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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

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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.
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.”).
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.\textsuperscript{9} It was a well-recognized aspect of imperial Brazil as well.\textsuperscript{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.\textsuperscript{11} In the eighteenth century, slavery was rampant in the Caribbean.\textsuperscript{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.\textsuperscript{13}

This historical arc informs attitudes about slavery in American colonies, the rise of the plantation South, and the advent of the Civil War.\textsuperscript{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,

\textsuperscript{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.”).


\textsuperscript{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.”).

\textsuperscript{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.").

\textsuperscript{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).

\textsuperscript{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 of 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 wrote 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 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,

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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.
19 Id. at 300–38.
20 Id.
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.’

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.” 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. 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.

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. David Oshinsky—in his history of the Parchman

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.”).
Farm in Mississippi—observed, “Emancipation had ended slavery but had not destroyed the assumptions on which slavery was based.”

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.”

This also informed a pattern of legislation at the municipal level across the South that ignited a pattern of incarceration of Black people. 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).”

These offenses included “‘mischief,’ ‘insulting gestures,’ ‘cruel treatment to animals,’ and the ‘vending of spiritous or intoxicating liquors.’” Free Black people were also prohibited from keeping firearms and from cohabitating with white people. The penalty for intermarriage was “confinement to the state penitentiary for life.”

To understand the rise of mass incarceration of Black people in the New South is to understand the Mississippi Vagrancy Act. 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.” Prior to 1867, these Black Codes were vigorously enforced. This

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28 Id. at 17.
29 Id. at 17–18.
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.”).
resulted in a substantial number of cases, often overseen by the sheriff.\textsuperscript{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.\textsuperscript{39}

In 1867, the U.S. Congress passed a substantial Reconstruction Act which, for a short period of time, transformed the South.\textsuperscript{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.”\textsuperscript{41} Progress was short-lived and soon violence overwhelmed Mississippi.\textsuperscript{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.”\textsuperscript{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.

\section{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

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\item[\textsuperscript{38}] Oshinsky, \textit{supra} note 27, at 21.
\item[\textsuperscript{39}] \textit{Id.}
\item[\textsuperscript{40}] James M. McPherson, \textit{The Dimensions of Change: The First and Second Reconstructions}, 2 \textit{Wilson Q.} 135, 136 (1978) (“For half a century after 1900, the \textit{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.”).
\item[\textsuperscript{41}] Oshinsky, \textit{supra} note 27, at 22.
\item[\textsuperscript{42}] \textit{Id.} at 23.
\item[\textsuperscript{43}] \textit{Id.} at 33.
\end{itemize}
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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. 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. This informs why, over time, a punishment exception was common in state slavery bans that drafters considered it as essentially boilerplate language. 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. 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.

Many members of Congress envisioned the amendment as a charter for labor freedom. 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.

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44 U.S. CONST. amend. XIII, § 1.
46 Id. at 19–20.
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”).
In an 1850 letter, U.S. Representative Thaddeus Stephens expressed fear that slavery would interfere with white working conditions. 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.” Arguably, many in Congress saw the abolition of slavery as a necessity—preserving white working conditions was vital in their eyes. 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.” 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.” 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.”

On January 31, 1865, the United States House of Representatives voted to approve the Thirteenth Amendment. 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.” 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.”

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

53 Id.
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).
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.” To that end, the U.S. Supreme Court has interpreted the Thirteenth Amendment narrowly, as the Court demonstrated in United States v. Kozminski. 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.” 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.” 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.” As Professors Jack Balkin and Sanford Levinson stated, “It is worth emphasizing how narrow this interpretation is.” Parsing the essential text of the Thirteenth Amendment, other scholars have observed that the Thirteenth Amendment outlawed not involuntary work, but involuntary servitude.

