices Act

Perhaps one of the greatest un-illuminated tragedies of the prison system is that prisoners are “charged” for services under state-imposed incarceration.⁴⁴² Such a system is aligned with the debt peonage systems that informed aspects of America’s painful past. While this paper cannot fully investigate the ways in which federal garnishment laws and debt collection practices should be amended to guard against this type of state oppression, it is worth noting that the pass-through costs from prisons to prisoners merits considerable scrutiny.⁴⁴³ Otherwise, debt peonage pervades the system, and prisoners are caught in an inescapable cycle of poverty that encourages a return to criminal behavior as a last resort. Most notably, the debt itself can cause an individual to return to prison.⁴⁴⁴ Such a policy only serves the interests of those looking to keep prisons populated and ignores a broader societal interest to allow those who have paid their proverbial debt through incarceration to assimilate into civil society with the potential to earn a meaningful, living wage, free from debt constraints.

G. Create an Open, Free Prison Market of Certain Legal and Desired Products

Since the 1980s, cigarette-smoking policies have become increasingly restrictive in jails and prisons across the United States.⁴⁴⁵ These restrictions must

⁴⁴² See, e.g., Sara Feldschrieber, *Fee at Last? Work Release Participation Fees and the Takings Clause*, 72 *FORDHAM L. REV.* 207, 207 n.1 (2003) (“U.S. Dep’t of Justice, Nat’l Inst. of Corr., Fees Paid by Jail Inmates: Findings from the Nation’s Largest Jails, Special Issues in Corrections 3 (February 1997), available at <http://www.nicic.org/pubs/1997/013499.pdf>. The majority of the data on prison reimbursement plans comes from a survey done by the National Institute of Corrections (“NIC”) Jails Division and Information Center. *Id.* at 1. The survey was sent to those jails with populations of over 1,000 inmates participating in the “Large Jail Network” (“LJN”). *Id.* In states without members of the LJN, the NIC sent surveys to the largest jails in those states. *Id.* The data is based on information provided by all states except Alaska, Louisiana and West Virginia. *Id.* Among the prisons surveyed, seventy-seven of them collect fees from inmates. *Id.* Forty-one states have passed legislation authorizing the collection of fees. *Id.* at 2.”).

⁴⁴³ *Id.*

⁴⁴⁴ Juleyka Lantigua-Williams, *How Prison Debt Ensnarers Offenders*, *ATLANTIC* (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/how-prison-debt-ensnarers-offenders/484826/>.

⁴⁴⁵ See Stephen E. Lankenau, *Smoke ‘Em If You’ve Got ‘Em: Cigarette Black Markets in US Prisons and Jails*, 81 *PRISON J.* 142, 142 (2001) (“This study describes how bans can transform largely benign cigarette ‘gray markets,’ where cigarettes are used as a currency, into more problematic black markets, where cigarettes are a highly priced commodity.”).

be repealed, which some say could eliminate the black market altogether.⁴⁴⁶ Furthermore, because cigarettes are such a prized commodity in American prisons, cigarette manufacturers—as part of their means to do business in the United States—should provide an annual quota to prisons in the markets where they operate for free. In other words, there should be no pass-through costs. Prisoners should be able to obtain cigarettes freely and fairly; in order to accomplish this, it is necessary to kill the black market.⁴⁴⁷

Concurrently, federal and state prison systems should democratize telephone privileges. Cell phones are another black-market commodity in American prisons.⁴⁴⁸ This perpetuates interest in subversive prison labor activities.⁴⁴⁹ If the FCC would utilize necessary enforcement tools, concurrent with Department of Justice understanding, to regulate prison communications in a fair and equitable manner, communication could improve.⁴⁵⁰ This would also disrupt the gang-driven economy that ultimately influences whether prisoners choose to pursue labor or nefarious activities involving lifetime exploitation, like joining gangs.⁴⁵¹

There will always be nefarious activities in prison—like contraband—but creating open markets for the most desired products could help improve conditions, invite greater participation in positive labor endeavors, and avoid the violence that too often consumes the prison narrative.

H. Reform the Profitable and Opaque Dynamic Between Corrections Staff and Prisoners

There is a long and sordid history involving corrections staff and prisoners. In today's climate, prisoners report that corrections staff are complicit in the black-market economy in an effort to supplement their modest income.⁴⁵² It is not enough to compel the state to pay corrections staff more (although I am confident that would help); it is also a matter of transforming the entire enterprise of prisons and correspondingly, prison labor. While I cannot purport to wave a magic wand and provide the mechanisms necessary to achieve this goal, the Department of Justice

⁴⁴⁶ Alysia Santo, *The Case for Smoking in Prison*, THE MARSHALL PROJECT (July 1, 2015, 6:24 PM), <https://www.themarshallproject.org/2015/07/01/the-case-for-smoking-in-prison>.

⁴⁴⁷ *Id.*

⁴⁴⁸ Giang, *infra* note 450.

⁴⁴⁹ *Id.*

⁴⁵⁰ Vivian Giang, *Inmate Talks to Us Over an Illegal Cell Phone About Working the Jailhouse Black Market*, YAHOO! NEWS (July 2, 2012), <https://news.yahoo.com/news/exclusive-inmate-tells-us-over-210400382.html>.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

must exert its inspector general function to investigate what is a well-known and complicit arrangement of mutual financial gain.⁴⁵³

VII. CONCLUSION

One of the predominant aims of this paper was to illuminate both historical and modern prison labor systems. As discussed, they are very different in terms of presentation and effect. William Faulkner's fictional observation that, "[t]he past is never dead, it's not even past," may also prove accurate in the prison labor context.⁴⁵⁴ An additional aim was to offer practical legal and policy reforms that, based on historical context, merit consideration. In that regard, I endeavored to be sensible, although certainly more than one idea will be chastised for being the opposite. Such is the nature of prison reform, which has been an obstacle for nearly a century.

Modernity is not synonymous with a black-market. America has not quite grasped this idea, partly because of attitudes towards those who are incarcerated, but also because of our rapid gravitation towards a soundbite media culture—a sinister element that can feed on the downtrodden. This is occurring in the American penal system today and merits a thorough and exhaustive review for the reasons I have stated.

The Thirteenth Amendment may not be an ally of prison labor reform, but other amendments are, and I have attempted in this paper to illuminate where future legal research and policy advocacy are needed. In that regard, I have worn two hats: the legal scholar and the public policy advocate. This is justifiable as prison labor rests at the intersection of law and public policy. There is simply no way to reconcile the past without acknowledging the present, while also contemplating the complex but perhaps hopeful future.

⁴⁵³ *Id.*

⁴⁵⁴ WILLIAM FAULKNER, *REQUIEM FOR A NUN* (1919).