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. For example, the penitentiary in Jackson, Mississippi, had been burned to the ground. With the flood of new Black

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.
68 OSINSKY, supra note 27, at 35.
69 Id.
prisoners, the penal system in the postbellum South was unequipped to handle them.\textsuperscript{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.\textsuperscript{71} He promised to feed them, clothe them, guard them, and treat them well.\textsuperscript{72} For that he was paid $18,000 along with additional money for transportation.\textsuperscript{73} Richardson was also permitted to keep all the profits he derived from the convict labor.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{77} In Mississippi, for example, the exclusive right to lease state convicts became the most coveted political contract.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{81} Arkansas moved 1,200 convicts to a penal farm operated by the state.\textsuperscript{82} But progressivism may be too

\begin{footnotes}
\item[70] LICHTENSTEIN, supra note 1, at 3.
\item[71] OSHINSKY, supra note 27, at 35.
\item[72] Id.
\item[73] Id.
\item[74] Id.
\item[75] LICHTENSTEIN, supra note 1, at 3.
\item[76] Id. at 4.
\item[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. \textit{Id.} at 45.
\item[78] Id. at 43.
\item[79] Id. at 70.
\item[80] Id. at 67.
\item[81] Id. at 69.
\item[82] Id.
\end{footnotes}
favorable of a label, as Alex Lichtenstein observed, because it merely shifted the exploitation of convict labor from the private to public sectors.\textsuperscript{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].”\textsuperscript{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.\textsuperscript{85}

\section*{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.\textsuperscript{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.\textsuperscript{87} Thus, the concept of the chain gang was born.

The concept of the chain gang became so popular that it threatened to displace all other penal systems in the South.\textsuperscript{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.”\textsuperscript{89} It was not long, however, before reports of systemic abuse were reported across the South.\textsuperscript{90} Throughout the 1920s, 1930s, and 1940s, convicts continued to labor, eat, and sleep with chains around their ankles.\textsuperscript{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.\textsuperscript{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.\textsuperscript{93} John L. Spivak offered this picture of life on a South Carolina chain gang:

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\textsuperscript{83} Lichtenstein, \textit{supra} note 1, at 14–15.
\textsuperscript{84} \textit{Id.} at 15
\textsuperscript{85} \textit{Id.} at 15.
\textsuperscript{87} \textit{Id.} at 87.
\textsuperscript{88} \textit{Id.} at 105.
\textsuperscript{89} \textit{Id.} at 106.
\textsuperscript{90} \textit{Id.} at 92.
\textsuperscript{91} \textit{Id.} at 93.
\textsuperscript{92} \textit{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.
\end{flushright}
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.\textsuperscript{94}

In 1932, Robert Burns published \textit{I am Fugitive from a Chain Gang!} which was subsequently adapted as a feature film.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{99} Indeed, the attitudinal

\begin{itemize}
  \item \textsuperscript{94} \textbf{JOHN L. SPIVAK, GEORGIA NIGGER} (1932), later retitled \textit{HARD TIMES ON A SOUTHERN CHAIN GANG}.
  \item \textsuperscript{95} David A. Davis, “\textit{I Am a Fugitive from a Chain Gang!” and the Materiality of Southern Depravity}, 63 Miss. Q. 399, 399 (2010).
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Benno C. Schmidt, Jr., \textit{Principle and Prejudice: The Supreme Court and Race in the Progressive Era (pt. 2: The Peonage Cases)}, 82 Colum. L. Rev. 646, 653 (1982).
  \item \textsuperscript{99} Lichtenstein Roads, \textit{supra} note 86, at 107.
\end{itemize}
distance between the convict lease and the chain gain was minimal and relative. Both systems operated on the foundational belief that Black people only worked effectively under the threat of punishment. This racialist view informed penal attitudes towards punishment as well, which is why, in part, convicts in leasing programs and on chain gangs experienced tremendous brutality. 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. 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. 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.

Yet, on May 3, 1995, chain gangs returned to Alabama. 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. 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, supra note 105.
104 LICHTENSTEIN, supra note 1, at 190.
prisoner with a bush ax. By June of that year, Alabama had ended the practice of chaining prisoners together. Ultimately, compelled by factors influenced by history, gender, and simply poor ideation, the concept ended.

Of course, Alabama was not alone. Chain gangs re-emerged in Arizona, Florida, Iowa, Oklahoma, Tennessee, and Wisconsin. 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. 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. 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.”

Joe Arpaio is no longer the sheriff of Maricopa County, and many of his tactics have been dismantled by his successor. Largely, the chain gang has disappeared from the roads of the South. 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.
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.
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. 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. 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.” 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. In 1917, 90 percent of the prison population was Black.

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

One of the unique aspects of Parchman Farm was its reliance on the “trusty system,” which functioned as a means of self-policing. In other words, selected inmates, known as “trusty-shooters,” watched over the regular convicts. Trusty-shooters comprised about 20 percent of the prison population, lived apart from the
rest of the prison population, dressed differently, and carried .30-.30 Winchesters while on duty. Their only allegiance was to the sergeant who promoted them.

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. 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.” 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.”

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. Cummins Farm was a place of isolation, and an improbable escape for inmates: most who tried to swim the Arkansas River boundary drowned. Cummins Farm was 16,000 acres, and Arkansas later opened the 5,500 acre Tucker Farm. On these farms, prisoners worked ten to fourteen hours a day, six or seven days a week, growing cops like cotton, rice, and strawberries. The farms brought in an average $1.4 million per year in revenue, which added hundreds of thousands of dollars to the state treasury. 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. 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.
\[136\] 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).
\[138\] 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.\textsuperscript{141} When the crank was turned, an electric shock was sent through their body.\textsuperscript{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.\textsuperscript{143} During Murton’s tenure, prison farms operated at a loss.\textsuperscript{144} He was fired in 1968 following political pressure from the Arkansas General Assembly.\textsuperscript{145} Despite eliminating whipping and other forms of corporal punishment as well as the “trusty system,”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{150}

\textsuperscript{141} Id. at 220–21.
\textsuperscript{142} Id.
\textsuperscript{144} BAUER, supra note 137, at 225.
\textsuperscript{145} Id.
\textsuperscript{146} See ROBERT CHASE, infra note 156, at 95 (In 1967, “Cummins prison farm, the largest in Arkansas, had 145 armed trusty 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.”).
\textsuperscript{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).
\textsuperscript{148} BAUER, supra note 137, at 226.
\textsuperscript{149} Id.
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. 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.

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. The following year, more lawsuits were filed. The prisoners prevailed in 1970, and Arkansas became the first state to have its entire prison system declared cruel and unusual. This development caused then-governor Dale Bumpers to make a change in prison leadership. He turned to

153 Holt, 300 F. Supp. at 826.
155 BAUER, supra note 137, at 226.
Texas’s Ramsey prison farm 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.

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

More lawsuits followed during the Hutto era, in 1976 and 1977. 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. 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).
165 Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977).
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

They 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.


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.”).
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.
to have begun during the Reagan administration.\textsuperscript{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.\textsuperscript{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.\textsuperscript{176} By 1974, funding to combat drugs in America was $257 million, an increase from $36 million just four years before in 1969.\textsuperscript{177} The impact of this funding was felt immediately. From 1975 to 1980, for example, increased forty-two percent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{181} The budgets of the Federal Bureau of Investigation doubled in Regan’s first term,\textsuperscript{182} and by the time Reagan left office, in 1989, the American prison population had doubled.\textsuperscript{183}

\textsuperscript{175} Kenneth B. Nunn, \textit{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).
\textsuperscript{182} Platt, supra note 178, at 59.
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. This was the sharpest escalation of federal government spending in the history of the drug war. 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).

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. Instead of attempting to understand the underlying causes of drug use, Rather’s report was generally criticized for being assembled too hastily. 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.”

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. Crime legislation was the central focus of Clinton’s 1994 agenda. Perhaps its most significant provision was what was

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185 Id.

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


189 Pembleton, supra note 184.


known as the “three strikes and you’re out” provision. This provision caused a lot of consternation, particularly as states adopted concurrent provisions. And, to be sure, there were myriad questions about due process and equal protection. 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. 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.

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. 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

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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 attractive . . . . 198

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,

202 Id. at 86.
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.
206 Sweet & Mathews, supra note 203, at 75.
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)).
[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.
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.\(^{226}\)

\(^{219}\) See DETROIT UNDER S.T.R.E.S.S. (Fat Hendrick Productions 2016).
\(^{220}\) Bill McGraw, DPD’s Troubled Relationship with Black Detroiter 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.”

Furthermore, America’s attitudes towards incarceration, as the evidence demonstrates, has a considerable amount to do with race. 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.”

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. As Alexander observed, “the collapse of inner-city economies collided with conservative backlash against the Civil Rights Movement, creating the perfect storm.” This had a devastating effect on Black men most notably, but also their families. 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.

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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.”).
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.” 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.

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.”

The American penal system has performed consistent with these terms. The facts stipulate that criminal punishment has been doled out disproportionately to detriment of Black men and women. 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. 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 OP 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).

Alexander, supra note 229, at xxvi.

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.

Alexander, supra note 229, at 319.


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.


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

242 Id.
243 Id.
244 Id.
245 Id.
quarantining criminal offenders while applying rehabilitative procedures, and maintaining the internal security of penal institutions.\textsuperscript{247} That same year, in \textit{Wolff v. McDonnell}, the Court addressed the types of procedural protections prisoners are entitled to at disciplinary hearings.\textsuperscript{248} Justice White, writing for the majority, observed, “[t]hough 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.”\textsuperscript{249} In \textit{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.\textsuperscript{250} Three years after \textit{Wolff}, in \textit{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.\textsuperscript{251} In 1978, as I have discussed previously, the Court in \textit{Hutto} placed the Arkansas prison system under court supervision for prisoner mistreatment.\textsuperscript{252} Finally, in \textit{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.\textsuperscript{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,

\begin{quote}
[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 untrammeled 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.\textsuperscript{254}
\end{quote}

\textsuperscript{247} \textit{Id.} at 822–24.
\textsuperscript{249} \textit{Id.}
\textsuperscript{253} \textit{Bell v. Wolfish}, 441 U.S. 520 (1979).
\textsuperscript{254} \textit{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

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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 . . . .”).


261 *Id.*


reference to Du Bois’s 1928 classic publication, ‘The Negro Criminal’.”\textsuperscript{264} Sellin and Du Bois also corresponded with one another for decades, as Sellin often asked Du Bois to review books for the \textit{Annals of the American Academy of Political and Social Science}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{267}

\section*{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.\textsuperscript{268} Until now, attention had been focused on working conditions, but there was another form of slavery taking hold.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{271} For several weeks he was forced to engage in coerced sexual activity.\textsuperscript{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

\begin{enumerate}
\item \textsuperscript{264} \textit{Id.}
\item \textsuperscript{265} \textit{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).}
\item \textsuperscript{266} \textit{GABBIDON, supra note 263, at 79 (“[B]y influencing Sellin, Du Bois, as suggested before, may have influenced later scholarship by African Americans.”).}
\item \textsuperscript{267} \textit{Id.}
\item \textsuperscript{268} \textit{ROBERT CHASE, supra note 156, at 102–03.}
\item \textsuperscript{269} \textit{Id.}
\item \textsuperscript{270} \textit{Id.}
\item \textsuperscript{271} \textit{Id. at 102.}
\item \textsuperscript{272} \textit{Id.}
\end{enumerate}
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.\textsuperscript{273}

In Texas, for example, at the dawn of the 1980s, prisoners had to contend with a series of unwritten rules.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{276} This vicious prison sex trade provided for the power to rape other prisoners and buy and sell other prisoners’ bodies.\textsuperscript{277}

Ultimately, the Supreme Court in \textit{Ruiz v. Estelle} held that the state prison system violated the Eighth Amendment’s protection against cruel and unusual punishment.\textsuperscript{278} In \textit{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.”\textsuperscript{279} The Texas prison system, like the Arkansas prison system a few years before it, was placed under court supervision.\textsuperscript{280} By the mid to the late 1980s, prison systems in thirty-nine states were placed under court supervision.\textsuperscript{281} The \textit{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.\textsuperscript{282} This system continues to exploit prisoners.\textsuperscript{283} As David Skarbek observed in his book, \textit{The Social Order of the Underworld}, which examines the prison gang system, gangs play a vital role in maintaining social order in prisons.\textsuperscript{284} For example, prison gangs enforce property rights, manage how currency is exchanged, manage trade

\begin{footnotes}
\item[273] \textit{Id.}
\item[274] \textit{Id.} at 103.
\item[275] \textit{Id.}
\item[276] \textit{Id.} at 105.
\item[277] \textit{Id.} at 125.
\item[280] \textit{Id.}
\item[281] \textit{Id.}
\item[282] \textit{Robert Chase, supra} note 156, at 343.
\item[284] \textit{Id.}
\end{footnotes}
and profits within the prison, and offer a system of protection. 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.” 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. When a deputy saw Reyes holding the piece of mail, he accused him of stealing it. When deputies approached him, they asked him to provide names of drug dealers. 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. Two of the gang members were Hispanic, and their “gang code” required them to assault inmates from Central America and Mexico. The beatings began almost instantly and continued throughout the day. At night, they took turns raping Reyes.

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. Across America in the early 1980s, unemployment and crime were on the rise. 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.” The privatization trend emerged in the mid-1980s as many states faced budget shortfalls associated with their prison systems. This also coincided with a change in the federal tax code, in 1981, that encouraged private investment in correctional facilities.

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. Privatization became a trend. 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.” 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. CCA was originally funded with $10 million from a venture capital firm in Nashville, Tennessee. Private prisons are most profitable when operated at full capacity. Additionally, “Private prison corporations benefited from the political challenges state policy makers faced when fundraising to build new prisons quickly enough to meet demand.” 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.” 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.’” 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.”

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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. at 57. 302 Id. 303 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.”). 304 Id. at 65. 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.\footnote{Id. at 81.} In 1991, spending on prison construction, renovations, and major repairs was $4.6 billion, an all-time high.\footnote{Id. at 71.} In 1996, the United States spent $22 billion on prisons, including $1.3 billion on new prison construction.\footnote{Id. at 81.} Over the entire decade, a prison was built somewhere in rural America every fifteen days.\footnote{Id. at 67, Figure 3.2.} From 1990 to 1995, a vast majority of prisons built in the U.S. were public.\footnote{Id.} From 1995 through the remainder of the decade, this paradigm shifted in favor of private prison construction.\footnote{Id.} By the turn of the century, private prisons would vastly outnumber public prisons at a rate of 151 to 2.\footnote{Id. at 73.} 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.\footnote{Id. at 73.}

This boom in construction invited many essential services, including health care, transportation, telecommunications, Internet, food, beverage, and packaging, to be tied directly to corrections.\footnote{Id.} This prompted Eric Schlosser, in 1998, to describe this phenomenon as the “prison industrial complex.”\footnote{Eric Schlosser, The Prison Industrial Complex, ATLANTIC (Dec. 1998), https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/; supra note 279, at 70.} It is estimated that American corrections is an $80 billion business annually, although some scholars suggest that figure is low.\footnote{Id. at 81.}

\footnote{309 Id. at 81.} \footnote{310 Id. at 71.} \footnote{311 Id. at 81.} \footnote{312 Id.} \footnote{313 Id. at 67, Figure 3.2.} \footnote{314 Id.} \footnote{315 Id.} \footnote{316 Id. at 73.} \footnote{317 Id.} \footnote{318 Eric Schlosser, The Prison Industrial Complex, ATLANTIC (Dec. 1998), https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/; supra note 279, at 70.} \footnote{319 Id.} \footnote{320 Enterprise, 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$1.4,people%20of%20color%20into%20debt&text=The%20correctional%20telecom%20sector%20is,in%20telephone%20calls%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. 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” – to further curtail prisoner rights. In 1995, Republican Sens. Robert Dole of Kansas and Jon Kyl of Arizona, introduced the Prison Litigation Reform Act (“PLRA”). The aim of this legislation was to discourage frivolous lawsuits and curtail attorneys’ fees in support of that effort. It also imposed an administrative scheme that forced prisoners to exhaust all internal remedies before they could access federal court.

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. In prison, Mr. Hulin was repeatedly raped and beaten by inmates, yet nothing was done about it. 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.


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”).


Id. at 193.

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.”).


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

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. Meanwhile, they continue to suffer profound physical abuse, rape and other forms of sexual assault, exposure to disease, and even death.

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. This legislation provided “for the employment of inmate labor in state correctional institutions and in the private manufacturing of certain products under specific conditions” and was constructed on the back of the PIECP. It also stipulated that wages taken from inmates to offset the costs of incarceration should be spent on expanding prison industries. 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.

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.” 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.
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. 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. 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.

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. 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.” Although other entities promote model state legislation, ALEC’s operations are quite distinct from other organizations. ALEC’s public and private sector members convene each year to draft model bills addressing an array of issues. The private industry is intimately involved in this process to ensure that model bills are not “killed at the table.” Members pay between $7,000 and $25,000 in dues annually. For the price of $50,000, private

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341 Id. at 380.
342 Id. at 382.
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. 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. 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. At the same time, most legislators do not have access to the necessary staffing, research, or experts to inform the policymaking process. In that respect, ALEC fills a considerable void, particularly among conservatives. 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.”

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. According to the Bureau of Prisons, UNICOR is a “life-changing program that has a profound impact on everyone in the community.” The Board of Directors of UNICOR includes representatives from agriculture, industry, retail, labor, defense, and the Department of Justice. UNICOR offers 250 categories of products and services through eight business groups: “(1) Clothing and Textiles;
(2) Electronics; (3) Fleet Management and Vehicular Components; (4) Graphics; (5) Industrial Products; (6) Office Furniture; (7) Recycling; and (8) Services.

UNICOR contracts predominantly with the federal government. 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.” 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. Market research in this context involved price, quality, and time of delivery, which was left to the sole discretion of the contracting officer. However, if the UNICOR item was comparable, it must be purchased unless the contracting officer obtains a waiver. 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.” Regardless of the purchaser, UNICOR workers are paid between $0.23 and $1.15 per hour for their labor. This, in turn, puts hundreds of millions of dollars into the Bureau of Prison coffers.

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. Other proponents have argued that labor helps cultivate self-esteem, self-worth, and sense of purpose.

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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.
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”).


\(^{371}\) 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-ae26-989cfe1c7c7_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).


\(^{373}\) 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/2021/10/15/3310ecce-2c61-11ec-8ef6-3ca89e943a92_story.html.
classification based on sustained good behavior.\textsuperscript{375} When not fighting fires, incarcerated firefighters perform conservation and community service projects, including clearing brush, sandbagging, reforestation, and flood prevention.\textsuperscript{376} For this labor, prisoners are paid between $2.90 and $5.12 per day, plus $1 per hour during an active emergency.\textsuperscript{377} Comparatively, full time California wildfire firefighters earn $91,000 annually.\textsuperscript{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.\textsuperscript{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.\textsuperscript{380}

\textit{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

\textsuperscript{376} Id.
\textsuperscript{378} Id.
\textsuperscript{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.”).
justice system costs. These costs cover a wide range of services, including the cost of incarceration and post-release supervision. 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. If they cannot pay that bill, and the vast majority cannot, they often find themselves reincarcerated. This is not an anomaly. In 24 states, prisoners are charged for their own incarceration. States pursue this action for four reasons, according to Lauren-Brooke Eisen. First, the revenue stream helps offset the prison budget. Second, certain state policymakers believe that there should be more punitive measures beyond incarceration, like debt. Third, support for “pay-to-stay” fees has political potency. And fourth, it diminishes frivolous requests for services by inmates.

“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. Others are charged for specific items, such as toilet paper, medical co-pays, dental services, meals, clothing, and other necessities. For low-level offenders, some prison systems offer “upgrades” for a fee. If a prisoner relies on a public defender, which

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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.
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. ACADEMY POL. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).
\textsuperscript{395} Id. at 73.
\textsuperscript{396} Id.
\textsuperscript{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.”).
mass incarceration. This is what Joseph Heller articulated, albeit in a different context, as a Catch-22.

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

This cycle of poverty is a natural extension of debt peonage within America’s prison system. 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. 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.

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 Id.
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. 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.” 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 BARDAKE, 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’T 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.


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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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).\textsuperscript{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.\textsuperscript{412} In places where labor or production resources are scarce, prison labor can be retrofitted to pursue projects that help improve environmental quality.\textsuperscript{413} When deployed strategically, it does not give rise to competition concerns, but rather, provides a necessary and immediate public

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\textsuperscript{408} Id.
\textsuperscript{409} Id. at 290.
\textsuperscript{410} Id.
benefit, as well as new and necessary skills that can be advantageous to individuals after their incarceration term ends.\textsuperscript{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.\textsuperscript{415} Today, many prisoners are incarcerated because of a pre-existing condition, such as drug or mental health disorders,\textsuperscript{416} and prison work provides a haven from prison violence.\textsuperscript{417} That said, many states are plagued with food insecurity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{420} Large-scale flower farms

\textsuperscript{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.”).


\textsuperscript{417} Lerman et al., *supra* note 414.

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


\textsuperscript{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.\textsuperscript{421}

\section*{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{424}

Prisoners today are far less likely to return to prison if they have steady employment.\textsuperscript{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.\textsuperscript{426}

\begin{itemize}
    \item 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/.
    \item 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.”).
    \item Rick Linden & Linda Perry, The Effectiveness of Prison Education Programs, 6 J. OFFENDER COUNSELING SERV. REHAB. 43, 43 (1983).
    \item Id.
    \item Duwe & Clark, supra note 422, at 454.
    \item 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...”)
\end{itemize}
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.”).

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.
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. CoreCivic and The GEO Group are the two primary publicly traded private prison operating companies. Planatir Technologies is also a publicly traded company founded by technological entrepreneur Peter Theil, a well-known supporter of President Donald Trump. Further, Planatir is a government contractor that offers a product to better visualize data. 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. The GreenDot bank card is the preferred currency in prison, something Shane Bauer discovered in his undercover work. These are available at convenience stores. 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. Their sellers will then call an 1800-number, “give them the code” and have the money downloaded onto their own credit cards.”

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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 Raher, 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/.


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.


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.


\(^{445}\) 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.\textsuperscript{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.\textsuperscript{447}

Concurrently, federal and state prison systems should democratize telephone privileges. Cell phones are another black-market commodity in American prisons.\textsuperscript{448} This perpetuates interest in subversive prison labor activities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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\textsuperscript{447} Id.

\textsuperscript{448} Giang, *infra* note 450.

\textsuperscript{449} Id.


\textsuperscript{451} Id.

\textsuperscript{452} Id.
must exert its inspector general function to investigate what is a well-known and complicit arrangement of mutual financial gain.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{453} Id.
\textsuperscript{454} WILLIAM FAULKNER, REQUIEM FOR A NUN (1919).